

No. 21-CV-543



IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

Clerk of the Court
Received 02/04/2022 01:16 PM
Filed 02/04/2022 01:16 PM

DISTRICT OF COLUMBIA,
Appellant,

v.

TERRIS, PRAVLIK & MILLIAN, LLP,
Appellee.

On Appeal from a Judgment of the
Superior Court of the District of Columbia

**BRIEF FOR AMICI CURIAE D.C. OPEN GOVERNMENT COALITION,
AMERICAN CIVIL LIBERTIES UNION OF THE DISTRICT OF
COLUMBIA, DC FISCAL POLICY INSTITUTE, PUBLIC CITIZEN,
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
AND WASHINGTON, D.C. PROFESSIONAL CHAPTER OF THE
SOCIETY OF PROFESSIONAL JOURNALISTS
IN SUPPORT OF APPELLEE AND AFFIRMANCE**

*Adina H. Rosenbaum
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
202-588-1000
arosenbaum@citizen.org

*Attorneys for Amici Curiae
D.C. Open Government Coalition, et al.*

February 4, 2022

*Counsel expected to argue

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. App. R. 29(a)(4)(A), undersigned counsel certifies that the D.C. Open Government Coalition, American Civil Liberties Union of the District of Columbia, DC Fiscal Policy Institute, Public Citizen, and Washington, D.C. Professional Chapter of the Society of Professional Journalists are nonprofit corporations. The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors. The amici have no parent corporations or subsidiaries, and no publicly held company has a ten percent or greater ownership interest (such as stock or partnership shares) in any of them.

/s/Adina H. Rosenbaum
Adina H. Rosenbaum

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENTi

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

BACKGROUND AND SUMMARY OF ARGUMENT4

ARGUMENT 7

I. DC FOIA authorizes actions seeking declaratory and injunctive relief to
remedy violations of D.C. Code § 2-536.7

II. DC FOIA authorizes the Superior Court to order agencies to comply
with D.C. Code § 2-536.9

III. DC FOIA authorizes the Superior Court to order disclosure of records
on a prospective basis to remedy ongoing violations of § 2-536.....17

CONCLUSION19

REDACTION CERTIFICATE DISCLOSURE FORM.....21

CERTIFICATE OF SERVICE23

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Animal Legal Defense Fund v. United States Department of Agriculture</i> , 935 F.3d 858 (9th Cir. 2019)	9, 11, 13, 15
<i>Barry v. Washington Post Co.</i> , 529 A.2d 319 (D.C. 1987)	12, 18
<i>Bruesewitz v. Wyeth LLC</i> , 562 U.S. 223 (2011).....	11
<i>Citizens for Responsibility & Ethics in Washington v. United States Department of Justice</i> , 846 F.3d 1235 (D.C. Cir. 2017).....	13, 14, 19
<i>Citizens for Responsibility & Ethics in Washington v. United States Department of Justice</i> , 922 F.3d 480 (D.C. Cir. 2019).....	15
<i>EPA v. Mink</i> , 410 U.S. 73 (1973).....	8
<i>Humane Society v. United States Fish & Wildlife Service</i> , 838 F. App'x 721 (4th Cir. 2020)	18
<i>Kennecott Utah Copper Corp. v. United States Department of Interior</i> , 88 F.3d 1191 (D.C. Cir. 1996).....	13, 14
<i>Mbakpuo v. Ekeanyanwu</i> , 738 A.2d 776 (D.C. 1999)	18
<i>New York Legal Assistance Group v. Board of Immigration Appeals</i> , 987 F.3d 207 (2d Cir. 2021)	10, 13, 15

*Authorities on which we chiefly rely are marked with asterisks.

<i>Renegotiation Board v. Bannercraft Clothing Co.</i> , 415 U.S. 1 (1974).....	12
<i>Smith v. United States Immigration and Customs Enforcement</i> , 429 F. Supp. 3d 742 (D. Colo. 2019).....	11
<i>Washington Post Co. v. Minority Business Opportunity Comm’n</i> , 560 A.2d 517 (D.C. 1989)	8

D.C. Code

*D.C. Code § 2-531	4, 6, 8, 9, 16, 17
D.C. Code § 2-532(c)(1)	4
*D.C. Code § 2-536	3, 4, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19
*D.C. Code § 2-536(a).....	4, 7, 9, 16
D.C. Code § 2-536(a)(6A)	5, 6
*D.C. Code § 2-536(b).....	4, 5, 6, 8, 12
*D.C. Code § 2-537(a).....	5, 8
*D.C. Code § 2-537(a)(1)	8
*D.C. Code § 2-537(b).....	5, 6, 10, 11, 12, 17, 18

Other Authorities

5 U.S.C. § 552(a)(4)(B)	12
<i>Withhold</i> , The Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/withhold	10

INTEREST OF AMICI CURIAE

Amici curiae are organizations that support public access to information about the actions and operations of the District of Columbia government and rely on public records laws to gain access to records to do their work. Together, the amici have substantial expertise in how the District of Columbia Freedom of Information Act (DC FOIA or the Act) operates in practice.

The D.C. Open Government Coalition is a nonprofit organization established in 2009 to enhance public access to government information and ensure the transparency of government operations of the District of Columbia. The Coalition educates officials and the public about the principles and benefits of open government in a democratic society, advocates for improved processes by which the public can access government records, and provides training to members of the public on how to gain access to information about the functioning of the District government.

The American Civil Liberties Union of the District of Columbia (ACLU-DC) is a nonprofit organization with more than 14,000 local members, which for more than sixty years has sought to protect and expand civil liberties and civil rights for people who live in, work in, and visit the District of Columbia. ACLU-DC frequently uses DC FOIA to obtain information in the service of its mission. ACLU-DC has also had to file lawsuits to compel compliance with its requests for information under

DC FOIA; the courts' ability to enforce the requirements of that statute is thus of ongoing importance to ACLU-DC.

The DC Fiscal Policy Institute (DCFPI) is a nonprofit organization that promotes opportunity and widespread prosperity for all residents of the District of Columbia through thoughtful policy solutions. DCFPI accomplishes this through research and analysis, direct engagement with policymakers, and strategic partnerships with other organizations and individuals. It uses and requests government data and records to analyze policy decisions and program implementation and to prepare advocates and community members to engage and shape government decisions.

Public Citizen is a nonprofit consumer advocacy organization that advocates on a wide range of issues involving openness and integrity in government, the protection of consumers and workers, and public health and safety. Public Citizen promotes government accountability by requesting agency records to inform the public about government activities, providing advice to people who seek access to information held by government agencies, and litigating to challenge unwarranted withholding of government records.

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its

attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The Society of Professional Journalists (SPJ), a nonprofit organization, is the nation's most broad-based journalism organization, with a long history of advocating for freedom of information, press freedom, and journalistic ethics. Amicus, the Washington, D.C., Professional Chapter (SPJ DC Pro), includes SPJ members who produce news for local, regional and national media, and whose work directly depends on access to District government records. The Chapter embraces the Society's conviction that a well-informed public is crucial to self-government, and actively promotes freedom of information. Without access to government records—agency budgets, practices and policies—journalists cannot provide information citizens need to hold elected officials accountable.

Amici believe that D.C. Code § 2-536, which requires public bodies in the District of Columbia to make certain categories of information available online without a written request, provides an effective and efficient way for members of the public to learn about the government's activities and operations.

The District of Columbia takes the position that there is no private right of action to enforce § 2-536 and that the Superior Court lacks authority to enjoin violations of § 2-536. Amici are filing this brief because adoption of that position would

undercut § 2-536's affirmative disclosure requirements. The brief explains that DC FOIA's administrative appeal and judicial review provisions authorize actions seeking to enforce § 2-536 and allow courts to order public bodies to comply with the provision. The brief also explains that courts may order public bodies to comply with § 2-536 on a prospective or ongoing basis.

All parties have consented to the filing of this brief.

BACKGROUND AND SUMMARY OF ARGUMENT

DC FOIA promotes the “public policy of the District of Columbia ... that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.” D.C. Code § 2-531. Generally, under the Act, a person who wants access to a public record must submit a request for the record to the relevant public body. *See id.* § 2-532(c)(1). However, DC FOIA declares certain categories of information to be “public information” that “do not require a written request.” *Id.* § 2-536(a). Public bodies within the District of Columbia must make records within these categories “available on the Internet or, if a website has not been established by the public body, by other electronic means.” *Id.* § 2-536(b) (applicable to records created on or after November 1, 2001). To help ensure compliance with the law, DC FOIA contains administrative appeal and judicial review provisions authorizing a person who was “denied the right to inspect a public record” to petition the Mayor, allowing

the person to file suit if the petition to the Mayor is unsuccessful, and authorizing the Superior Court hearing the suit to “enjoin the public body from withholding records and order the production of any records improperly withheld from the person seeking disclosure.” *Id.* § 2-537(a), (b).

In this case, plaintiff-appellee Terris, Pravlik & Millian, LLP (TPM) submitted a DC FOIA request to the Executive Office of the Mayor, seeking certain documents that fall within the scope of § 2-536(a)(6A), which requires public bodies to make available:

Budget requests, submissions, and reports available electronically that agencies, boards, and commissions transmit to the Office of the Budget and Planning during the budget development process, as well as reports on budget implementation and execution prepared by the Office of the Chief Financial Officer, including baseline budget submissions and appeals, financial status reports, and strategic plans and performance-based budget submissions.

The District of Columbia denied TPM’s request, and TPM appealed to the Office of the Mayor. When the applicable time limits passed without a response to its appeal, TPM filed this case. TPM’s complaint included allegations that “DC FOIA obligates the District to make available on a public Internet website or by other electronic means the documents requested by TPM,” and that the “District has a policy or practice of failing to make the documents available to the public electronically.” Joint Appendix (JA) 28. It requested that the Superior Court, among other things, “[o]rder

the District to make available on a public internet website or by other electronic means all documents as required by D.C. Code 2-536(a)(6A) and 2-536(b).” JA 28.

The Superior Court granted summary judgment to TPM and ordered the District to produce the documents requested by TPM, to comply with D.C. Code § 2-536(a)(6A), and to publish the required documents pursuant to § 2-536.

On appeal, the District argues, among other things, that “DC FOIA’s publication requirement includes no provision for private enforcement,” that the “only injunctive remedy available to a requester under DC FOIA is to obtain copies of the requested documents,” and that the Superior Court lacked authority to order “prospective publication.” Appellant’s Br. 1, 38. The District’s narrow interpretation of DC FOIA, however, conflicts with the statute’s plain text, which provides a cause of action to people denied the right to inspect records—not only to people who filed FOIA requests that were denied—and which broadly authorizes the court to “enjoin the public body from withholding records.” D.C. Code § 2-537(b). It is also inconsistent with the powers inherent in an equity court and with DC FOIA’s explicit direction that the law be “construed with the view toward expansion of public access.” *Id.* § 2-531.

D.C. Code § 2-536 provides an important means for members of the public to learn about “the affairs of government and the official acts of those who represent them.” *Id.* § 2-531. It allows members of the public to peruse documents such as

final opinions, public body meeting minutes, and pending applications for building permits, *see id.* § 2-536(a), without having to be able to identify ahead of time which specific documents will be of interest, and without having to wait for the public body to respond to a request. The right of members of the public to seek, and the power of the court to order, relief to remedy violations of § 2-536's requirements is important to ensure that public bodies within the District take those requirements seriously and provide members of the public with access to important information without delay. This Court should hold that DC FOIA authorizes actions seeking declaratory and injunctive relief to remedy violations of § 2-536, that the Superior Court may order public bodies to comply with § 2-536's posting requirements, and that the Superior Court may require public bodies to comply with § 2-536 on a forward-looking or ongoing basis.

ARGUMENT

I. DC FOIA authorizes actions seeking declaratory and injunctive relief to remedy violations of D.C. Code § 2-536.

DC FOIA authorizes actions to enforce § 2-536. Section 2-536 requires public bodies to make certain records available to the public online, giving members of the public a right to inspect those records without having to file a "written request for information." D.C. Code § 2-536(a). With exceptions not relevant here, the Act provides that "any person denied the right to inspect a public record of a public body may petition the Mayor to review the public record to determine whether it may be

withheld from public inspection.” *Id.* § 2-537(a). If the Mayor denies a petition or does not respond in the applicable time limits, “the person seeking disclosure may institute proceedings for injunctive or declaratory relief in the Superior Court for the District of Columbia.” *Id.* § 2-537(a)(1).

Nothing in these provisions suggests that the cause of action in § 2-537(a)(1) is inapplicable to people challenging violations of § 2-536. Such people are “denied the right to inspect a public record” when a public body fails to post online a record that the public body is required by law to post. *Id.* § 2-537(a). And such people are “seeking disclosure” of the records by seeking to have them placed online, as required by § 2-536(b). *Id.* § 2-537(a)(1). Accordingly, § 2-537(a)(1) authorizes such people to “institute proceedings for injunctive or declaratory relief in the Superior Court for the District of Columbia.”

The District’s position that DC FOIA does not authorize a cause of action to enforce § 2-536 runs counter to the purposes of the statute and to the statutory requirement that DC FOIA “be construed with the view toward expansion of public access.” *Id.* § 2-531. DC FOIA “seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such official information from possibly unwilling official hands.” *Washington Post Co. v. Minority Bus. Opportunity Comm’n*, 560 A.2d 517, 521 (D.C. 1989) (quoting *EPA v. Mink*, 410 U.S. 73, 80 (1973)). Section 2-536

reflects the D.C. Council’s determination that certain records are of such interest or importance that they should be made affirmatively available online without a written request. The District’s interpretation of the statute, however, deprives members of the public of any means of enforcing their right to access the records online and requires interested persons to file FOIA requests asking for the records to be released to them individually if they want to vindicate their right to access the records, despite § 2-536’s explicit requirement that the records be made available without a request. That interpretation thus “collapses an agency’s affirmative responsibility to post certain records ... into an agency’s responsibility to respond to requests for copies of documents,” *Animal Legal Def. Fund v. United States Dep’t of Agric.*, 935 F.3d 858, 872 (9th Cir. 2019) (*ALDF*) (addressing the federal FOIA), and turns § 2-536 into little more than a suggestion. In contrast, construing the statute in accordance with its plain text to allow causes of action to remedy violations of § 2-536 respects § 2-536’s distinction between records that are “specifically made public information” and those that are not, D.C. Code § 2-536(a), and furthers DC FOIA’s overall animating policy of fostering “expansion of public access,” *id.* § 2-531.

II. DC FOIA authorizes the Superior Court to order agencies to comply with D.C. Code § 2-536.

A. Where an action is brought to enforce § 2-536, DC FOIA provides the Superior Court authority to order agencies to comply with the statute by posting records online. DC FOIA provides that, in any suit filed under its judicial review

provisions, “the Superior Court for the District of Columbia may enjoin the public body from withholding records and order the production of any records improperly withheld from the person seeking disclosure.” D.C. Code. § 2-537(b). To “withhold” means “to hold back from action.” *Withhold*, The Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/withhold>. In the context of § 2-536, a public body “withholds” records when it “holds back from” publicly posting those records online—the “action” required by that statutory mandate. *See New York Legal Assistance Grp. v. Bd. of Immigr. Appeals*, 987 F.3d 207, 219 (2d Cir. 2021) (NYLAG) (noting that “it is entirely natural to say that an agency ‘withholds’ documents when it fails to publish them in violation of a direct statutory command that they be published in a manner accessible to the public”). Accordingly, a plaintiff who alleges that a public body has not posted records online as required by § 2-536 is alleging that the public body has withheld the records. And a court that issues an order requiring a public body to cease its failure to post documents online is “enjoin[ing] the public body from withholding records.” D.C. Code § 2-537(b). That relief falls squarely within the bounds of § 2-537(b).

Emphasizing that § 2-537(b) authorizes the Superior Court to “enjoin the public body from withholding records and order the production of any records improperly withheld *from the person seeking disclosure*,” the District contends that “the court may order production of improperly withheld documents to an individual

requester,” but may not “require documents to be published on the internet.” Appellant’s Br. 36–37 (quoting D.C. Code § 2-537(b); emphasis added by Appellant). As an initial matter, the assumption that the authorization to “order the production of any records improperly withheld from the person seeking disclosure,” encompasses only production to the specific complainant is unwarranted. Records that have not been posted online as required by law *are* being withheld from the person seeking disclosure, as well as from other members of the public. And a court “could order ‘the production’ by ordering the agency to post records” online. *ALDF*, 935 F.3d at 871 n.14.

In any event, § 2-537(b) expressly authorizes the Superior Court to “enjoin the public body from withholding records” *in addition* to authorizing the court to “order the production of any records improperly withheld from the person seeking disclosure.” The use of the conjunctive “and” indicates that the Superior Court has the power to issue injunctive relief beyond merely compelling production of records to particular requesters. *Cf. Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236 (2011) (explaining the conjunctive role of “and” is the “linking [of] independent ideas”). Focusing only on the language authorizing courts to order the production of records improperly withheld from the person seeking disclosure “ignores half of the statutorily authorized remedies.” *Smith v. U.S. Immigr. & Customs Enf’t*, 429 F. Supp. 3d 742, 767 (D. Colo. 2019).

That § 2-537(b) does not limit the Superior Court’s authority to ordering the production of records to specific requesters is reinforced by *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 18–20 (1974). There, the Supreme Court explained that federal FOIA’s judicial review provision, which authorizes courts “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant,” does not create an “exclusive remedy.” 415 U.S. at 20 (addressing 5 U.S.C. § 552(a)(4)(B)). Noting the “broad language of the FOIA, with its obvious emphasis on disclosure and with its exemptions carefully delineated as exceptions,” “the truism that Congress knows how to deprive a court of broad equitable power when it chooses so to do,” and “the fact that the Act, to a definite degree, makes the District Court the enforcement arm” of the statute, the Supreme Court found “little to suggest ... that Congress sought to limit the inherent powers of an equity court.” *Id.* at 19–20. Citing *Renegotiation Board*, this Court has stated that DC FOIA likewise “does not limit the inherent power of a court to grant equitable relief.” *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987). Although the Superior Court’s equitable powers are not limitless—they do not include, for example, the power to create exemptions that are not in the statute, *id.*—ordering public bodies to comply with the statute does not come close to the edge of the court’s authority. Instead, that relief falls well within the scope of § 2-537(b).

B. Notwithstanding the plain meaning of § 2-537(b)'s statutory text and the Superior Court's inherent powers to grant relief, the District contends that the statute does not authorize the Superior Court to order agencies to publish documents online. It relies primarily on *Citizens for Responsibility & Ethics in Washington v. United States Department of Justice*, 846 F.3d 1235 (D.C. Cir. 2017) (*CREW*), in which the D.C. Circuit concluded that although federal FOIA allows plaintiffs to bring an action to enforce its affirmative disclosure requirement (sometimes referred to as the "reading-room provision"), federal FOIA's judicial review provision does not authorize a court "to issue an injunction mandating that an agency 'make available for public inspection' documents subject to the reading-room provision." 846 F.3d at 1240, 1243 (citation omitted). Instead, *CREW* held, a court may address a violation of the reading-room provision by "requir[ing] disclosure of documents ... only to [the plaintiff], not disclosure to the public." 846 F.3d at 1244.

CREW's interpretation of federal FOIA's judicial review provision, however, is a *minority* position in the federal courts of appeals. Both the Second and Ninth Circuits have explicitly rejected it, *see NYLAG*, 987 F.3d at 214; *ALDF*, 935 F.3d at 875, and this Court should likewise decline to follow it. As the Second Circuit pointed out, *CREW* "spent little time parsing the text of the statute." *NYLAG*, 987 F.3d at 214. Instead, *CREW*'s conclusion about federal FOIA's judicial review provision reflected the panel's view that it was bound by a prior decision, *Kennecott*

Utah Copper Corp. v. United States Department of Interior, 88 F.3d 1191, 1202–03 (D.C. Cir. 1996), which held that federal FOIA does not authorize a court to order publication of a document in the Federal Register. *Kennecott* reasoned in part that such relief did not fall within a court’s authority to “order the production of any agency records improperly withheld from the complainant” under federal FOIA’s judicial review provision. *Kennecott* did not, however, expressly address whether a court’s additional power under that provision to “enjoin the agency from withholding any records” could support relief beyond ordering production of records to the plaintiff.

CREW acknowledged that *Kennecott* did not discuss the scope of the statutory language authorizing injunctions against the withholding of records, but concluded that *Kennecott* “implicitly” considered that language and limited the scope of federal FOIA’s judicial review provision “as a whole” to remedies solely for the plaintiff. 846 F.3d at 1244. Thus, *CREW* concluded that it was bound by circuit precedent, compelling it to reach the paradoxical conclusions that federal FOIA’s judicial review provision authorizes injunctive relief to remedy violations of the reading-room provision but that such relief may not require compliance with that provision.

Here, this Court is not bound by precedent requiring an illogical “mismatch” between the statutory obligation under a reading-room provision and the remedies available under a judicial review provision. *CREW*, 846 F.3d at 1246. And a more

recent D.C. Circuit case involving the same parties as in *CREW, Citizens for Responsibility & Ethics in Washington v. United States Department of Justice*, 922 F.3d 480, 485 (D.C. Cir. 2019), appears to read *CREW* “narrowly,” suggesting that the D.C. Circuit itself may “have reservations about the interpretation of the remedial provision expressed in *CREW*.” *NYLAG*, 987 F.3d at 214; *see also ALDF*, 935 F.3d at 876 (stating that “D.C. Circuit law on this issue does not seem settled”).

Rather than following *CREW*, which did not analyze the language permitting a court to enjoin an agency from withholding records, this Court should follow the Ninth and Second Circuits, which did. As the decisions in *ALDF* and *NYLAG* demonstrate, and as the discussion above explains, analysis of that statutory language “support[s] the position that courts may order” agencies to comply with the online posting requirement. *NYLAG*, 987 F.3d at 214. “The words ‘to enjoin the agency from withholding agency records’ ... 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 ... documents online.” *ALDF*, 935 F.3d at 869. “That the statute uses broad words to vest expansive equitable authority in district courts does not create ambiguity or vagueness.” *Id.*

C. The District’s interpretation of DC FOIA creates a disconnect between the legal violation at issue—the failure to comply with § 2-536—and the remedy for that violation. The District contends that the Superior Court’s authority in a DC FOIA

case is limited to “order[ing] production of improperly withheld documents to an individual requester.” Appellant’s Br. 37. The purpose of § 2-536, however, is to ensure that agencies affirmatively and continuously provide records to the public *without* the need for individual members of the public to file FOIA requests. If an agency is violating § 2-536, an order requiring the agency to produce the records solely to an individual requester does not remedy that violation. To the contrary, insisting that anyone who wants the records must request them *perpetuates* the violation.

Moreover, an order requiring an agency to produce records solely to an individual requester does not provide the public access to information envisioned in § 2-536. Section 2-536 declares that certain records are “specifically made *public* information.” D.C. Code § 2-536(a) (emphasis added). And DC FOIA requires that its provisions be construed with “the view towards expansion of *public* access.” *Id.* § 2-531 (emphasis added). The District’s contention that DC FOIA only permits courts to order the release of records to individual plaintiffs is incongruous with DC FOIA’s focus on *public* access rights.

In addition, limiting the Superior Court’s authority in the manner proposed by the District would pose practical barriers to achieving § 2-536’s purposes. That limitation would require any plaintiff who seeks to vindicate her right to access materials that are required to be made available online to choose between two unpalatable

options: either shouldering the burden of requesting, accepting, and housing all the materials that the agency has wrongfully withheld from its website or requesting specific records on a periodic basis and accepting the delays inherent in the process of making individual requests. Either way, to keep current, the plaintiff would have to file subsequent requests for new and updated documents and accept the costs and delays involved. And either way, the plaintiff would have to accept something different from, and more burdensome than, what DC FOIA requires: namely, the ability to access the materials online. DC FOIA's statutory language does not support, let alone require, this result, and the result does not comply with DC FOIA's requirement that the statute "be construed with the view toward expansion of public access." D.C. Code § 2-531.

III. DC FOIA authorizes the Superior Court to order disclosure of records on a prospective basis to remedy ongoing violations of § 2-536.

Under DC FOIA, a Superior Court may order public bodies to publish records on a forward-looking or ongoing basis. As discussed above, DC FOIA authorizes the Superior Court to "enjoin the public body from withholding records and order the production of any records improperly withheld from the person seeking disclosure." D.C. Code § 2-537(b). An order requiring a public body to publish records prospectively is an order "enjoin[ing] the public body from withholding records." Nothing in that language forecloses the Superior Court from ordering disclosure on a forward-looking or ongoing basis.

Arguing that the Superior Court lacked authority to order prospective posting of records, the District states that DC FOIA's disclosure requirements "refer[] to information that already exists." Appellant's Br. 38 (quoting *Humane Soc'y v. United States Fish & Wildlife Serv.*, 838 F. App'x 721, 731 (4th Cir. 2020)). But § 2-536 requires disclosure on an affirmative and ongoing basis. And the issue is not what records an agency must *currently* disclose, but what remedial authority a court has when faced with an agency that is violating disclosure requirements.

With respect to remedial authority, the District notes that the statute "provides that the court may 'order the production of any records improperly withheld.'" Appellant's Br. 39 (quoting § 2-537(b)). True, but as discussed above, that statement tells only half the story: Section 2-537(b) also authorizes courts to "enjoin the public body from withholding records." An order requiring an agency to make records available on a forward-looking or ongoing basis falls squarely within that judicial authority.

Moreover, DC FOIA does not limit "the inherent power of a court to grant equitable relief." *Barry*, 529 A.2d at 321. Those inherent powers include the power to grant prospective injunctive relief. *See, e.g., Mbakpuo v. Ekeanyanwu*, 738 A.2d 776, 782 (D.C. 1999) (noting that the "purpose of an injunction is to prevent future violations ... and, of course, it can be utilized even without a showing of past wrongs" (citation omitted)). Thus, even *CREW* had "little trouble concluding that a district

court possesses authority to grant ... a prospective injunction with an affirmative duty to disclose,” that is, an injunction that “would apply to [records] not yet written” and would impose a duty to disclose “without need for a specific prior request.” *CREW*, 846 F.3d at 1241, 1242.

Section 2-536’s operation would be severely undercut if, in the face of ongoing violations, the Superior Court could not issue prospective relief and, instead, an interested member of the public, entitled by law to online access to the records, each year had to await the violation and then sue to correct it. DC FOIA does not place such a limit on the Superior Court’s authority to remedy the District’s ongoing violations of its obligations to post records online under § 2-536.

CONCLUSION

This Court should hold that DC FOIA authorizes actions seeking declaratory and injunctive relief to remedy violations of § 2-536, that the Superior Court may order public bodies to comply with § 2-536’s online posting requirement, and that the Superior Court may order public bodies to comply with § 2-536 on a forward-looking or ongoing basis.

Respectfully submitted,

/s/ Adina H. Rosenbaum

Adina H. Rosenbaum

Allison M. Zieve

Public Citizen Litigation Group

1600 20th Street NW

Washington, DC 20009

202-588-1000
arosenbaum@citizen.org

*Attorneys for Amici Curiae
D.C. Open Government Coalition, et al.*

February 4, 2022

REDACTION CERTIFICATE DISCLOSURE FORM

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
 - An individual's social-security number
 - Taxpayer-identification number
 - Driver's license or non- driver's license identification card number
 - Birth date
 - The name of an individual known to be a minor
 - Financial account numbers, except that a party or nonparty making the filing may include the following:
 - (1) the acronym "SS#" where the individual's social-security number would have been included;
 - (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
 - (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
 - (4) the year of the individual's birth;
 - (5) the minor's initials; and
 - (6) the last four digits of the financial-account number.
2. Any information revealing the identity of an individual receiving mental-health services.
3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.
4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing

- violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).
5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.
 6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Adina H. Rosenbaum
Signature

No. 21-CV-543
Case Number(s)

Adina H. Rosenbaum
Name

February 4, 2022
Date

arosenbaum@citizen.org
Email Address

CERTIFICATE OF SERVICE

I certify that on February 4, 2022, this brief was served through this Court's electronic filing system on counsel for all parties as follows:

Richards S. Love
Loren L. AliKhan
Ashwin P. Phatak
Attorneys for Appellant

Todd A. Gluckman
Nicholas Soares
Attorneys for Appellee

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum