No. 17-16858

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANIMAL LEGAL DEFENSE FUND, *et al.*,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF AGRICULTURE, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 17-cv-00949
(Hon. William H. Orrick, United States District Judge)

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

Scott L. Nelson
Patrick D. Llewellyn
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

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Attorneys for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Public Citizen, Inc., is a nonprofit organization that has not issued shares or debt securities to the public. It has no parent companies, and no publicly held company has any form of ownership interest in it.

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen, Inc., is a national nonprofit advocacy organization with members and supporters nationwide. Public Citizen appears before Congress, administrative agencies, and the courts on a wide range of issues involving openness and integrity in government, the protection of consumers and workers, and public health and safety. Since its founding in 1971, Public Citizen has supported government transparency and relied on the Freedom of Information Act (FOIA) as an important tool for obtaining information for its work. Public Citizen has significant expertise in how FOIA works in practice, and it has litigated many FOIA cases and appeared as amicus curiae in many others.

Public Citizen submits this brief because of its view that FOIA's affirmative requirement that agencies make important documents publicly available in on-line libraries is as critical to the statute's aims as the more familiar requirement that agencies release documents to individuals who make specific requests for them. The agencies' statutory

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[1] This brief was not authored in whole or in part by counsel for a party. No party or party's counsel, nor any other person or entity other than amicus curiae or its counsel, made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of the brief.

obligation to make records available to the public proactively, however, will have little meaning if there is no effective remedy when an agency flouts it. These concerns led Public Citizen to file an amicus brief in *Citizens for Responsibility & Ethics in Washington v. United States Department of Justice*, 846 F.3d 1235 (D.C. Cir. 2015) (*CREW*), the decision the district court chose to follow in this case. In *CREW*, the D.C. Circuit recognized the importance of the concerns raised by Public Citizen, *see id*. at 1241, but felt obligated by circuit precedent to read FOIA in a way that, perversely, prevents a court from ordering public disclosure of records to remedy a violation of FOIA's public-disclosure requirements. *See id*. at 1244.

This Court does not face the arguable constraints of circuit precedent that led the D.C. Circuit to the reading of FOIA's remedial provisions adopted in *CREW*. Public Citizen submits this brief to aid the Court in considering whether to follow *CREW*'s path or to adopt a reading of FOIA that is more faithful both to the statute's text and to its purpose of promoting dissemination of important information about the functions of the federal government.

INTRODUCTION AND SUMMARY OF ARGUMENT

FOIA is most widely known for requiring agencies to provide records in response to individual requests. *See* 5 U.S.C. § 552(a)(3). The statute, however, also requires agencies to make certain records available to the public on the agencies' own initiative, without waiting for a request. *See id.* § 552(a)(2). Further, FOIA broadly empowers courts to issue injunctive relief to redress the withholding of records in violation of any of the Act's substantive disclosure provisions. *See id*. § 552(a)(4)(B).

Nonetheless, in the decision on appeal, the district court interpreted FOIA in a way that effectively prevents plaintiffs from enforcing § 552(a)(2)'s proactive disclosure requirements. Adopting the holding of the D.C. Circuit in *CREW*, 846 F.3d at 1243, the district court dismissed an action brought by the Animal Legal Defense Fund (ALDF) seeking an injunction to require the United States Department of Agriculture (USDA) to make certain records available to the public in compliance with § 552(a)(2). The district court expressly adopted *CREW*'s view that a court's remedial authority under FOIA is limited to ordering an agency to release records covered by § 552(a)(2) to the

individual plaintiff only, and does not allow a court to order compliance with the statute's public-disclosure obligations.

FOIA's creation of a broad right of action to "enjoin [an] agency from withholding agency records," 5 U.S.C. § 554(a)(4)(B), is more than sufficient to empower a court to order agencies to make public, on an ongoing basis, records that fall within § 552(a)(2). The district court, however, held that FOIA's broad authorization of injunctive relief to prevent any withholding of agency records that is unlawful under the statute is limited by the statute's conjunctive grant of authority "to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

The district court recognized that neither *CREW* nor the prior D.C. Circuit authority on which it rested had addressed the argument that the statute's plain language authorizes broader injunctive relief as well as orders requiring production of records to the complainant. The district court nonetheless found *CREW*'s holding persuasive based on two textual arguments of its own. First, the court stated that giving effect to the statute's broad authorization of injunctive relief would render superfluous the grant of authority to order production of records to

particular complainants. That rationale, however, overlooks that the court's holding itself renders the statute's broad authorization of injunctive relief surplusage. Second, the court concluded that a FOIA provision authorizing disciplinary sanctions for certain FOIA violations suggests a limitation on a court's remedial powers. This argument relies on a non sequitur, as it does not follow that Congress would have wanted to place the same limits on the courts' equitable powers that it placed on the extraordinary step of initiating disciplinary proceedings against employees who arbitrarily withhold records from a requester.

Beyond the weaknesses in the district court's textual analysis, its adoption of *CREW*'s holding places FOIA's remedial scheme at odds with its substantive requirements. *CREW* rests on the strange notion that, although the FOIA right of action authorizes prospective relief for violations of § 552(a)(2), it also imposes limitations on relief that inherently create a "mismatch" between the violation and the remedy. 846 F.3d at 1246. The decision posits that Congress thought the appropriate remedy for a failure to provide on-line public access to important records is to order them to be turned over, in their entirety, to the plaintiff but to no one else. Far from remedying the violation, that

relief *perpetuates* it. And the limitation on relief poses severe practical difficulties for plaintiffs who seek to remedy the injuries imposed on them by violations of FOIA's public-access requirements, while failing altogether to vindicate the public interests that those requirements—and FOIA more generally—were intended to serve.

ARGUMENT

I. FOIA expressly authorizes actions seeking injunctive relief to remedy violations of its affirmative obligations.

FOIA provides three principal mechanisms by which agencies "shall make available to the public information." 5 U.S.C. § 552(a). First, agencies must "publish" certain information, including substantive rules, in the Federal Register. *Id*. § 552(a)(1). Second, under the statute's so-called "electronic reading room" provision, agencies must "make available for public inspection and copying," through "electronic means," other important information not subject to the publication requirement, including records whose "subject matter" is of demonstrated interest to the public. *Id.* § 552(a)(2). Third, "upon any request for records" not already published in the Federal Register or made publicly available through electronic means, the agency must make those records

"promptly available" to the requester unless they are exempt from disclosure. *Id*. § 552(a)(3).

These substantive requirements are backed by an express right of action allowing a person injured by the withholding of information in violation of FOIA to seek a judicial remedy in a federal district court. *See id*. § 552(a)(4)(B). In such an action, the court has the power both "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." *Id*. As the Supreme Court held in *Renegotiation Board v. Bannercraft Clothing Co.*, the statute confers broad remedial authority on the district courts consistent with "the inherent powers of an equity court." 415 U.S. 1, 20 (1974). This Court has likewise long held that this authority broadly empowers the courts to enjoin agency actions that "violate the intent and purpose of the FOIA." *Long v. IRS*, 693 F.3d 907, 909–10 (1982). As the Supreme Court has explained, when a plaintiff shows that an agency has "(1) 'improperly'; (2) 'withheld'; (3) 'agency records,'" a district court has "authority to devise remedies and enjoin agencies … under the jurisdictional grant conferred by § 552." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980).

A straightforward reading of the statute demonstrates that ALDF properly invoked the powers of the court under § 552(a)(4)(B). ALDF has alleged that USDA is improperly withholding records—databases concerning Animal and Plant Health Inspection Service (APHIS) enforcement and compliance—from public access, contrary to § 552(a)(2). And ALDF seeks an order "enjoin[ing] the agency from withholding [those] agency records" from the public on an ongoing basis. *Id.* § 554(a)(4)(B). That relief falls squarely within the bounds of FOIA's remedial scheme. Although ALDF does not ask the court to order the agency to produce the databases to *it*, nothing in § 552(a)(4)(B) limits a court to ordering an agency to turn over records to a specific requester. The statute expressly gives district courts the power "to enjoin the agency from withholding agency records *and* to order the production of any agency records improperly withheld from the complainant." *Id.* (emphasis added). FOIA's use of the conjunctive "and" in its remedial provision indicates that courts have the power to issue injunctive relief beyond merely compelling production of records to particular requesters. That conclusion is, as ALDF's brief demonstrates, reinforced by a host of

decisions of the Supreme Court and this Court emphasizing the sweep of the courts' equitable powers under FOIA.

II. Neither the D.C. Circuit's *CREW* decision nor the district court's adoption of *CREW*'s holding squares with FOIA's language.

Notwithstanding FOIA's broad authorization of injunctive relief in addition to orders requiring production of records to specific plaintiffs, the district court dismissed ALDF's FOIA claim for failure to state a claim based on its adoption of *CREW*'s holding that "federal courts do not have the power to order agencies to make documents available for public inspection under section 552(a)(4)(B) of FOIA," but plaintiffs can "enforce section 552(a)(2)" solely by seeking "production of documents to them personally." ER0020 (order denying preliminary injunction); *see also* ER0005 (adopting this reasoning as basis for dismissal). Neither *CREW* nor the district court's holding adopting that decision finds support in the statute's language.

A. Controlling statutory language belies *CREW*'s holding that courts may "enforce" § 552(a)(2) but cannot compel compliance with it.

CREW, like this case, was an action seeking to compel an agency to comply with its obligations to make records available for public access

under § 552(a)(2). Although the plaintiff invoked the Administrative Procedure Act (APA) as the source for its right of action, the D.C. Circuit began by considering whether the relief sought was available under FOIA. Acknowledging the Supreme Court's decisions concerning the breadth of injunctive relief under FOIA, *see* 846 F.3d at 1241–42, the court held that the statutory right of action encompasses a claim for prospective injunctive relief to enforce § 552(a)(2), and that such an injunction may impose on the agency an ongoing, "affirmative duty to disclose" records covered by § 552(a)(2), *id*., at 1242, without any requirement that a plaintiff make a request for the "specific records" subject to the agency's affirmative disclosure obligation, *id*. at 1240.

So far, so good. Nonetheless, although recognizing in theory that courts in FOIA actions may enforce § 552(a)(2)'s requirements, *CREW* immediately rendered that recognition meaningless by imposing a limit on the courts' remedial authority under § 554(a)(4)(B) that prevents them from ordering compliance with § 552(a)(2)'s requirement of public access to records. Instead, *CREW* held, a court may address a violation of § 552(a)(2) by "requir[ing] disclosure of documents only to [the plaintiff], not disclosure to the public." 846 F.3d at 1244.

CREW held that this "mismatch" between the violation and the relief available for it, *id*. at 1246, was required by a prior D.C. Circuit decision, *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191 (D.C. Cir. 1996), which held that 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 § 552(a)(4)(B)—language *Kennecott* concluded empowered courts only to "[p]rovid[e] documents to the individual," not to order production of "agency records withheld from the public." 88 F.3d at 1203. *Kennecott* did not, however, expressly address whether a court's additional power under § 552(a)(4)(B) to "enjoin the agency from withholding any records" could support relief beyond ordering production of records to the plaintiff.

The court in *CREW* acknowledged that *Kennecott* did not discuss the scope of the statutory language broadly authorizing injunctions against withholding of records, but concluded that *Kennecott* "implicitly" considered that language and limited the "scope of section 552(a)(4)(B) as a whole" to remedies solely for the plaintiff. 846 F.3d at 1244. Thus,

the D.C. Circuit panel in *CREW* concluded that its hands were tied by circuit precedent, *see id*., compelling it to reach the paradoxical conclusion that although § 552(a)(4)(B) authorizes injunctive relief aimed at violations of § 552(a)(2), such relief may not require compliance with § 552(a)(2). *See id*. The court made no attempt to square that holding with the statutory language authorizing injunctive relief against any withholding of records.

Moreover, having held itself bound by precedent to restrict the relief available under FOIA without regard to the statute's language, the court went on to hold that the availability of such a non-remedy under FOIA precluded relief under the APA, which provides a remedy only where adequate relief is not otherwise available. 5 U.S.C. § 704. The court held that the FOIA remedy was "adequate" in the sense of being in the "same genre" as the APA remedy the plaintiffs sought—although relief under FOIA, as limited by *CREW*, would not actually remedy the violation. 846 F.3d at 1245–46.

B. The district court's attempt to find textual support for *CREW*'s outcome is not sustainable.

Below, the district court recognized that neither *CREW* nor *Kennecott* considered the breadth of § 554(a)(4)(B)'s authorization of

orders that enjoin agencies from withholding records and that, indeed, "no court has explicitly responded to or addressed th[e] argument" that that language authorizes a court to order actual compliance with § 552(a)(2). ER0019. Although characterizing that argument as "plausible," the district court stated that it was "ultimately persuaded by the D.C. Circuit's conclusions in *Kennecott* and *CREW*," *id*., based on two textual arguments.

First, the district court stated that "[t]o read section 552(a)(4)(B) as plaintiffs suggest would render superfluous the second provision, that courts may 'order the production of any agency records improperly withheld from the complainant.'" *Id*. As ALDF's brief explains, Congress's decision to make clear that the statute specifically authorizes production of requested records to a plaintiff (the most commonly sought relief in FOIA cases) is not meaningless merely because the preceding broad grant of authority to enjoin wrongful withholding of documents could also be read to encompass that relief. *See* App'ts' Br. 31–33.

Furthermore, even if a broader reading of the first grant of authority would render the second superfluous, that conclusion could not justify adopting a construction of the statute that has exactly the same

flaw. The district court's holding that the authority to "enjoin the agency from withholding any records" is coextensive with the authority to "order the production of agency records" to the plaintiff unquestionably renders the former grant of authority superfluous. As the Supreme Court has explained, "the canon against surplusage 'assists *only* where a competing interpretation gives effect to every clause and word of a statute.'" *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013) (quoting *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011)) (emphasis added); *see also Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236 & n.48 (2011); *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *United States v. Menasche*, 348 U.S. 528, 538–39 (1955). The canon against surplusage does not apply where a proffered statutory construction attempts to give meaning to one passage in a statute "only at the expense of rendering the remainder … superfluous." *Bruesewitz*, 562 U.S. at 236.

Thus, even taken at face value, the district court's view that a plain-language construction of the grant of authority to enjoin withholding of records would render the authority to order production of records to the plaintiff superfluous does not answer the statutory construction question. Instead, it suggests looking to other aids to

construing the statute. Here, the most obvious guidepost is FOIA's broad remedial purpose: "the statute's goal is 'broad disclosure,'" *Milner v. Dep't of Navy*, 562 U.S. 562, 571 (2011), and "the policy of [FOIA] requires that the disclosure requirements be construed broadly." *Dep't of Air Force v. Rose*, 425 U.S. 352, 366 (1976); *accord*, *e.g.*, *First Amend. Coal. v. U.S. Dep't of Justice*, 878 F.3d 1119, 1126 (9th Cir. 2017).

The statute's animating policies, moreover, specifically include fostering the *public* access rights that are served by construing § 552(a)(4)(B) to allow relief beyond orders requiring production of records solely to a plaintiff. "Without question, the Act is broadly conceived. It 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 information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973). "Consistently with that objective, the Act repeatedly states 'that official information shall be made available "to the public," "for public inspection."'" *Rose*, 425 U.S at 361 (quoting *Mink*, 410 U.S. at 79). Thus, to the extent the district court perceived a need to choose between a broad reading of its remedial authority that arguably rendered a

narrower grant of authority unnecessary, and a narrow reading of its authority that plainly rendered the broad grant of authority to enjoin withholding of records superfluous, it erred by not choosing the reading most consistent with the statute's goal of facilitating public access to government records.

The district court's second asserted textual basis for its decision is also unconvincing. The court pointed out that a provision of the statute requiring disciplinary investigations of government personnel who arbitrarily withhold records from requesters, § 552(a)(4)(F)(i), applies only when a court has "order[ed] the production of any agency records improperly withheld from the complainant," *id.*, as authorized by § 552(a)(4)(B). The court reasoned that if § 552(a)(4)(B) in fact authorizes injunctions against withholding in addition to orders requiring production of records to plaintiffs, § 552(a)(4)(F)(i) should have been written to require investigations when such injunctions are issued as well. The court concluded that construing the authority to issue injunctions to encompass only orders requiring production to a plaintiff is necessary to "resolve[]" the "seemingly illogical result" of reading the

statute to allow injunctive orders that do not trigger the disciplinary process. ER0020.

Contrary to the court's view, however, determining the circumstances in which a disciplinary investigation may be warranted is a completely different question from defining the appropriate scope of judicial remedies for violations of FOIA's substantive provisions. The district court provided no convincing explanation of why it is appropriate to limit the latter based on limitations on the former.

Indeed, there is nothing "irrationally narrow" about limiting disciplinary investigations to cases where an agency has arbitrarily refused to produce documents to a requester who then successfully sues for documents. Rather, the availability of sanctions against individual agency employees who have arbitrarily withheld records from a specific requester makes perfect sense in the context of FOIA's scheme and implementation. When a specific request for records is made under § 552(a)(3), one or more agency employees must review the request, search for records, and determine which records, if any, to release. Employees tasked with responding to the request are delegated decisionmaking authority about the production of records, and

§ 554(a)(4)(F) appropriately provides an avenue to hold rogue civil servants accountable for blatantly disregarding the law in responding to FOIA requests. *See* S. Rep. No. 93-854, at 22 (1974), *reprinted in* Subcomm. on Gov't Info. & Individual Rights of the House Comm. on Gov't Operations *et al.*, Freedom of Information Act Source Book 174 (Joint Comm. Print 1975) (discussing the civil service penalties, including dismissal from government service, that may appropriately be included in sanctions under FOIA).

In contrast, the sorts of violations likely to justify broader injunctive relief against an agency could reasonably have been viewed by Congress as less likely to give rise to a need for disciplinary proceedings. Section 552(a)(2), for example, requires proactive disclosure by the agency of certain *categories* of records. Accordingly, a violation of § 552(a)(2) reflects an unlawful agency policy that does not conform to the requirements of FOIA rather than misconduct by an individual civil servant. Granting injunctive relief against such a violation would therefore be a poor indication that disciplinary action aimed at an individual might be warranted.

III. Individual relief cannot adequately remedy violations of § 552(a)(2).

CREW's peculiar holding is one that no court that did not feel itself bound by precedent or clear statutory language could reasonably reach because that holding limits courts to providing relief that does not redress the violation it is supposed to remedy. *CREW* states that it is "certain" that "a plaintiff may bring an action under FOIA to enforce the reading-room provision, and may do so without first making a request for specific records under section 552(a)(3)." 846 F.3d at 1240. Moreover, *CREW* recognizes that a plaintiff may seek "a prospective injunction with an affirmative duty to disclose" records that fall within the categories subject to the reading-room requirement. *Id*. at 1242. There is, as Joseph Heller might have said, only one catch: A court that determines that the agency has wrongfully withheld records from its public electronic reading room can only order the agency to supply those records to an individual plaintiff. Far from "breath[ing] life into [the agency's] obligations" under FOIA, *id*. at 1240, this remedial limitation sucks the air out of § 552(a)(2)'s public disclosure requirement.

The purpose of § 552(a)(2) 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. "The materials encompassed by paragraph (2) are automatically available for public inspection; no demand is necessary." *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 756 (D.C. Cir. 1978) (en banc). Section 552(a)(2) "sets out the affirmative obligation of each agency" "to make information available to the public, with certain information required to be published and other information merely required to be made available for public inspection and copying." S. Rep. No. 93-854, at 5, *reprinted in* Freedom of Information Act Source Book 157. Agencies must make publicly available without any request their "final opinions," "orders," "statements of policy," "interpretations," "administrative staff manuals" and "instructions to staff," 5 U.S.C. § 552(a)(2), because this "material is the end product of Federal administration." H.R. Rep. No. 89-1497, at 7 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2424. And § 552(a)(2) further requires the agency to include in its electronic reading room records that have been frequently requested under § 552(a)(3), to obviate the need for repeated individual requests and productions.

The district court's adoption of *CREW*'s holding that the only relief available for a violation of § 552(a)(2) is an order requiring production of

records to an individual FOIA plaintiff obliterates the distinction between an agency's duties to make records publicly available in its electronic reading room under § 552(a)(2) and its duties to provide records that are not already available in its electronic reading room to individual requesters under § 552(a)(3). *CREW*'s holding reduces § 552(a)(2) to little more than a suggestion to agencies that they affirmatively make records public. If the APHIS website records at issue here should be available to the general public under § 552(a)(2)—an issue not decided by the district court—then the determination that an order requiring production of those records to an individual FOIA plaintiff would remedy USDA's violation of that section is incorrect.

CREW's remedial limitation, moreover, poses a number of practical barriers to achievement of § 552(a)(2)'s purposes. It requires that any plaintiff who seeks to vindicate her right to access materials that should be in the agency's public reading room must shoulder the burden of accepting and housing, on an ongoing basis, all the materials that the agency has wrongfully withheld from the reading room. Some plaintiffs, in some cases, may be willing and able to seek such relief. For example, in the aftermath of *CREW* itself, another plaintiff sought an order

requiring ongoing production to it of the OLC opinions that were the subject of the case, and thus was able to obtain a merits adjudication of whether § 552(a)(2) applied to those records. *See Campaign for Accountability v. U.S. Dep't of Justice*, __ F. Supp. 3d __, 2017 WL 4480828 (D.D.C. Oct. 6, 2017) (holding that the plaintiff had a right of action but that § 552(a)(2) did not require public access to the OLC opinions). But in other cases, such as this one, seeking the relief *CREW* offers for a § 552(a)(2) violation would require a plaintiff to be willing, and to have the technological capability, to replicate and update on a periodic basis the extensive databases that formerly were available for public access on-line. That formidable undertaking might deter many plaintiffs who desire access to the materials in the agency's electronic reading room but do not want or need production of all the materials that are being wrongfully withheld. Such plaintiffs may be forced instead to request specific records they need on a periodic basis under § 552(a)(3), and accept the delays—and possible need for litigation over access—inherent in the process of making individual FOIA requests.

Requiring a plaintiff who wishes to vindicate its statutory right to access materials in a reading room to make such a choice between

unpalatable alternatives is like telling a person who was wrongfully denied a library card that her remedy is either to have the entire library dumped on her front lawn, or to mail in requests for individual books, which will go into a lengthy queue of similar requests for processing. Even if a plaintiff has the practical capability to choose the alternative of asking for production of everything that the agency is withholding from the reading room, a remedy with such strings attached does not redress the plaintiff's injury because it does not "give the plaintiff everything to which he is entitled"—it "does not provide the access granted by the FOIA." *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 689, 690 (9th Cir. 2012).[2] Instead, the remedy forces the plaintiff to accept something very different from, and more burdensome than, what FOIA requires: namely, the ability to access the materials on-line in the agency's electronic reading room.

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[2] *Yonemoto*'s relevant holding was that a FOIA claim was not mooted by the release of records to the plaintiff with improper restrictions on his right to share it with others. Another holding of the case, on a point concerning the standard of appellate review of summary judgment rulings in FOIA cases, was overruled in *Animal Legal Defense Fund v. FDA*, 836 F.3d 987, 989 (9th Cir. 2016) (en banc). That decision, however, has no impact on *Yonemoto*'s rulings on mootness and on the merits of the question whether the agency's conditional production of records satisfied FOIA.

Moreover, even if one plaintiff succeeds in proving a violation of § 552(a)(2) and obtaining a judicial order requiring production of records to her, that relief will accomplish little in advancing the purposes of FOIA, which is to grant broad public access to records. *See Yonemoto*, 686 F.3d at 689–90. If the result of litigation over § 552(a)(2) is that only one plaintiff receives the access that is supposed to be granted to "the public at large," *id*. at 690, then other members of the public who are equally entitled to access may be forced either to bear the burden of litigating for the same relief or to resort to individual FOIA requests for specific items that should be included in the agency's electronic reading room (with all the attendant delays and potential need for litigation that individual FOIA requests entail). As this Court stated in *Yonemoto*, FOIA "does not sanction such redundancy," but instead "recognizes that 'if the information is subject to disclosure, it belongs to all.'" *Id*. (quoting *Nat'l Archives & Records Admin. v. Favish,* 541 U.S. 157, 172 (2004)). Just as a production of documents that purports to restrict access to an individual requester does not genuinely remedy a violation of § 552(a)(3), *see id.*, an order requiring records that should be made available to the

general public to be produced only to one plaintiff does not remedy a violation of § 552(a)(2).

In short, a remedy that effectively deletes an entire provision from FOIA cannot be an adequate remedy for violation of that provision. Allowing the agency to continue to withhold the records from the general public does not cure the violation, but perpetuates it. If FOIA in fact limited the relief available for a violation of § 552(a)(2) in this way, it would, as ALDF argues, be inadequate to foreclose the relief otherwise available under the APA for final agency action that is contrary to law. *See* App'ts' Br. 46–58. The Court need not reach that question, however, as the more straightforward, and correct, solution is to give effect to § 552(a)(4)(B)'s broad grant of remedial authority and allow injunctions that genuinely enforce § 552(a)(2)'s public access requirement.

CONCLUSION

For the foregoing reasons, this Court should reverse the order of the district court.

Respectfully submitted,

/s/Scott L. Nelson

Scott L. Nelson
Patrick D. Llewellyn
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Amicus Curiae

February 9, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief complies with the typeface and volume limitations set forth in Federal Rules of Appellate Procedure 32(a)(5), 32(a)(6), 32(a)(7)(B) and 29(d) as follows: The proportionally spaced typeface is 14-point Century Schoolbook BT, and, as calculated by my word processing software (Microsoft Word 2016), the brief contains 4,975 words, exclusive of those parts of the brief not required to be included in the calculation by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and the rules of this Court.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I certify that on February 9, 2018, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in this case.

/s/ Scott L. Nelson
Scott L. Nelson