ORAL ARGUMENT NOT YET SCHEDULED

No. 16-5110

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,
Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF JUSTICE, *et al.*,
Defendants-Appellees.

On Appeal from a Final Order of the
U.S. District Court for the District of Columbia
(Honorable Amit P. Mehta)

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC. IN SUPPORT OF PLAINTIFF-APPELLANT AND IN SUPPORT OF REVERSAL

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August 15, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici. Except for the following, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief of Plaintiff-Appellant Citizens for Responsibility and Ethics in Washington (CREW). In addition to the parties listed there, amicus curiae Public Citizen, Inc., the filer of this brief, is appearing with consent of both parties in support of the plaintiff-appellant and reversal. 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. The general purpose of the organization is to advocate for the public interest on a range of issues, including openness in government.

(B) Rulings Under Review. References to the rulings at issue appear in the Brief of Plaintiff-Appellant CREW. We note in addition that Judge Mehta's memorandum opinion has been designated for publication in F. Supp. 3d, but its official citation is not available as of this writing.

(C) Related Cases. Amicus curiae Public Citizen is aware of no related cases within the meaning of this Court's Rule 28(a)(1)(C)—that is, cases involving both "substantially the same parties and the same or similar issues." However, in addition to the case listed in the certificate in the Brief of Plaintiff-Appellant CREW, the pending case *Public Citizen Foundation, Inc. v. Food & Drug Administration*, No. 16-cv-781 (APM), filed April 27, 2016, also presents similar issues concerning the availability of a right of action under either the Freedom of Information Act or the Administrative Procedure Act to enforce the requirements of 5 U.S.C. § 552(a)(2).

/s/ Scott L. Nelson
Scott L. Nelson

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Cases:

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

Statutes and Rules:

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GLOSSARY

APA	Administrative Procedure Act
CREW	Citizens for Responsibility and Ethics in Washington
DOJ	U.S. Department of Justice
FOIA	Freedom of Information Act
OLC	Office of Legal Counsel, U.S. Department of Justice

RELEVANT STATUTES

Relevant statutes are set forth in the brief of plaintiff-appellant CREW.

INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen 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 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. Of particular relevance here, Public Citizen's attorneys are currently litigating a case in which the government agency defendant has challenged the authority of the district court to order prospective injunctive relief for violations of FOIA's

[1] This brief was not authored in whole or in part by counsel for a party. No person or entity other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

affirmative disclosure provision, 5 U.S.C. § 552(a)(2). *See Pub. Citizen Found., Inc. v. Food & Drug Admin.*, No. 16-cv-781 (D.D.C.).

Public Citizen submits this brief because it believes that, in determining whether a meaningful remedy is available for violations of FOIA's affirmative disclosure requirements, the Court must consider whether FOIA's own remedial provision creates a right of action to obtain an injunction requiring compliance with those requirements. Only by considering the complete scope of the FOIA right of action can the Court ensure that its resolution of the question whether a right of action is available under the Administrative Procedure Act (APA), 5 U.S.C. § 704, rests on a correct understanding of the adequacy of remedies that may otherwise be available.

Public Citizen's arguments fully support the position of plaintiff-appellant Citizens for Responsibility and Ethics in Washington (CREW), that it should be permitted to proceed with its action to compel compliance with 5 U.S.C. § 552(a)(2). Public Citizen's arguments, however, do not duplicate CREW's because our analysis of the remedies available under FOIA differs in certain respects from CREW's. Public

Citizen believes that consideration of these arguments will be helpful to the Court in resolving this case.

All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Freedom of Information Act (FOIA) requires agencies to disclose certain records on their own initiative, without waiting for an individual to request those records. 5 U.S.C. § 552(a)(2). The decision on appeal effectively prevents CREW from enforcing these proactive disclosure provisions. Specifically, the decision dismissed CREW's action seeking forward-looking injunctive relief for violations of FOIA's affirmative disclosure provisions, § 552(a)(2), because, in the district court's view, the court's authority to order agencies to release records sought in a specific FOIA request under § 552(a)(3) provides an adequate alternative remedy. This Court should reverse that decision because it effectively writes out of FOIA the affirmative duty of federal agencies to disclose records to the public without such a specific request. The court should hold either that FOIA itself empowers district courts to order a wide range of relief, including requiring an agency to make records

publicly available on an ongoing basis, or, if FOIA does not provide that authority, that such relief is available under the APA.

FOIA's creation of a right of action for broad injunctive relief, 5 U.S.C. § 552(a)(4)(B), is sufficient to empower a court to order agencies to make public, on an ongoing basis, the records that fall within § 552(a)(2). If it is not, then forward-looking relief for agency violations of § 552(a)(2) must be available under the APA, because suits seeking disclosure of records sought in individual FOIA requests do not provide an adequate remedy for an agency's failure to make records available without a request, as required by § 552(a)(2). Whichever statute provides the avenue for seeking forward-looking relief for a violation of § 552(a)(2), some such avenue must exist. This Court should therefore clarify that § 552(a)(2) is enforceable and that, as CREW argues, CREW "can properly seek the affirmative relief sought" in its lawsuit "under one statute or the other." CREW Br. 20.

In the court below, the issue was framed as whether FOIA provides an "other adequate remedy" that, under 5 U.S.C. § 704, precludes APA relief for a violation of § 552(a)(2). Both parties' arguments on that question assumed that the relief available in the right of action created

by FOIA, 5 U.S.C. § 552(a)(4)(B), is limited to orders compelling an agency to release particular records requested under § 552(a)(3). *See* JA 38. The district court was "far from convinced that the parties are correct about the limited extent of the court's remedial authority under FOIA," but held that it need not decide the matter because, even if FOIA authorized a court only to order disclosure of specifically requested records, "in this case, FOIA provides an adequate remedy," through actions seeking to compel responses to individual FOIA requests. JA 39.

The district court erred in dismissing an action seeking forward-looking relief for a violation of section 552(a)(2) on the ground that relief limited to remedying the withholding of particular records specifically requested under § 552(a)(3) is an adequate remedy for the claimed violation. First, by its plain language, FOIA's judicial review provision, 5 U.S.C. § 552(a)(4)(B), grants district courts authority to remedy violations of FOIA beyond merely compelling the disclosure of records to specific requesters, and the Supreme Court and courts in this Circuit have interpreted § 552(a)(4)(B) as granting district courts broad authority to remedy violations of FOIA. The relief sought in this case falls easily within that authority. Second, this Court should reverse the

district court's holding that actions to compel responses to individual FOIA requests adequately remedy a violation of § 552(a)(2), because that provision requires agencies to disclose records *without* a FOIA request. Finally, if this Court agrees that FOIA itself empowers district courts to order forward-looking relief, then under the liberal pleading principles of Federal Rule of Civil Procedure 8, CREW has adequately pleaded a claim under FOIA and this Court should remand the case to the district court for CREW to pursue its case under FOIA.

ARGUMENT

I. This Court, unlike the district court, should consider the full scope of judicial remedial authority under FOIA.

The district court in this case did not affirmatively endorse the view that FOIA does not provide an avenue for prospective relief under section 552(a)(2). Indeed, the court stated that it was "far from convinced that the parties are correct about the limited extent of the court's remedial authority under FOIA." JA 39. The court even explained that FOIA's statutory language "suggests that district courts have the power to issue injunctive relief beyond merely compelling disclosure of records." *Id.*

The court did not, however, follow the logic of its own view of the statutory language and hold that FOIA provides for the relief sought by CREW in this case: an injunction compelling the agency to comply with its obligations to disclose to the public, without request, opinions (and indices of those opinions) that are subject to § 552(a)(2)'s affirmative disclosure requirements. Had it done so, CREW presumably would have been permitted to amend its complaint to invoke the FOIA right of action rather than the APA as the basis for requesting that relief. Instead, the court stated that it "need not … decide the extent of a district court's equitable powers under FOIA's remedial scheme …." *Id.* Rather, accepting for the sake of argument that FOIA's remedial scheme is limited to actions seeking documents responsive to specific FOIA requests under § 552(a)(3), the district court held that disclosure of Office of Legal Counsel (OLC) opinions through individual FOIA requests was an adequate alternative remedy to CREW's APA lawsuit.

Although the district court thus left open the question of what relief a court could award under FOIA if a plaintiff were to prevail on a claim that an agency violated § 552(a)(2), this Court should not follow that course. If, as CREW argues—correctly, in our view, *see infra* pp. 20–

21—relief tailored to violations of § 552(a)(3)'s requirement that agencies provide particular records in response to specific requests is not adequate to remedy violations of § 552(a)(2)'s requirement that agencies disclose categories of records without waiting for requests, this Court must go further to determine whether FOIA provides an adequate remedy or whether a plaintiff should instead proceed under the APA: The Court must consider the full range of remedies potentially available under FOIA.

Not addressing that question could lead to a decision that rests on an erroneous premise about FOIA's scope. The Supreme Court has cautioned against deciding cases based on faulty assumptions, *see*, *e.g.*, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 382 (1995), and, to avoid such decisions in statutory matters, has pointed out that courts need not "accept an interpretation of a statute simply because it is agreed to by the parties." *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 56 (2006). Moreover, courts have "independent power to identify and apply the proper construction of governing law" and authority to consider questions that are "antecedent to" the issues framed by the parties. *U.S. Nat'l Bank of Ore. v. Indep. Ins. Agents of*

Am., Inc., 508 U.S. 439, 447 (1993) (citation omitted); *see also Lesesne v. Doe*, 712 F.3d 584, 588 (D.C. Cir. 2013). The question of *what remedies FOIA provides* for a violation of § 552(a)(2) is surely antecedent to *whether those remedies are adequate*.

Moreover, both litigants and district courts in this Circuit, where FOIA litigation is concentrated, will look to this Court's decision to determine whether § 552(a)(2)'s requirements may be enforced through actions under FOIA or under the APA, and a decision that does not actually resolve the scope of the courts' remedial authority under FOIA may provide inadequate or even faulty guidance. And although CREW's action should be allowed to proceed whether the right of action is provided by the APA or FOIA, the source of the right of action makes a significant practical difference in a number of respects, including the standards under which attorney fees may be available to a prevailing plaintiff and the applicability of FOIA's venue and other procedural provisions. *See* 5 U.S.C. § 552(a)(4)(B)–(F); *see also* CREW Br. 28 n.9. Thus, while the most important proposition to be established here is that plaintiffs have an effective remedy for violations of § 552(a)(2) as well as

violations of § 552(a)(3), it is also important that the Court make clear the source of that right of action.[2]

II. FOIA itself authorizes actions seeking injunctive relief to remedy violations of its affirmative obligations.

FOIA, 5 U.S.C. § 552(a)(4)(B), provides in relevant part:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.

CREW's amended complaint seeks an order requiring defendants "to make all final opinions made in the adjudication of cases and statements of policy and interpretations available for public inspection and copying, including on an ongoing basis, and without a specific request for any specific opinion or category of opinion." JA 19. In substance, what CREW seeks is an order "enjoin[ing] the agency from

[2] If the Court decides instead to follow the district court's approach and decide the "adequate remedy" issue on the assumption that the relief available in the FOIA right of action is limited to orders compelling compliance with FOIA requests under § 552(a)(3), the Court should make clear that that is an assumption only and does not foreclose courts in this Circuit from considering, in another case where the issue is raised, whether the FOIA remedy is broader.

withholding agency records" from public inspection. 5 U.S.C. § 552(a)(4)(B). The right of action provided by FOIA empowers the district court to order this relief. The view that FOIA's remedial scheme is limited to disclosing records in response to a specific request is contradicted by the statutory language in § 552(a)(4)(B) and decisions of the Supreme Court and this Court applying that provision.

A. FOIA's remedial provision authorizes courts to order disclosure of records on an ongoing, forward-looking basis.

The district court's authority under FOIA hinges on the plaintiff showing that the agency has "(1) 'improperly'; (2) 'withheld'; (3) 'agency records.'" *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980). So long as the plaintiff makes that showing, the district court has the "authority to devise remedies and enjoin agencies" "under the jurisdictional grant conferred by § 552." *Id.* Section 552(a)(4)(B) "governs judicial review" of agencies' compliance with all of FOIA's major substantive requirements with respect to agency records: the requirement that agencies "publish" certain materials in the Federal Register under § 552(a)(1), the requirement that agencies proactively "make available for public inspection in an electronic format" opinions

and certain other documents under § 552(a)(2),[3] and the requirement that it make available all other non-exempt records responsive to a specific request under § 552(a)(3). *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1202 (D.C. Cir. 1996).

Here, CREW alleges that the Department of Justice (DOJ) is (1) improperly (2) withholding (3) the OLC opinions and indices, and requests an order "enjoin[ing] the agency from withholding agency records" on an ongoing basis. 5 U.S.C. § 554(a)(4)(B). That relief falls squarely within the bounds of FOIA's remedial scheme. Nothing in § 552(a)(4)(B) forecloses the district court from ordering disclosure on an ongoing basis or limits it to ordering disclosure of records specifically requested under § 552(a)(3). The statute gives district courts 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.* (emphasis added). As the court below noted, FOIA's "use of the conjunctive 'and'" in its judicial review provision "suggests

[3] Section 552(a)(2) formerly required that records be made "available for public inspection and copying," but was very recently amended to say that they must be "available for public inspection in an electronic format." FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2, 130 Stat. 538 (2016).

that district courts have the power to issue injunctive relief beyond merely compelling disclosure of records" withheld from requesters. JA 39. The contention that FOIA only permits district courts to order disclosure of specifically requested records to a specific FOIA requester ignores the language of § 552(a)(4)(B).

B. Decisions of the Supreme Court and this Court indicate that FOIA authorizes district courts to order forward-looking injunctive relief.

In *Renegotiation Board v. Bannercraft Clothing Co.*, the Supreme Court explained that FOIA authorizes district courts to order relief beyond disclosing records in response to specific requests. 415 U.S. 1, 20 (1974). The Supreme Court observed that the "broad language of the FOIA, with its obvious emphasis on disclosure and with its exemptions carefully delineated as exceptions" and "the truism that Congress knows how to deprive a court of broad equitable power when it chooses so to do," together with "the fact that the Act, to a definite degree, makes the District Court the enforcement arm of the statute," all show that "there is little to suggest … that Congress sought to limit the inherent powers of an equity court." *Id.* at 19–20.

This Court has likewise interpreted FOIA's judicial review provision as granting federal courts a range of equitable powers beyond ordering an agency to disclose improperly withheld records from a particular requester. "The FOIA imposes no limits on courts' equitable powers in enforcing its terms," *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988), and the "courts have a duty to prevent" agency actions that "violate the intent and purpose of the FOIA." *Id.* at 488 (quoting *Long v. IRS,* 693 F.2d 907, 910 (9th Cir. 1982)).

In furtherance of this duty, this Court has long recognized that a plaintiff may assert a claim that an agency has adopted a policy or practice that violates FOIA, separate and apart from a claim for the release of particular requested records that the agency has withheld from the complainant under FOIA. As the Court explained in *Payne*, "[s]o long as an agency's refusal to supply information evidences a policy or practice of delayed disclosure or some other failure to abide by the terms of the FOIA, and not merely isolated mistakes by agency officials, a party's challenge to the policy or practice cannot be mooted by the release of the specific documents that prompted the suit." 837 F.2d at 491 (footnote omitted). In *Payne*, the Court awarded declaratory relief to

a plaintiff in a FOIA case brought to challenge the Air Force's unlawful practice of withholding non-exempt bid abstracts until the requester filed an administrative appeal. *Id*. In *Newport Aeronautical Sales v. Dep't of Air Force*, the Court reviewed under FOIA a claim seeking declaratory relief from the agency's practice of refusing to disclose certain information allegedly in violation of FOIA, and held that the agency's disclosure of unredacted copies of requested records did not moot the claim that the agency's policy of denying requests for certain types of records violated FOIA. 684 F.3d 160, 163–64 (D.C. Cir. 2012). *See also Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 266 (D.D.C. 2012) (holding that the court had the power under FOIA to order declaratory and injunctive relief on plaintiff's policy-or-practice claims alleging procedural violations of FOIA); *Muttitt v. U.S. Cent. Command*, 813 F. Supp. 2d 221, 229 (D.D.C. 2011) (holding that the court had "the power under FOIA and *Payne*" to provide declaratory and prospective injunctive relief on a claim that the agency's policy or practice of refusing to provide time estimates for responses violated FOIA); *Long v. IRS*, 693 F.2d at 909 (holding that FOIA empowered the district court to

permanently enjoin the agency from withholding similar records in the future).

Courts often order relief under FOIA that goes beyond compelling disclosure of particular records to a particular complainant. This Court has directed agencies to conduct additional searches for records responsive to a FOIA request, *Morley v. CIA*, 508 F.3d 1108, 1120 (D.C. Cir. 2007); *Nation Magazine, Wash. Bur. v. U.S. Customs Serv.*, 71 F.3d 885, 892 (D.C. Cir. 1995), and reviewed the adequacy of agency's searches under FOIA, *see Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994), and *Perry v. Block*, 684 F.2d 121, 126–27 (D.C. Cir. 1982). And the Court has ordered an agency to grant a FOIA requester a fee waiver. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1315 (D.C. Cir. 2003); *see also Cause of Action v. FTC*, 799 F.3d 1108 (D.C. Cir. 2015) (reviewing denial of public interest fee waiver under FOIA); *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (same). Recently, in *American Immigration Lawyers Association v. Executive Office for Immigration Review*, this Court addressed the merits of the requester's claim that § 552(a)(2) required the agency to affirmatively disclose certain agency decisions, without suggesting that the alleged § 552(a)(2) violation could be

litigated or remedied only through a series of individual FOIA requests. __ F.3d __, 2016 WL 4056405 at *9–10 (D.C. Cir. July 29, 2016).

Although it is well established that courts have the power to grant a range of equitable relief to remedy violations of FOIA, what remains unsettled is the full "scope of the equitable powers available under the FOIA." *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d at 265; *see also Tax Analysts v. IRS*, 117 F.3d 607, 610 & n.4 (D.C. Cir. 1997) (acknowledging that the extent of the courts' remedial powers under FOIA is an open question in this Circuit); *Pub. Citizen, Inc. v. Lew*, 127 F. Supp. 2d 1, 9 (D.D.C. 2000) (holding that the court would review under the APA, not FOIA, the claim that the agency had violated FOIA by not preparing and making available an index of its major information systems pursuant to 5 U.S.C. § 552(g)). However, courts have spelled out some of the outer bounds of authority Congress conferred on district courts under FOIA. For instance, FOIA "does not confer authority upon the courts to command agencies to acquire a possession or control of records they do not already have." *Founding Church of Scientology of Wash. v. Regan*, 670 F.2d 1158, 1163 (D.C. Cir. 1981); *see also Kissinger*, 445 U.S. at 139.

And, as discussed below, FOIA does not permit courts to order an agency to publish records in the Federal Register. *Kennecott*, 88 F.3d at 1203.

But the relief sought in this case does not even graze the edges of a court's authority under FOIA. Instead, here, the plaintiff asks the court to enjoin the agency from improperly withholding agency records, relief that falls well within the bounds of the court's authority under § 552(a)(4)(B).

C. *Kennecott* addressed the courts' authority to order an agency to publish records in the Federal Register, not their authority to order prospective injunctive relief against the withholding of records from the public.

In the district court, DOJ cited *Kennecott*, 88 F.3d at 1203, to support its argument that FOIA does not confer authority on the district court to order DOJ prospectively to make its OLC opinions publicly available. *See* JA 39 n.5. *Kennecott* is not on point. As the court below observed, that case considered the district court's authority to order an agency to "publish" a document in the Federal Register, as required by § 552(a)(1). *Id.* The FOIA provision at issue here, § 552(a)(2), requires agencies to "make available for public inspection" certain categories of records; it does not deal with an agency's duty to "publish" records in the Federal Register.

Kennecott "did not address the scope of a district court's authority to afford relief for a violation of Section 552(a)(2)," where the agency has violated its duty to make certain records available *without* a FOIA request. JA 39 n.5. Instead, in *Kennecott*, the Court held that the district court's authority in § 552(a)(4)(B) to order the "production" of agency records does not include the authority to order "publication" of agency records in the Federal Register, but the Court did not discuss the court's authority to order an agency to "make available for public inspection," through means other than publication in the Federal Register, the records that fall within § 552(a)(2). 88 F.3d at 1203. And *Kennecott* focused on the second clause of § 552(a)(4)(B), allowing "district courts to order 'the production of any agency records improperly withheld *from the complainant*,'" *id.* at 1203, and did not examine the scope of the court's authority under the first clause, which gives courts the power "to enjoin the agency from withholding agency records," without any limitations. 5 U.S.C. § 552(a)(4)(B). Although that language, like the language on which this Court focused concerning "production," might not encompass ordering *publication*, it comfortably includes the power to enjoin withholding records from public release.

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

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). 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 (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 157 (Joint Comm. Print 1975). 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.

The district court's holding that individual FOIA requests would provide adequate relief for a violation of § 552(a)(2) obliterates the distinction between an agency's duties under § 552(a)(2) and its duties under § 552(a)(3) and reduces § 552(a)(2) to little more than a suggestion to agencies that they affirmatively disclose certain records. The aim of § 552(a)(2) is to require agencies to make certain records available *without* a FOIA request. Requiring an individual FOIA request to obtain information that an agency must affirmatively disclose does away with the purpose of § 552(a)(2). If the OLC opinions fall within § 552(a)(2)—an issue not decided by the district court—then the determination that individual FOIA requests adequately remedy DOJ's violation of that section is incorrect.

A remedy that effectively deletes an entire provision from FOIA cannot be an adequate remedy for violation of that provision. When an agency is required to do something without being repeatedly asked to do it, a remedy that relies on the repeated requests that the requirement is supposed to avoid is no remedy at all. Far from remedying the violation, insisting that anyone who wants the records must request them *perpetuates* the violation.

IV. The Court should vacate the decision and remand the case to allow CREW to pursue its claim under FOIA.

One way or another, a party injured by an agency's violation of the affirmative disclosure obligations of § 552(a)(2) should be able to obtain an effective judicial remedy—an injunction requiring compliance. That remedy is either available under FOIA itself or, if not, it is provided by the APA, as a lesser remedy would be wholly inadequate. Acceptance of DOJ's position that compliance with § 552(a)(2) may be obtained *neither* under FOIA nor the APA would weaken FOIA's "basic purpose" of "ensur[ing] an informed citizenry." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

If the Court determines that the APA is the applicable right of action, the decision below, which holds otherwise, must of course be reversed. Should the Court instead conclude that the right of action is provided by FOIA itself, the Court should vacate the decision and remand with instructions that CREW be allowed to pursue its claim under FOIA. Federal Rule of Civil Procedure 8's "'liberal pleading principles' do not permit dismissal for 'failure in a complaint to cite a statute, or to cite the correct one …. Factual allegations alone are what matters.'" *Wynder v. McMahon*, 360 F.3d 73, 77 (2d Cir. 2004) (internal

citation and quotation marks omitted) (quoted in *Rahman v. Johanns*, 501 F. Supp. 2d 8, 17 (D.D.C. 2007)); *see also Johnson v. City of Shelby*, 135 S. Ct. 346 (2014); *Brown v. Sessoms*, 774 F.3d 1016, 1022 (D.C. Cir. 2014). Because CREW adequately pleaded a claim that DOJ violated § 552(a)(2), and the relief CREW seeks for that violation is available through the FOIA right of action, the Court should reverse the dismissal and remand the case to permit CREW to seek relief under FOIA on its § 552(a)(2) claim.

In addition, CREW's original complaint claimed that the action arose under FOIA and the APA, but the district court later ordered CREW to file "'an amended complaint clarifying the relief sought, the legal basis for such relief, and the avenue for judicial review of the claim,'" JA 28 (quoting Minute Order, Sept. 24, 2014), and CREW amended its complaint to seek relief only under the APA. JA 7 ¶ 1. To the extent the district court effectively asked CREW to choose either FOIA or the APA as the legal basis for its complaint, and then dismissed the suit because CREW chose the wrong alternative, that approach is inconsistent with the Federal Rules' liberal pleading principles that allow

pleading in the alternative, Fed. R. Civ. P. 8(d)(2), and do not require pleading of legal theories.

CONCLUSION

For the foregoing reasons, the Court should vacate the order of the district court and remand the case to allow CREW to pursue its case under FOIA.

Dated: August 15, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) as follows: The type face is fourteen-point Century Schoolbook BT font, and the word count is 4,769.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I certify that on August 15, 2016, 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