19-3248

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW YORK LEGAL ASSISTANCE GROUP,
Plaintiff-Appellant,

v.

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

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

BRIEF OF APPELLANT
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January 16, 2020

CORPORATE DISCLOSURE STATEMENT

New York Legal Assistance Group is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

/s/ Patrick D. Llewellyn
Patrick D. Llewellyn

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INTRODUCTION

The Freedom of Information Act (FOIA) obligates agencies to take specific actions to disseminate information to the public. Among its mandates is the so-called "reading room" requirement: Agencies must publicly post, in an electronic format, records including "final opinions … and orders, made in the adjudication of cases." 5 U.S.C. § 552(a)(2).

Despite FOIA's clear command, the Board of Immigration Appeals (BIA) withholds electronic copies of all but a tiny fraction of its final opinions and orders from the public. Moreover, the BIA argues that courts cannot remedy this violation by requiring it to publicly post electronic copies of the vast majority of its case law. The district court in this case agreed, holding that neither FOIA nor the Administrative Procedure Act (APA) provides a mechanism to compel the BIA to comply with this statutory mandate. The question posed by this appeal is whether courts may enforce FOIA's requirement that records be made public electronically or whether the courts' power is limited to requiring agencies to fulfill their separate obligation under FOIA to produce copies of records to individual requesters, leaving the agencies free to disregard the statute's distinct public posting requirement.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. On August 13, 2019, the district court entered a final opinion and order dismissing the case and all of the claims brought by plaintiff-appellant New York Legal Assistance Group (NYLAG). JA 56–65. On August 14, 2019, the district court entered judgment in favor of defendants-appellees the BIA, Executive Office for Immigration Review (EOIR), and U.S. Department of Justice. JA 66. On October 7, 2019, NYLAG timely filed a notice of appeal as to the August 13, 2019 opinion and order and August 14, 2019 judgment. JA 67. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether courts have the authority under the right of action created by FOIA, 5 U.S.C. § 552(a)(4)(B), to order agencies to post records publicly in their online electronic reading rooms when agencies have failed to do so in violation of 5 U.S.C. § 552(a)(2).

2. Alternatively, if courts lack the authority under FOIA to order agencies to post records publicly in their online electronic reading rooms as required by 5 U.S.C. § 552(a)(2), whether courts may do so under the

APA, 5 U.S.C. § 704, because there is no adequate alternative legal remedy.

STATEMENT OF THE CASE

I. Nature of the Case

NYLAG submitted a FOIA request under 5 U.S.C. § 552(a)(2) requesting that the unpublished decisions of the BIA be publicly posted online in an electronic reading room. EOIR, the agency within the U.S. Department of Justice that encompasses the BIA, denied the FOIA request and failed to respond to NYLAG's administrative appeal. NYLAG then filed suit in the U.S. District Court for the Southern District of New York, raising claims under FOIA and the APA. The case was assigned to the Hon. Paul A. Crotty. The government moved to dismiss NYLAG's claims under Federal Rule of Civil Procedure 12(b)(1) and Rule 12(b)(6), or, in the alternative, for summary judgment under Rule 56, and NYLAG cross-moved for summary judgment. Judge Crotty granted the government's motion to dismiss as to both of NYLAG's claims, based on his conclusion that neither FOIA nor the APA authorizes the relief NYLAG seeks. The decision below is reported at 401 F. Supp. 3d 445 (S.D.N.Y. 2019).

II. Statutory Background

A. The Freedom of Information Act

FOIA was enacted to help "insure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). "Congress intended FOIA to permit access to official information long shielded unnecessarily from public view." *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011) (internal quotation marks omitted).

FOIA accordingly requires agencies to disclose information to the public in three distinct ways. First, under § 552(a)(1), an agency "shall separately state and currently publish in the Federal Register for the guidance of the public" certain categories of records, including (A) descriptions of the agency's organization and of where and how to obtain additional information; (B) descriptions of the agency's general methods and procedures; (C) the agency's procedural rules and forms; (D) the agency's substantive rules and statements of general policy; and (E) amendments, revisions, or repeals of the foregoing.

Second, under § 552(a)(2), sometimes referred to as the "reading room provision," an agency "shall make available for public inspection in an electronic format" the following categories of records:

> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
>
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
>
> (C) administrative staff manuals and instructions to staff that affect a member of the public;
>
> (D) copies of all records, regardless of form or format—
>
> > (i) that have been released to any person under [§ 552(a)(3)]; and
> >
> > (ii) (I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or
> >
> > (II) that have been requested 3 or more times; and
>
> (E) a general index of the records referred to under subparagraph (D).

As originally enacted, this provision of FOIA required that agencies make specified categories of records "available for public inspection and copying." *Id.* § 552(a)(2) (1995). Accordingly, agencies had "reading

rooms" where such materials were available in hard copy to the public. Following amendments to FOIA in 1996 and 2016 that required that these materials be made available electronically, agencies began utilizing online "electronic reading rooms" to make these materials available to the public.

Third, under § 552(a)(3), "upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, [the agency] shall make the records promptly available to any person."

To enforce these disclosure requirements, FOIA also contains a private right of action, set forth in § 552(a)(4)(B), which provides as follows:

> 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. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters

> to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

B. The Administrative Procedure Act

The APA provides for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. A reviewing court has the power under the APA to, among other things, "compel agency action unlawfully withheld or unreasonably delayed," *id.* § 706(1), and "hold unlawful and set aside agency action … found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.* § 706(2)(A).

III. Factual and Procedural Background

A. Board of Immigration Appeals

The BIA is "the highest administrative body for interpreting and applying immigration laws." EOIR, *Board of Immigration Appeals* (last updated Oct. 15, 2018), https://www.justice.gov/eoir/board-of-immigration-appeals. The BIA is part of EOIR, which is a component of the U.S. Department of Justice. 8 C.F.R. §§ 1003.0(a), 1003.1(a)(1). The BIA hears appeals from matters adjudicated by immigration judges and district

directors of the U.S. Department of Homeland Security, including cases involving deportation, removal, and asylum. *See id.* § 1003.1(b).

Every year, the BIA issues over 30,000 decisions. JA 10. The BIA's decisions are binding on the parties unless overturned by the Attorney General or a federal court. 8 C.F.R. § 1003.1(d)(7); 8 U.S.C. § 1252(a)(1). The BIA designates some of its final decisions as binding precedent, *see* 8 C.F.R. § 1003.1(g), and the BIA makes those decisions available online, *see* EOIR, *Agency Decisions* (last visited Jan. 9, 2020), https://www.justice.gov/eoir/ag-bia-decisions. Precedential decisions, however, comprise a *de minimis* proportion of the BIA's decisions, approximately 30 decisions per year. JA 9–10. The BIA also makes a handful of its unpublished decisions available online, *see* EOIR, *Frequently Requested Agency Records* (last updated Dec. 23, 2019), https://www.justice.gov/eoir/frequently-requested-agency-records; EOIR, *Proactive Disclosures* (last updated Sept. 17, 2019), https://www.justice.gov/eoir/proactive-disclosures, and a small percentage available in hard copy at the EOIR Law Library and Immigration Research Center in Falls Church, Virginia. JA 10–11.

Notwithstanding FOIA's express command that final agency opinions and orders in adjudicated cases be made available to the public in electronic form, 5 U.S.C. § 552(a)(2), the vast majority of unpublished BIA decisions are not publicly available in an electronic format—or any format. Despite their general unavailability, the BIA's unpublished decisions are cited, used, and relied upon by government lawyers,[1] immigration judges,[2] and the BIA itself.[3] *See, e.g.*, *In re Martinez*, 2016

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[1] *See, e.g.*, *In re Stewart*, 2016 WL 4035746, at *1 (BIA June 30, 2016) (government sought remand from Ninth Circuit to BIA to "determine the effect" of a Supreme Court decision, a Third Circuit decision, and "the Board's decision in an unpublished case" on the respondent's claim); *In re Iqbal*, 2007 WL 2074540, at *3 (BIA June 19, 2007) (government argued the BIA should reverse immigration judge's decision based on unpublished BIA decision).

[2] *See, e.g.*, *In re Perez-Herrera*, 2018 WL 4611455, at *4, 6 (BIA Aug. 20, 2018); *In re Bayoh*, 2018 WL 4002292, at *1 n.1 (BIA June 29, 2018); *In re Arangure*, 2017 WL 1951527, at *2 (BIA Apr. 7, 2017); *In re Yanez*, 2012 WL 5473648, at *1 (BIA Oct. 18, 2012); *In re Zea-Flores*, 2011 WL 1570463, at *1 (BIA Apr. 6, 2011); *In re Lima*, 2008 WL 4222170, at *1 & n.1 (BIA Aug. 29, 2008); *In re Arieli*, 2006 WL 3203647, at *1 (BIA Aug. 30, 2006); *In re Johnson*, 2005 WL 1766782, at *2 n.2 (BIA May 3, 2005); *In re Garcia-Linares*, 21 I. & N. Dec. 254, 256–57 (BIA 1996).

[3] *See, e.g.*, *In re Alvarez Fernandez*, 2014 WL 4966372, at *2 (BIA Sept. 23, 2014) (adopting "similar analysis" to that used in an unpublished BIA decision); *Matter of Echeverria*, 25 I. & N. Dec. 512, 519 (BIA 2011) (declining to reach same conclusion as unpublished cases but acknowledging that departure from those decisions requires a "principled reason"); *cf. In re Persaud*, 2010 WL 1747399, at *2 (BIA Apr. 15, 2010) (Pauley, Bd. Member, dissenting) (noting that a "tendency" by BIA to

WL 8471078, at *1 (BIA Dec. 30, 2016) ("We also find no error in the Immigration Judge's citation of an unpublished Board decision address [sic] the statute at issue as persuasive, but not controlling, authority.").

B. New York Legal Assistance Group

NYLAG is one of the largest immigrant services providers in New York City. JA 8. NYLAG provides low-income immigrants with comprehensive legal services, including direct representation in removal defense and asylum proceedings. JA 8. NYLAG also offers immigrant community education, including "know your rights" presentations, immigration trainings, and fraud awareness and prevention programs. JA 8.

The agency's failure to make unpublished BIA decisions publicly available in an online electronic reading room impairs and will continue to impair NYLAG's ability to represent clients in immigration proceedings, as NYLAG will not have access to unpublished decisions

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decide cases "in unpublished orders" consistently will be "cited by future aliens and courts"). Other examples include *In re Razo*, 2017 WL 7660432, at *1 n.1 (BIA Oct. 16, 2017); *In re Cai*, 2015 WL 1208206, at *1 (BIA Feb. 12, 2015); *In re Tolase*, 2010 WL 3355110, at *1 (BIA July 29, 2010); *In re Negrete-Rodriguez*, 2006 WL 2183402, at *2 (BIA June 19, 2006); and *In re Morales*, 21 I. & N. Dec. 130, 136 (BIA 1995).

that should be available to support the claims of NYLAG's clients. JA 13–14. That the BIA, immigration judges, and government attorneys have access to those same unpublished BIA decisions, while NYLAG does not, provides an information advantage to the government that further harms NYLAG's ability to represent clients in immigration proceedings. JA 13–14.

On June 8, 2016, NYLAG submitted a FOIA request to the BIA and EOIR under 5 U.S.C. § 552(a)(2), asking them to make available in their online electronic reading room "[a]ll nonpublished decisions of the BIA (including concurring and dissenting opinions) from November 1, 1996, through the present." JA 25; *see* JA 44–45. On August 8, 2018, EOIR denied NYLAG's request. JA 13; *see* JA 47–48. EOIR stated that § 552(a)(2) did not apply to the BIA's unpublished decisions and that, in any event, "the remedy for members of the public wishing to access records not published pursuant to 5 U.S.C. § 552(a)(2) is to request the records under 5 U.S.C. § 552(a)(3)." JA 13; *see* JA 47. On September 11, 2018, NYLAG submitted an administrative appeal of EOIR's denial of its FOIA request; the agency did not respond prior to the filing of this lawsuit. JA 13; *see* JA 50–55.

C. Procedural History

After the time to respond to the administrative appeal had passed, NYLAG initiated this lawsuit against the BIA, EOIR, and the Department of Justice (hereafter collectively referred to as the BIA). In its Complaint, NYLAG asserted a claim under FOIA to enjoin the BIA from withholding records required to be made available for public inspection in an electronic format under § 552(a)(2). JA 14. NYLAG also asserted an alternative claim under the APA, alleging that the BIA has a nondiscretionary statutory obligation under § 552(a)(2) to make unpublished BIA decisions available for public inspection in an electronic format and that NYLAG was aggrieved by the BIA's failure to do so. JA 14–15. NYLAG sought as relief a court order requiring the online public posting of unpublished BIA decisions from November 1, 1996, through the present, as well as an order requiring the online public posting of future unpublished BIA decisions. JA 15–16.

The BIA moved to dismiss both claims under Federal Rule of Civil Procedure 12(b)(1) and Rule 12(b)(6), or, in the alternative, for summary judgment under Rule 56. JA 17–18. Relying primarily on the D.C. Circuit's decision in *Citizens for Responsibility & Ethics in Washington v.*

DOJ (*CREW I*), 846 F.3d 1235 (D.C. Cir. 2017)—which at the time was the only decision of a court of appeals to have considered the issue—the BIA argued that (1) NYLAG's FOIA claim should be dismissed because the district court's remedial power under FOIA, 5 U.S.C. § 552(a)(4)(B), was limited to ordering production of records to an individual requester, and (2) NYLAG's APA claim should be dismissed because, even as so limited, the FOIA remedy was an adequate alternative legal remedy that barred review under the APA pursuant to 5 U.S.C. § 704.[4] Defs. Mem. 8–13, District Court Dkt. 25.

NYLAG opposed the BIA's motion and cross-moved for summary judgment. JA 32. As to its FOIA claim, NYLAG explained that the courts' power under § 552(a)(4)(B) "to enjoin the agency from withholding agency records" includes authority to enjoin agencies from withholding records required to be publicly posted online under § 552(a)(2). Pl. Mem. 5–10, District Court Dkt. 30. As to its APA claim, NYLAG explained that, if the

[4] The BIA also contended that (1) unpublished BIA decisions are not "final opinions" within the meaning of 5 U.S.C. § 552(a)(2)(A), (2) NYLAG's request is unduly burdensome, and (3) NYLAG's claim could only apply to records created after June 30, 2016. Defs. Mem. 13–21, District Court Dkt. 25. The district court did not reach these additional arguments.

remedy available under FOIA were limited to the production of records to an individual requester, FOIA would not provide an adequate remedy for violations of § 552(a)(2).[5] *Id.* at 10–13.

On August 13, 2019, the district court denied NYLAG's cross-motion for summary judgment and granted the BIA's motion to dismiss, although it did not specify whether it was granting the motion under Rule 12(b)(1) or Rule 12(b)(6). *See* JA 56–65. As to NYLAG's FOIA claim, the district court relied primarily on *CREW I* in holding that the court could only "order the production of documents to the complainant" under FOIA's remedial provision. JA 60 (citing 5 U.S.C. § 552(a)(4)(B)). Although § 552(a)(4)(B) provides that a court has the authority "to enjoin the agency from withholding agency records," the district court agreed with *CREW I* that that clause provides no authority beyond that conferred by § 552(a)(4)(B)'s second clause, which provides authority "to order production of any agency records improperly withheld from the

[5] NYLAG also rebutted the BIA's additional arguments and demonstrated that (1) the BIA's unpublished decisions are subject to § 552(a)(2)(A), (2) compliance with NYLAG's § 552(a)(2) request would not be unduly burdensome, and (3) FOIA requires online public posting of unpublished BIA decisions issued since at least November 1, 1996. Pl. Mem. 13–25, District Court Dkt. 30.

complainant." JA 62 (citing *CREW I*, 846 F.3d at 1244, and *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1203 (D.C. Cir. 1996)). The district court also stated that the relief NYLAG sought was akin to a "general order[] compelling compliance with [a] broad statutory mandate[]" that was beyond the court's authority. JA 62 (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66 (2004)).

As to NYLAG's APA claim, the district court again relied on *CREW I* to hold that what the court considered FOIA's sole remedy—production of records to an individual requester—was an adequate remedy for a violation of § 552(a)(2) and thus barred relief under the APA pursuant to 5 U.S.C. § 704. The court conceded a "mismatch between the relief sought and the relief available" under FOIA, but nonetheless dismissed NYLAG's APA claim. JA 9 (quoting *CREW I*, 846 F.3d at 1246).

SUMMARY OF ARGUMENT

NYLAG seeks an order requiring the BIA to make its unpublished decisions publicly available online. These decisions affect not only the individuals in the cases in which the decisions are issued, but also everyone brought into immigration courts: They constitute a body of law relied upon by both judges and government lawyers in immigration

courts. *See supra* nn.1–3. Advocates for immigrants, however, lack access to the vast majority of these decisions.

FOIA's reading room provision expressly mandates that decisions by agency adjudicators be shared with the public: "Each agency, in accordance with published rules, *shall* make available for public inspection in an electronic format—(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases." 5 U.S.C. § 552(a)(2)(A) (emphasis added). FOIA also provides a broad right of action empowering plaintiffs to seek injunctive relief to prevent any withholding of records in violation of the statute. *Id.* § 552(a)(4)(B). Addressing the precise question presented by this appeal, the Ninth Circuit—in a decision issued after the district court opinion here—has held that those terms "mean what they say: FOIA authorizes district courts to stop the agency from holding back records it has a duty to make available, which includes requiring an agency to post § 552(a)(2) documents online." *Animal Legal Defense Fund v. USDA* (*ALDF*), 935 F.3d 858, 869 (9th Cir. 2019).

In this case, relying on the D.C. Circuit's earlier-issued decision in *CREW I*, 846 F.3d 1235, the district court instead held that FOIA denies

courts the authority to order the public posting of records under § 552(a)(2) but, paradoxically, that FOIA nonetheless provides an adequate remedy for § 552(a)(2) violations and thus bars relief under the APA as well. JA 59–63. As *ALDF* explains, that conclusion "renders the reading-room provision into precatory language" and "a dead letter," all but writing that provision out of the statute. 935 F.3d at 875. Like the Ninth Circuit, this Court should reject the conclusion that FOIA "constrains judicial enforcement of the reading-room provision," *id.* at 874, by disallowing enforcement of that provision as written.

The plain text of § 552(a)(4)(B) provides courts with authority to order agencies to publicly post records online that are subject to FOIA's reading room provision: The court can "enjoin" the agency from unlawfully "withholding agency records," including by ordering that such records be publicly posted online. That FOIA also empowers courts to "order the production of any agency records improperly withheld from the complainant" does not limit their authority "to enjoin the agency from withholding agency records." Moreover, the statutory structure of FOIA as a whole confirms this interpretation. FOIA provides separately for online public posting under the reading room provision and for individual

requests for record production under § 552(a)(3), and FOIA specifically authorizes a private right of action for violations of each mandate. Limiting the relief available for reading room violations to the production of records to an individual requester would collapse those two provisions, making the distinction largely pointless. Other tools of statutory interpretation bolster this conclusion. If "to enjoin the agency from withholding agency records" is read to mean only "to order production of any agency records improperly withheld from the complainant," the former phrase is entirely superfluous. Both FOIA's legislative history and its primary purpose of broad disclosure further support interpreting § 552(a)(4)(B) to permit courts to order enforcement of the terms of the reading room provision.

The D.C. Circuit's contrary conclusion in *CREW I* did not flow from a reasoned analysis of FOIA's statutory language, but from a determination that the *CREW I* panel was bound by an "implicit" holding in that court's earlier decision in *Kennecott*. Although *Kennecott* itself expressly held only that a court's authority to "order the production of any agency records improperly withheld from the complainant" did not permit the court to order records to be published in the Federal Register

under § 552(a)(1), *CREW I* concluded that the holding applied to § 552(a)(4)(B) as a whole, and the court therefore made no attempt to square that holding with the statutory language providing authority "to enjoin the agency from withholding agency records." As *ALDF* explains, there is no sound reason for a court not constrained by D.C. Circuit precedent as construed in *CREW I* to follow *CREW I*'s holding, which conflicts with FOIA's plain text and poses significant practical problems for intended recipients of § 552(a)(2) records.

The district court's additional reasons for limiting FOIA's remedial powers are also unpersuasive. NYLAG has not sought a "general order" to compel compliance with a "broad statutory mandate." JA 62. And the statutory grant of authority "to enjoin the agency from withholding agency records," 5 U.S.C. § 552(a)(4)(B), cannot be rewritten, as the district court did, to empower courts only "to enjoin the agency from withholding agency records *from production to an individual requester*."

Finally, if this Court agrees with the district court that a court's remedial authority under FOIA is limited to ordering the production of records to an individual requester, the Court should hold that FOIA does not provide NYLAG an "adequate remedy" for the BIA's claimed violation

of § 552(a)(2), and that 5 U.S.C. § 704 therefore permits NYLAG's APA claim. Far from remedying § 552(a)(2) violations, the production of records only to an individual requester perpetuates those violations. So limiting relief under FOIA would leave no alternative claim to be brought or alternative defendant to be sued for a plaintiff to enforce § 552(a)(2)'s mandate that records be posted publicly online other than under the APA. And concluding that neither FOIA nor the APA allows for that relief would leave a plaintiff harmed by reading room violations without any meaningful remedy, rendering that statutory mandate unenforceable.

STANDARD OF REVIEW

This Court reviews a district court dismissal under Rule 12(b)(1) or Rule 12(b)(6) *de novo*, "accepting all factual allegations in the complaint as true." *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 65 (2d Cir. 2012).

The BIA moved to dismiss under both Rule 12(b)(1) and Rule 12(b)(6), and the district court did not state on which basis it granted the motion. JA 56, 65. This Court's decision in *Main Street Legal Services, Inc. v. National Security Council*, 811 F.3d 542, 566 (2d Cir. 2016), makes plain that § 552(a)(4)(B) "reference[s] remedial power, not subject-matter

jurisdiction." Accordingly, that provision "does not speak to the court's ability to adjudicate a claim, but only to the remedies that the court may award." *Id.* Thus, the district court's holding that, as a matter of law, NYLAG cannot seek relief for the agency's violation of § 552(a)(2) under FOIA should be treated as a holding that it failed to state a claim on which relief can be granted.

This Court also has not resolved whether "threshold limitations" on APA claims are "truly jurisdictional or are rather essential elements" of APA claims. *Westchester v. HUD*, 778 F.3d 412, 416 n.5 (2d Cir. 2015) (quoting *Sharkey v. Quarantillo*, 541 F.3d 75, 87 (2d Cir. 2008)). Because this Court's review under either Rule 12(b)(6) or Rule 12(b)(1) is *de novo*, this distinction is immaterial in this case. *Id.* at 416 nn.5 & 6.

ARGUMENT

I. FOIA authorizes courts to enforce the reading room provision.

The question in this case is whether § 552(a)(4)(B) provides for the remedy that NYLAG seeks—an order requiring online public posting of unpublished BIA decisions. As the Ninth Circuit concluded in *ALDF*, the answer to this question is yes. A contrary outcome "renders the reading-room provision into precatory language" and "a dead letter," directly

contravening the plain language of FOIA's right of action. *ALDF*, 935 F.3d at 875. The district court's decision—issued before the Ninth Circuit decided *ALDF*—relied almost entirely on the D.C. Circuit's decision in *CREW I*, which included little statutory analysis and turned on the court's determination that it was bound by the implicit holding of a prior D.C. Circuit case, *Kennecott*. Neither *CREW I* nor any other authority presents a compelling reason to depart from the plain language of FOIA.

A. The plain language of FOIA's remedial provision authorizes courts to order online public posting of records withheld from the public in violation of the reading room provision.

The starting point for construction of any statute, including FOIA, is its plain language. *Milner*, 562 U.S. at 569; *Kuzma v. IRS*, 821 F.2d 930, 932 (2d Cir. 1987); *see ALDF*, 935 F.3d at 869 ("The Supreme Court has 'stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'" (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006)). Moreover, this Court "look[s] to the statutory scheme as a whole and plac[es] the particular provision within the context of that statute" in determining the provision's plain meaning. *Nwozuzu v. Holder*, 726 F.3d 323, 327 (2d Cir. 2013). Where the meaning

remains ambiguous or unclear, the Court first "turn[s] to canons of statutory construction" and may then also consider legislative history if the meaning remains ambiguous. *United States v. Rowland*, 826 F.3d 100, 108 (2d Cir. 2016).

Here, as the Ninth Circuit concluded in *ALDF*, the plain terms of § 552(a)(4)(B), FOIA's statutory scheme as a whole, and other tools of statutory interpretation all confirm that FOIA provides courts with the authority to order online public posting of records.

1. A straightforward reading of FOIA demonstrates that NYLAG has properly invoked the district court's remedial powers under § 552(a)(4)(B): NYLAG has alleged that the BIA is improperly withholding records—unpublished decisions of the BIA—from public access, contrary to the reading room provision. And NYLAG seeks an order "enjoin[ing] the agency from withholding [those] agency records" from public inspection in an electronic format. *Id.* § 552(a)(4)(B); *see* JA 15–16. As the Supreme Court held in *Renegotiation Board v. Bannercraft Clothing Co.*, the statute's authorization of injunctive relief against withholding confers broad remedial authority consistent with "the inherent power of an equity court." 415 U.S. 1, 20 (1974). 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).

Interpreting this same language, the Ninth Circuit held that FOIA empowers courts to order compliance with FOIA's reading-room provision. Because "to enjoin" means "to legally prohibit or restrain by injunction" and "[t]o prescribe, mandate or strongly encourage," that court "interpret[ed] the words 'to enjoin the agency from withholding agency records' to mean what they say: FOIA authorizes district courts to stop the agency from holding back records it has a duty to make available, which includes requiring an agency to post § 552(a)(2) documents online." *ALDF*, 935 F.3d at 869 (internal brackets omitted). Likewise, before the district court's decision here, another district court in this Circuit anticipated the holding in *ALDF*, explaining that a "plain reading" of FOIA's remedial provision indicates courts have the authority "to enjoin the agency from withholding records (*i.e.*, injunctive relief)" that "would appear to cover the reading room provision." *Animal Welfare Inst. v. USDA*, No. 6:18-CV-06626-MAT, 2019 WL 3083025, at *6

(W.D.N.Y. July 15, 2019). As the Ninth Circuit recognized, interpreting § 552(a)(4)(B) "to mean Congress *withheld* jurisdiction to enjoin agencies withholding records"—the government's view—"would directly contradict the plain text." *ALDF*, 935 F.3d at 869.

As *ALDF* demonstrates, the meaning of the word "withholding" in § 552(a)(4)(B) is clear: "Withhold" means "to hold back from action." *The Merriam-Webster.com Dictionary* (last visited January 14, 2020), https://www.merriam-webster.com/dictionary/withhold; *see ALDF*, 935 F.3d at 869. In the context of the reading room provision, an agency "withholds" records when it "holds back from" publicly posting those records in an online reading room—the "action" required by that statutory mandate.

The broad authority "to enjoin the agency from withholding agency records" cannot be limited by the phrase that follows it, which provides that courts may also "order the production of any agency records improperly withheld from the complainant." First, the assumption that the language of the second clause encompasses only production to the specific complainant is unwarranted. As *ALDF* explains, "[a] district court could order 'the production' by ordering the agency to post records

in an online reading room." 935 F.3d at 871 n.14. Second, the statute expressly provides for broad injunctive relief against withholding *in addition* to the power to order production to a complainant. The two remedies are joined by the conjunction "and," meaning that Congress granted district courts the power to order both. *Cf. Brueswitz v. Wyeth, LLC*, 562 U.S. 223, 236 (2011) (explaining the conjunctive role of "and" is the "linking [of] independent ideas"). "That the statute uses broad words to vest expansive equitable authority in district courts does not create ambiguity or vagueness." *ALDF*, 935 F.3d at 869.

2. FOIA's broader statutory scheme strongly supports interpreting § 552(a)(4)(B) to authorize injunctive relief against withholding of records from online public posting in violation of the reading room provision. Congress specifically identified certain records for proactive disclosure under § 552(a)(2), rather than disclosure only upon request under § 552(a)(3). That distinction would be meaningless if an agency could place intended consumers of reading room records "right back into the requests and backlogs [under § 552(a)(3)] Congress sought to avoid in the first place" by simply "shrug[ging] th[e] congressional command" stated in § 552(a)(2). *ALDF*, 935 F.3d at 872. Such an

interpretation "collapses an agency's affirmative responsibility to post certain records (identified in the statute by Congress) into an agency's responsibility to respond to requests for copies of documents under § 552(a)(3)." *Id.* That result makes no sense because § 552(a)(3) by its own terms "does not apply to 'records made available under paragraphs (1) and (2) of [FOIA].'" *Id.*

FOIA also expressly contemplates that members of the public may request the production of records to them under § 552(a)(3), and also may request that records be publicly disclosed under § 552(a)(2): The statute refers to requests "made under paragraph (1), (2), or (3)" in setting forth an agency's obligations for responding to all such requests. *See* 5 U.S.C. § 552(a)(6)(A). FOIA further requires that if an agency upholds the denial of a request on appeal, it must "notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection," *id.* § 552(a)(6)(A)(ii), and provides that an agency's failure to comply with FOIA's time limits for a request "under paragraph (1), (2), or (3)" means the requester "shall be deemed to have exhausted his administrative remedies" for purposes of invoking FOIA's right of action, *id.* § 552(a)(6)(C)(i). And when FOIA requesters invoke the

statute's right of action to challenge violations of the reading room provision, Congress directed that courts, in determining the scope of relief, "shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C)"—that is, an affidavit concerning the feasibility of indicating the extent of a deletion from a record made available electronically under § 552(a)(2). *Id.* § 552(a)(4)(B).

This detailed statutory scheme clearly envisions that an agency's failure to satisfy a request for compliance with the reading room provision is specifically remediable through FOIA's right of action. Indeed, it would be nonsensical to direct a court to accord deference to an agency's view of whether redactions could feasibly be indicated on publicly posted electronic records, as § 552(a)(4)(B)'s cross-reference to "paragraph (2)(C)" requires, if the court could not order the agency to publicly post electronic records. *See ALDF*, 935 F.3d at 871. The statutory structure thus strongly reinforces *ALDF*'s conclusion that Congress did not intend for § 552(a)(2) to be mere "precatory language." *ALDF*, 935 F.3d at 875. The "significant implications of rendering § 552(a)(2) a dead letter" would be that "an agency would have no enforceable duty to post

its important staff manuals, or its interpretation of the statute it's charged with enforcing, or its final opinions in agency adjudication." *Id.*; *see also see also Animal Welfare Inst.*, 2019 WL 3083025, at *6 (explaining the government's position "suggests that there is virtually no meaningful remedy for parties aggrieved under the reading room provision"). This case, in which the district court's opinion permits no remedy for the BIA's years-long failure to post its final opinions, tellingly illustrates the consequences of reading § 552(a)(4)(B) to deny a remedy for violations of § 552(a)(2)'s public disclosure requirement.

3. Other tools of statutory interpretation bolster the meaning made plain by the language of § 552(a)(4)(B). First, as this Court has explained, "[s]tatutory enactments should … be read so as 'to give effect, if possible, to every clause and word of a statute.'" *United States v. DiCristina*, 726 F.3d 92, 96 (2d Cir. 2013) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). But interpreting § 552(a)(4)(B) to mean that courts may grant only one of § 552(a)(4)(B)'s two conjunctively provided remedies reads the other out of the statute: "If … Congress only authorized federal courts to 'order the production' of records to a particular complainant, then the judicial-review provision would not

need the words 'jurisdiction to enjoin the agency from withholding agency records'; the latter phrase would do all the necessary work." *ALDF*, 935 F.3d at 870. Reading the statute to render its authorization of injunctive relief against withholding to be superfluous violates fundamental canons of statutory construction. *See id.* (citing *Hibbs v. Winn*, 542 U.S. 88, 101 (2004); *Bailey v. United States*, 516 U.S. 137, 146 (1995)).

Moreover, a broad interpretation of a court's authority "to enjoin" the withholding of records—that is, one that permits the court to order the online public posting of records—does not render its authority "to order the production" of records superfluous. As *ALDF* explained, a court could interpret the power to enjoin "*withholding* agency records" as referring to "equitable prospective relief," and the power to order production of records "improperly *withheld*" as referring to "equitable retrospective relief." *Id.* at 870 n.13. Additionally, applying the doctrine of *noscitur a sociis*—meaning "that a word is known by the company it keeps"—in tandem with the canon against superfluity, *ALDF* reasoned that, if a court already has the authority "to order the agency to produce copies of the withheld records to a particular person" under the "to order" clause, the "to enjoin" clause should be read as "excluding [that] power …

to avoid superfluity." *Id.* at 870. In other words, the proper construction of the statute is one that gives the two distinct remedies provided by § 552(a)(4)(B) distinct meaning, not one that reads the broad grant of authority to enjoin withholding out of the statute entirely. *See also Smith v. ICE*, No. 16-cv-2137-WJM-KLM, 2019 WL 6838961, at *20 (D. Colo. Dec. 16, 2019) (explaining that reading the power to enjoin withholding to mean only the power to order production to a complainant "ignores half of the statutorily authorized remedies").

Second, FOIA's legislative history makes clear both the important role Congress envisioned for the reading room provision in disseminating information to the public and its intent to make that provision enforceable. In particular, Congress amended FOIA's private right of action in 1974 specifically to ensure that it applied to all three of FOIA's disclosure mechanisms. Originally, FOIA's private right of action appeared in § 552(a)(3), and the provision read in pertinent part as follows:

> Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records … shall make the records promptly available to any person. 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, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.

5 U.S.C. § 552(a)(3) (1970). As the Senate Judiciary Committee Report explains, although the placement of this language may have been unclear, "the original intent of Congress in enacting subsection (a)(3) [was] that the judicial review provisions apply to requests for information under subsections (a)(1) and (a)(2) of section 552, as well as under subsection (a)(3)." S. Rep. No. 93-854 (1974), at 9, *reprinted in* H.R. Comm. on Gov't Operations & S. Comm. on the Judiciary, 94th Cong., *Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book*, at 161 (1975) (hereinafter *1974 Source Book*). The Senate Report notes that the contrary argument had been "uniformly rejected" by courts, *id.* (citing *Am. Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 701 (D.C. Cir. 1969), *cited in ALDF*, 935 F.3d at 875), but "[t]he restructuring of subsection (a)(3) should lay this issue to rest, making it clear that de novo judicial review is available to challenge agency withholding under any provision in section 552," *id.* Thus, Congress understood "withholding" to mean a failure to take the action required by each of

FOIA's three subparts (including the failure to publicly post records in a reading room), consistent with the plain meaning of that word.

Further, the reading room provision "sets out the affirmative obligation of each agency of the federal government to make information available to the public" through proactive public posting of certain records. S. Rep. No. 93-854, at 5, *reprinted in 1974 Source Book*, at 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) now further requires agencies to include in their electronic reading rooms records that have been frequently requested under § 552(a)(3), to obviate the need for repeated individual requests and productions. *See* H.R. Rep. No. 104-795, at 21 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3464 (explaining the frequently requested records addition to § 552(a)(2) "would help to reduce the number of multiple FOIA requests for the same records requiring separate agency responses"). Congress's explanation for selecting these

materials to be subject to the reading room provision—and expanding that provision to encompass even more records—undermines the district court's holding, which relegates the directive in the reading room provision to mere "precatory language." *ALDF*, 935 F.3d at 875.

Third, a restrictive reading of § 552(a)(4)(B) is particularly incongruous in light of FOIA's primary purpose: "[T]he statute's goal is 'broad disclosure,'" *Milner*, 562 U.S. at 571, 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.*, *N.Y. Times Co. v. DOJ*, 756 F.3d 100, 111 (2d Cir.), *opinion amended on other grounds*, 758 F.3d 436 (2d Cir. 2014). The statute's animating policies specifically include fostering *public* access rights, which are served by construing § 552(a)(4)(B) to allow relief beyond orders requiring production of records solely to a plaintiff. *See EPA v. Mink*, 410 U.S. 73, 80 (1973) ("[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 information from possibly unwilling official hands."). "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).

Accordingly, any ambiguity in the meaning of FOIA's remedial provision must be resolved consistent with the statute's goal of facilitating public access to government records. *See Carlin v. Davidson Fink LLP*, 852 F.3d 207, 214 (2d Cir. 2017) (explaining that, in considering legislative history, the Court must "construct an interpretation that comports with [the statute's] primary purpose and does not lead to anomalous or unreasonable results" (alteration in original)). Permitting courts to order compliance with the reading room provision wholly accords with that principle, whereas restricting their remedial authority to ordering the production of records to an individual requester renders that provision a "dead letter." *ALDF*, 935 F.3d at 875.

B. The Court should not follow *CREW I*, which lacks any analysis of the statutory text.

Notwithstanding the plain meaning of the statutory text, the district court relied on the D.C. Circuit's ruling in *CREW I* to conclude that § 552(a)(4)(B) limits a court's remedial authority to ordering production of records to an individual requester and does not permit the court to order the public posting of records in the agency's online public

reading room. JA 61–62. *CREW I*, however, fails to grapple with "the scope of the statutory language broadly authorizing injunctions," as the Ninth Circuit recognized. *ALDF*, 935 F.3d at 875. Indeed, by its own acknowledgment, *CREW I* did not independently analyze § 552(a)(4)(B)'s authorization of orders enjoining agencies from withholding records. Instead, *CREW I*'s holding reflected the panel's view that it was bound by a prior decision, *Kennecott*, 88 F.3d 1191 (D.C. Cir. 1996), which itself had not considered the statutory language empowering courts to enjoin withholding of records in FOIA cases. *See CREW I*, 846 F.3d at 1244. Contrary to the district court's conclusion in this case, the D.C. Circuit's "implicit" consideration of the statute's language does not provide a "sound" basis for truncating its broad scope. JA 62. Rather, *CREW I* provides no reason for a court not bound by prior circuit precedent to interpret § 552(a)(4)(B) in such a self-defeating manner.

CREW I, 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 sued under the APA, the D.C. Circuit began by considering whether the relief sought was available under FOIA. While recognizing in theory that courts in FOIA actions may

enforce the reading room provision's requirements, *see* 846 F.3d at 1241–42, *CREW I* immediately rendered that recognition meaningless by imposing a limit on the courts' remedial authority under § 552(a)(4)(B) that prevents them from ordering compliance with that provision. Instead, *CREW I* held that 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." *Id.* at 1244.

CREW I recognized that its holding created a "mismatch" between the violation and the relief available for it. *Id.* at 1246. It held, however, that this odd result was required by *Kennecott*, 88 F.3d 1191, 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). 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.

CREW I 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 producing records to an individual plaintiff. 846 F.3d at 1244. In other words, *CREW I* concluded that its hands were tied by circuit precedent, compelling it to reach the paradoxical conclusions that § 552(a)(4)(B) authorizes relief for violations of the reading room provision but that such relief may not direct compliance with that provision. As the Ninth Circuit's detailed statutory analysis in *ALDF* makes clear, *CREW I*'s limitation of the relief available under FOIA contravenes the plain language of the statute and is one that no court that did not feel itself bound by precedent could reasonably reach. Indeed, *ALDF* points out that "an even newer D.C. Circuit case," *Citizens for Responsibility & Ethics in Washington v. DOJ* (*CREW II*), 922 F.3d 480 (D.C. Cir. 2019), appears to read *CREW I* "narrowly," suggesting that "D.C. Circuit law on this issue does not seem settled." 935 F.3d at 876.

The D.C. Circuit's own apparent discomfort with *CREW I*, and the Ninth Circuit's unwillingness to read § 552(a)(4)(B) to foreclose effective

remedies for violations of the reading room provision, reflects the fundamental illogic of reading a statute to provide only for relief that does not redress the violation it is supposed to remedy. 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.

CREW I's remedial limitation, moreover, poses a number of practical barriers to achieving § 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 online 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. In this case, a plaintiff would have to be willing, and have the technological capability, to replicate and update on a periodic basis a database of hundreds of thousands of BIA opinions. *See* JA 26, 28 (estimating the records at issue in this case concern over 700,000 decisions and totaling over 1.3 million pages). As their volume suggests, hosting these records to make them available for public access online—what the reading room provision dictates as the responsibility of the BIA—would be an immense burden, one that NYLAG is currently unable to meet. JA 38–39. Indeed, to do so,

"NYLAG would require a different data storage platform, which would carry its own cost, and a significant investment of time and money to engage in the project planning, infrastructure build-out, and testing to make the documents accessible to the public in a meaningful way," and "NYLAG does not have the resources to engage in such a project." JA 39. Such a formidable undertaking might deter many plaintiffs who desire access to the materials in the agency's electronic reading room but not individual copies of each of the hundreds of thousands of documents.

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), *overruled on other grounds by Animal Legal Defense Fund v. FDA*, 836 F.3d 987, 989 (9th Cir. 2016) (en banc). 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 online in the agency's electronic reading room.

C. The district court's other reasons for limiting the relief offered by FOIA are unpersuasive.

Beyond adopting the decision in *CREW I*, the district court offered two additional bases for its decision. Neither is correct.

1. The district court stated that it could not order the relief sought by NYLAG because it was "not 'empowered to enter general orders compelling compliance with broad statutory mandates'" but was limited to "provid[ing] relief to individual complainants, not the public, for violations" of FOIA. JA 62 (quoting *Norton*, 542 U.S. at 66). But even if *Norton*'s limits on APA relief for "agency action unlawfully withheld" under 5 U.S.C. § 706(1) apply to FOIA, NYLAG does not seek a "general order of compliance" with a statute. NYLAG has submitted a FOIA request to the BIA requesting that it publicly post *specific records*—unpublished BIA decisions since November 1, 1996—in an online

electronic reading room, JA 12, *see* JA 44, based on defendants' clear statutory obligation to make "final opinions" and "orders" available for public inspection in an electronic format, 5 U.S.C. § 552(a)(2)(A). To remedy this violation, NYLAG seeks an order enjoining the BIA from withholding these decisions from the reading rooms where they are statutorily required to be posted. JA 15–16. Rather than seeking a "general order" mandating compliance with a statute that grants agencies "a great deal of discretion in how to achieve" a particular objective, as in *Norton*, 542 U.S. at 66, NYLAG seeks compliance with a specific statutory requirement through an express right of action tailored to providing exactly that relief. Such relief does not strain the bounds of judicial competence or authority; rather, it is exactly "how courts enforce other provisions of the U.S. Code that require agencies to post or publish records." *ALDF*, 935 F.3d at 876.

Moreover, NYLAG does not seek relief to redress a generalized public grievance. The BIA's unpublished decisions are being withheld *from NYLAG* through the BIA's failure to publicly post them in an online electronic reading room, and NYLAG would use them to, among other things, provide effective representation to its clients in immigration

proceedings. *See* JA 10–11, 13–14. As *ALDF* explains, "the argument that FOIA's judicial-review provision is limited to 'relieving the injury suffered by the individual complainant, not by the general public' is a red herring." 935 F.3d at 875 (quoting *CREW I*, 846 F.3d at 1243). There, as here, "[t]he injuries complained of … *are* injuries sustained by individuals." *Id.* Thus, although the relief that NYLAG seeks would benefit other members of the public, NYLAG seeks that relief for itself. *See also id.* at 875–76 ("Ordering an agency to upload records that FOIA mandates agencies will post in reading rooms would provide relief to plaintiffs, like those here, injured by the agency's failure to make those records so available.").

In addition, contrary to the district court's trepidation, nothing in § 552(a)(4)(B) limits courts' remedial authority based on the volume of responsive records. Although the relief NYLAG seeks may eventually "requir[e] the BIA to publish many thousands of unpublished, nonprecedential cases totaling millions of pages for over 20 years," JA 62, the volume of records at issue results solely from the BIA's decades-long disregard of its statutory obligation to disclose these records proactively. NYLAG has repeatedly stated that it is willing to work with the BIA to

develop a reasonable timeline for the public posting of the records, and any court-ordered remedy may consider the time needed by the BIA to bring themselves into compliance. But the BIA should not be permitted to grant itself an exemption from the reading room provision by ignoring its obligation for years on end and then claiming it would be too much work to comply.

2. The district court also stated that, even if it "were to read the two clauses of § 522(a)(4)(B) separately instead of as a whole," it would conclude that the two phrases mean exactly the same thing as each other. JA 62–63. In the district court's view, the term "withholding" in the phrase "to enjoin the agency from withholding agency records" "suggests, in the context of the statute, that the records were withheld from a complainant." JA 63. Thus, the court concluded that it could only enjoin the agency from withholding records from a specific plaintiff and that "§ 552(a)(4)(B) does not say anything about enjoining an agency to require publication of withheld records." JA 63.

The district court's reasoning is flawed in several respects. First, when a plaintiff sues under § 552(a)(4)(B) claiming a violation of the reading room provision, the statutory context does not suggest that

"withholding" refers to the agency's failure to provide copies of the records to that plaintiff; rather, in that context, "withholding" of records refers to the agency's refusal to make the records available in the manner required by the reading room provision. *See supra* pp. 24–25, 31–33. Second, in such a case, the records *are* being "improperly withheld from a complainant," as well as from other members of the public. Here, for example, as explained above, the unpublished BIA decisions are unavailable to NYLAG because they are not posted in the BIA's electronic reading room.

The district court's contrary conclusion depends on reading "withholding of records" as "withholding of records *from production to an individual requester*." No principle of statutory construction supports that reading. *See supra* pp. 22–35. As the Ninth Circuit explained, these words "mean what they say: FOIA authorizes district courts to stop the agency from holding back records it has a duty to make available, which includes requiring an agency to post § 552(a)(2) documents online." *ALDF*, 935 F.3d at 869 (internal brackets omitted).

II. The APA provides a remedy for violations of FOIA's reading room provision if FOIA itself does not.

The APA provides for judicial review of "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704. NYLAG pleaded its APA claim as an alternative to its FOIA claim: If the Court concludes the relief sought by NYLAG is available under FOIA, NYLAG's APA claim is unnecessary and, indeed, is foreclosed by the adequate remedy FOIA provides under the proper reading of the statute. But if the Court were to affirm the district court's ruling that the only relief available under FOIA is production of the records to an individual requester, such relief would not be an "adequate remedy" for violations of the reading room provision. The APA would thus provide a right of action to remedy a final agency action refusing to comply with § 552(a)(2)'s proactive disclosure obligations.

As this Court has explained, the APA unquestionably "assures comprehensive review of 'a broad spectrum of administrative actions,' including those made reviewable by specific statutes without adequate review provisions as well as those for which no review is available under any other statute." *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97, 102 (2d Cir. 1970) (quoting *Abbott Labs. v. Gardner*, 387 U.S.

136, 140 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)). Thus, "determining whether a suit can be brought under the APA … 'begin[s] with the strong presumption that Congress intends judicial review of administrative action.'" *Sharkey*, 541 F.3d at 84 (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)). Accordingly, courts considering "threshold limitations to judicial review under the APA" should interpret them "narrowly in light of the APA's strong presumption in favor of judicial review." *Id.* Section 704's provision that APA review is not available if there is another adequate remedy in court is such a threshold limitation that must be "narrowly construed." *Id.* at 90 n.14.

Consistent with the appropriately narrow scope of the adequate remedy exception, this Court has held that "an adequate alternative legal remedy" that bars review under § 704 is "a remedy that offers the same relief the plaintiffs seek from the agency" under the APA. *N.Y. City Emps.' Ret. Sys. v. SEC* (*NYCERS*), 45 F.3d 7, 14 (2d Cir. 1995); *see also Niagara Mohawk Power Corp. v. Fed. Energy Regulatory Comm'n*, 306 F.3d 1264, 1268 (2d Cir. 2002) (holding plaintiff had "adequate remedy" where it could obtain "complete relief" in lawsuit against another party).

Moreover, the APA "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." *Larson v. United States*, 888 F.3d 578, 587 (2d Cir. 2018) (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988)). Thus, the ultimate question is whether APA review would "duplicate the previously established special statutory procedures relating to specific agencies." *Id.* (quoting *Bowen v. Massachusetts*, 487 U.S. at 903).

Ordering production of records to an individual requester—the only relief that the district court held was available for violation of FOIA's proactive disclosure requirement—is not an adequate remedy for failure to post those records publicly in an online electronic reading room. As detailed above, Congress specifically delineated records subject to the reading room provision's mandate because of their significance. *See supra* pp. 33–34. In other words, Congress identified specific categories of records as so vital to the public's right "to know what their Government is up to," *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004) (internal quotation marks omitted), that agencies must proactively disclose them without waiting to receive a request. *See also ALDF*, 935 F.3d at 872 (explaining Congress intended § 552(a)(2) records

"to avoid" the "requests and backlogs" associated with § 552(a)(3)). Concluding that production of records to an individual requester is an "adequate remedy" for § 552(a)(2) violations would eviscerate this statutory mandate. Agencies could, at their option, decline to proactively disclose *any* § 552(a)(2) records and make them available only "upon request" under § 552(a)(3).

As discussed above, the voluminous unpublished BIA decisions at issue starkly illustrate why production of individual copies of those records would not be an adequate remedy. *See supra* pp. 39–40. Requiring a non-profit legal aid organization to replicate an agency's electronic reading room cannot be an "adequate remedy." By contrast, enforcement of the statutory proactive disclosure requirement would provide NYLAG—and other members of the public—access to this body of law relied upon by both judges and government lawyers in immigration courts, *see supra* nn.1–3, on an ongoing basis, without the need for repeated FOIA requests and the lengthy delays from agency FOIA processing backlogs. *ALDF*, 935 F.3d at 872.

The district court held, as a matter of law, that FOIA provides an adequate remedy for a violation of § 552(a)(2)—even though the court had

construed FOIA *not* to permit an order requiring the agency to comply with its obligations under § 552(a)(2). The court again relied on *CREW I*, stating that "'section 704 requires only an *adequate* alternative' and not an identical one" and summarily adopting *CREW I*'s conclusion that "despite some mismatch between the relief sought and the relief available, FOIA offers an adequate remedy within the meaning of section 704" through the production of records to an individual requester. JA 64 (internal quotation marks omitted) (quoting *CREW I*, 846 F.3d at 1245, 1246). But the production of records to an individual requester is neither "identical" to the relief that would be available under the APA nor adequate to remedy the failure to publicly post records online, proactively. Indeed, the "mismatch" that would result is glaring: It would render a statutory command entirely unenforceable and limit plaintiffs to unwanted relief available under a separate statutory provision.

On this point, this Court's decision in *NYCERS* is instructive. There, three Cracker Barrel shareholders sued the SEC under the APA after Cracker Barrel, relying on an SEC no-action letter setting forth a new interpretation of an agency rule, refused to include a proposal by the plaintiff shareholders in the proxy materials for a shareholder meeting.

45 F.3d at 9–11, 14. The shareholders sought to have the SEC action set aside under the APA as arbitrary and capricious. *Id.* In concluding that the shareholders had an adequate alternative remedy that offered the "same relief" they sought under the APA, the court explained:

> They can sue Cracker Barrel … to enjoin the board to include their proposal in the proxy materials. In that suit, should the company offer the rule espoused in the [SEC's] no-action letter to show compliance, the plaintiffs may counter that the rule is arbitrary and capricious. If the plaintiffs prevail in that suit, they would get all the relief they now seek from the SEC on their claim of arbitrary and capricious agency action.

Id. at 14. This Court was explicit in determining that the alternative remedy would provide "all the relief" the plaintiffs sought under the APA—including a determination of the lawfulness of the SEC's action. The district court's view that *NYCERS* held an alternative remedy to be adequate even where it would *not* provide the "same remedy" to the shareholders, JA 64, is flatly wrong.[6]

[6] The district court also erroneously conflated the *NYCERS* plaintiffs' arbitrary-and-capricious claim with their notice-and-comment claim. JA 64 (explaining that "enjoining Cracker Barrel to include certain proposals is not the same remedy as enjoining the SEC from changing its interpretation of a rule without adhering to a notice and comment period"). This Court, however, did not hold the latter claim to be barred by § 704's "adequate remedy" exception, but decided it on the merits: The Court held the "no-action letter was not legislative" and, therefore, did not require notice and comment. *NYCERS*, 45 F.3d at 14.

The Court's opinion in *Larson* further demonstrates that, if an order requiring online public posting of records is not available under FOIA, APA review would not duplicate "special and adequate review procedures" under FOIA. In that case, the plaintiff had been charged several million dollars in tax penalties and challenged the amount charged in an APA claim. *Larson*, 888 F.3d at 581. But under a separate statute, the plaintiff could have filed a tax-refund suit challenging the amount charged to him and seeking a refund for any excessive taxes paid. *Id.* at 583, 587–88. The plaintiff did not contest that he could obtain full relief under the tax-refund statute but instead contended he lacked an adequate remedy because that statute requires full payment of the penalties prior to filing suit. *Id.* at 583–84, 587–88. This Court disagreed, holding the plaintiff was required to "follow Congress's established scheme by paying his penalties and then filing a tax-refund claim" under that specific statute. *Id.* at 588. The Court explained that, although it was "sympathetic" to the plaintiff's "dilemma," the APA does not permit plaintiffs to sidestep "review through a specific statutory procedure." *Id.* In other words, the end result in the tax-refund suit and the proffered

APA suit were the same: The taxpayer's debt would be reduced to the correct amount.

Here, if the Court were to hold that NYLAG's remedy under FOIA is limited to the production of records to NYLAG, there is no other defendant to be sued, and no alternative claim to be brought, that would result in the online public posting of unpublished BIA decisions. Neither, in contrast to *Larson*, is there any prerequisite to obtaining this relief under another statute that NYLAG simply does not wish to satisfy. Thus, if FOIA did not provide the relief NYLAG seeks, NYLAG would lack an adequate remedy under § 704, and its APA claim would not be barred.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this brief complies with the typeface and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(5), (a)(6), and (a)(7)(B) and Local Rule 32.1(a)(4) as follows: The proportionally spaced typeface is 14-point Century Schoolbook and, as calculated by my word processing software (Microsoft Word for Office 365), the brief contains 10,979 words, exclusive of those parts of the brief not required to be included in the calculation by Federal Rule of Appellate Procedure 32(f) and the rules of this Court.

/s/ Patrick D. Llewellyn
Patrick D. Llewellyn

STATUTORY ADDENDUM

The Freedom of Information Act

5 U.S.C. § 552 (excerpted)

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision or repeal of the foregoing.

Except to the extent that a person has actual and timely notice thereof, a person may not in any manner be required to

resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection in an electronic format—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format—

(i) that have been released to any person under paragraph (3); and

(ii) (I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or

(II) that have been requested 3 or more times; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case, the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection in an electronic format current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplement thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) (A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

***

(4) (B) 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. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

***

(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of—

(I) such determination and the reasons therefor;

(II) the right of such person to seek assistance from the FOIA Public Liaison of the agency; and

(III) in the case of an adverse determination—

(aa) the right of such person to appeal to the head of the agency, within a period determined by the head of the agency that is not less than 90 days after the date of such adverse determination; and

(bb) the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making

such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except—

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

***

(C) (i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the

request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

The Administrative Procedure Act

5 U.S.C. § 704

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.