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

REPLY BRIEF OF APPELLANT NEW YORK LEGAL ASSISTANCE GROUP

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I. FOIA expressly authorizes injunctive relief to enforce the affirmative disclosure requirements of its electronic reading-room provision.

The Board of Immigration Appeals (BIA) acknowledges that it is required to comply with the electronic reading-room requirement of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(2). The BIA also acknowledges that any failure to comply subjects it to the judicial remedies provided by section 552(a)(4)(B), which authorizes federal courts "to enjoin the agency from withholding agency records *and* to order the production of any agency records improperly withheld from the complainant" (emphasis added). *See* BIA Br. 12. Despite this broad grant of judicial remedial authority, however, the BIA insists that, in this action by the New York Legal Assistance Group (NYLAG) seeking to remedy a violation of section 552(a)(2)'s requirements, the court may not order an agency to comply with those requirements. Instead, the BIA argues that the court may only order the agency to comply with FOIA's entirely distinct requirement that, upon a proper request, the agency provide nonexempt records to an individual requester. 5 U.S.C. § 552(a)(3).

As the Ninth Circuit held in *Animal Legal Defense Fund v. USDA* (*ALDF*), 935 F.3d 858 (9th Cir. 2019), that position does not square with the unambiguous meaning of section 552(a)(4)(B)'s words granting power "to enjoin the agency from withholding agency records." Those 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.

The BIA relies instead on the D.C. Circuit's opinion in *Citizens for Responsibility & Ethics in Washington v. DOJ* (*CREW I*), 846 F.3d 1235 (D.C. Cir. 2017). But *CREW I* did not analyze the meaning of the statutory language granting authority to enjoin withholding. Rather, the panel in *CREW I* considered itself bound to follow older D.C. Circuit authority, *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191 (D.C. Cir. 1996). As *CREW I* acknowledged, *Kennecott* likewise had not analyzed that language but had ruled on its scope only "implicitly." *CREW I*, 846 F.3d at 1244. The BIA has therefore devised a rationale for its reading of the dispositive statutory language that is entirely absent

from the decision on which it relies. The result is a far less persuasive construction of the statute's plain language than that offered in *ALDF*.

The BIA's position reduces to the assertion that the authority to "enjoin the agency from withholding agency records" means nothing more than the conjunctive grant of the power "to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B); *see* BIA Br. 18. The BIA, however, cannot square that reading with the common meaning of the words "enjoin the agency from withholding agency records," which would allow a court to prohibit the agency from failing to post records in a reading room. Nor does the BIA contest that, on its reading, the "enjoin" clause is entirely superfluous, as the statute would mean exactly the same thing without it. The BIA's construction thus contravenes the principle that courts should not "adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Me. Commun. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (citations omitted).

Although the BIA downplays its significance, *see* BIA Br. 15 n.1, the D.C. Circuit's subsequent opinion in the *CREW* series of cases underscores why *ALDF*'s reading of "enjoin the agency from withholding

agency records" is correct and the government's is wrong. In *Citizens for Responsibility & Ethics in Washington v. DOJ* (*CREW II*), 922 F.3d 480 (D.C. Cir. 2019), the court recognized that "[a]n agency withholds its records 'improperly' if it fails to comply with one of FOIA's 'mandatory disclosure requirements,'" which include section 552(a)(2)'s requirement that agencies make specified records available in electronic reading rooms. *Id.* at 486. Thus, records that an agency "has declined to publish are 'withheld' 'agency records.'" *Id.* When that straightforward reading of "withholding" is combined with the plain meaning of "enjoin"—"[t]o legally prohibit or restrain by injunction," Black's Law Dictionary (11th ed. 2019)—the meaning of the key statutory phrase is evident: To "enjoin" an agency from "withholding" records in violation of the electronic reading-room provision means to legally prohibit it from declining to publish those records as required by subsection (a)(2)'s mandatory disclosure obligation. *See ALDF*, 935 F.3d at 869. Contrary to the BIA's suggestion, moreover, this reading does not authorize courts to do "more" than direct an agency to stop withholding agency records. BIA Br. 20. Rather, it provides for the exact relief necessary to end the improper

withholding by requiring the agency to make the records available in the manner described by the statute.

The BIA cannot genuinely contest that *ALDF*'s and NYLAG's reading comports with the meaning of the statute's words authorizing orders enjoining withholding of records. The BIA's reading, by contrast, fails to give those words their plain meaning. Instead, the BIA offers a number of reasons for reading the authorization to enjoin withholding to mean something other than what it says. None of those reasons withstands scrutiny.

A. The BIA contends that section 552(a)(4)(B)'s later reference to orders requiring "production" of records to the complainant imposes a "limitation on [the] relief" authorized by section 552(a)(4)(B)'s grant of the power to "enjoin the agency from withholding agency records." BIA Br. 18. Indeed, the BIA goes so far as to contend that the statute says that "the court may only 'order production' of records 'improperly withheld from the complainant.'" *Id.* (quoting 5 U.S.C. § 552(a)(4)(B)).

The statute, however, nowhere says that the court "may only" order production. Those words are the BIA's. Indeed, the very sentence the BIA quotes says that courts have authority to enjoin withholding of records

"*and*" to order production of records. 5 U.S.C. § 552(a)(4)(B) (emphasis added). Saying that someone may do A *and* B does not mean that she may *only* do B. It means just the opposite: She may do both.

B. The BIA does not contest that the language authorizing courts to enjoin withholding is surplusage under its construction of the statute. It argues, though, that a plain reading of that language would make the phrase in section 552(a)(4)B) empowering courts "to order the production of any agency records improperly withheld from the complainant" superfluous. BIA Br. 18. The BIA's argument is wrong.

As *ALDF* explains, the statute's grant of authority *both* to order production *and* to enjoin withholding makes clear that the court's power is not limited to a negative injunction of prospective effect ("stop withholding in violation of the statute") but also includes the power to grant affirmative relief redressing a past failure to provide documents to an individual requester in a timely manner ("give the requester the records you were supposed to give it within 20 days of its request"). *See ALDF*, 935 F.3d at 870 & n.13.

Although the BIA contends that "that distinction makes little sense," BIA Br. 19–20, the contrast between this case and one in which a

requester under subsection (a)(3) seeks the production of records specifically to it illustrates the difference. Here, NYLAG seeks prospective injunctive relief ordering the agency henceforth to cease its policy of noncompliance with subsection (a)(2) by making its opinions available electronically, on an ongoing basis, in the manner required by FOIA. In contrast, a plaintiff who seeks a one-time production to it of particular records that it requested under subsection (a)(3) and that the agency failed to provide to it by the statutory deadline does not require any such ongoing injunctive relief.

In any event, even if the BIA were correct in asserting that a literal reading of the language authorizing courts to enjoin withholding would make the grant of power to order production of records to a requester redundant, the proper solution would not, as the BIA asserts, be to limit the full effect of the first clause. As the Supreme Court has recently observed, "[r]edundancy in one portion of a statute is not a license to rewrite or eviscerate another portion of the statute contrary to its text." *Barton v. Barr*, 140 S. Ct. 1442, 1453 (2020). The BIA, however, proposes just such a rewriting: Faced with a broad grant of authority to enjoin withholding, and a narrower grant of authority to require production that

is arguably encompassed in the power to enjoin, the BIA proposes a limitation of the broad grant that is contrary to its text and that does not even achieve the supposed objective of avoiding redundancy. *ALDF*'s and NYLAG's reading, by contrast, is faithful to the text; it allows a court to grant the full scope of relief authorized by the statute—orders requiring production as well as orders enjoining agencies from withholding records in violation of the statute.

The BIA's reading also ignores the drafting history of the statute, which makes clear that "[t]he provision for enjoining an agency from further withholding [was] placed in the statute to make clear that the district courts would have this power." S. Rep. No. 88-1219, at 7 (1964), *quoted in Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 18 n.18 (1974). The BIA's reading makes that drafting choice a meaningless gesture.

The BIA asserts that its reading of section 552(a)(4)(B)'s authorization of injunctive relief as surplusage finds support in another remedial provision, subsection (a)(4)(F)(i). *See* BIA Br. 18. That assertion is also meritless. The latter provision requires an investigation by the Office of Special Counsel when a court orders production of documents to

a complainant, awards attorney fees, and finds reason to believe agency personnel acted arbitrarily and capriciously in withholding the documents. The BIA argues that because subsection (a)(4)(F)(i) applies only to cases in which the court orders production of withheld records, that subsection implies that subsection (a)(4)(B) authorizes only production orders. On the contrary, subsection (a)(4)(F)(i) demonstrates that when Congress intended to refer only to production orders, it did not mention the additional power to enjoin withholding included in subsection (a)(4)(B).

Reading subsection (a)(4)(B), which explicitly authorizes a form of relief not mentioned in subsection (a)(4)(F)(i), to be limited to the form of relief that may trigger a Special Counsel investigation under the latter provision would flout a long-established canon of construction: "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020) (citation omitted); *SEC v. Rajaratnam*, 918 F.3d 36, 43 (2d Cir. 2019). Under this rule, the proper inference is that when Congress referred only to production orders

in subsection (a)(4)(F)(i), but referred to both orders enjoining withholding and orders requiring production in subsection (a)(4)(B), it meant the language of the latter to sweep more broadly. And as the Ninth Circuit observed in *ALDF*, there is nothing "irrational" about this difference in meaning: Congress merely chose to "isolat[e] a particular evil—bureaucrats arbitrarily denying requests for copies of documents from particular people—for mandatory investigation." 935 F.3d at 872.

C. The BIA's argument that the Supreme Court's decision in *Bannercraft* supports a narrow reading of the power to enjoin withholding not only is wrong, but turns *Bannercraft*'s holding upside down. The BIA asserts that *Bannercraft* adopted the view that the power to enjoin withholding is limited to the power to order production of records to requesters when it stated that FOIA "explicitly confers jurisdiction to grant injunctive relief of a described type, namely, 'to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.'" 415 U.S. at 18. According to the BIA, *Bannercraft* thus endorsed the view that the available relief is of a "singular" described type—in the BIA's view, ordering production of records only. BIA Br. 19.

Bannercraft, however, says nothing about the relief available being "singular" or limited to records production. Rather, it describes the type of injunctive relief available in the inclusive, conjunctive terms used by the statute: The "described type" of relief consists of orders enjoining withholding *and* orders requiring production of records. *Bannercraft*, 415 U.S. at 18. And *Bannercraft*'s statement that the statute authorizes courts to "enjoin in a specific way," *id.*, is fully consistent with *ALDF*, which holds only that FOIA empowers courts to order the specific type of injunctive relief described by FOIA and *Bannercraft*: injunctions to stop agencies from withholding records and orders authorizing them to produce records.

Likewise unavailing is the BIA's attempt to invoke *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), to buttress its argument that injunctions against violations of subsection (a)(2) do not fall within the type of relief described in *Bannercraft*. The BIA cites *Kissinger*'s statement that a claim for relief under FOIA's right of action "is dependent upon a showing that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'agency records,'" *id.* at 150, and it suggests that an injunction against a withholding in violation of

subsection (a)(2) somehow fails to meet those requirements. BIA Br. 19. Again, however, "[a]n agency withholds its records 'improperly' if it fails to comply" with *any* of FOIA's mandatory disclosure requirements, including subsection (a)(2). *CREW II*, 922 F.3d at 486. When an agency fails to "make [records] available" in the manner required by subsection (a)(2), it "withholds" them under the common meaning of that word: "to hold back," or "to desist or refrain from granting, giving, or allowing," Webster's Third New International Dictionary (2017 ed.). Thus, a wrongful violation of subsection (a)(2) meets *Kissinger*'s criteria for relief, and an order enjoining that violation falls within *Bannercraft*'s "described type" of injunctive relief.

Finally, the BIA's reliance on *Bannercraft* as support for a restrictive reading of the courts' powers under section 552(a)(4)(B) is particularly incongruous because *Bannercraft* held that court's equitable powers are not limited at all, much less limited to the "described type" of injunctive relief expressly provided for in section 552(a)(4)(B). *See* 415 U.S. at 19–20. The BIA contends that the "broad equitable power" recognized in *Bannercraft*, *id*. at 10, is limited to the power to grant relief "ancillary" to orders requiring production of records to complainants. BIA

Br. 21. But the BIA cites no support in *Bannercraft* for that restrictive view. Nor does it offer any reason why Congress would recognize courts' unlimited equitable powers to provide "ancillary" relief and simultaneously impose a nontextual limitation on their express authority to enjoin withholding of records in violation of the statute's requirements. The proposition that *Bannercraft* somehow limits courts' injunctive powers to ancillary matters is impossible to square with the FOIA's express authorization of injunctions against withholding of records. And *Bannercraft*'s emphasis on "[t]he broad language of the FOIA, with its obvious emphasis on disclosure and with its exemptions carefully delineated as exceptions," 415 U.S. at 19, is wholly at odds with the BIA's circumscribed view of the authority granted by the statute.

D. The BIA wrongly claims that reading section 552(a)(4)(B)'s remedial provisions to allow injunctions against an agency's noncompliance with subsection (a)(2) would result in a judicial remedy that exceeds the administrative relief that the agency itself could provide under FOIA's administrative exhaustion provision, section 552(a)(6)(C)(i), if the agency complied with a request that it make records available under subsection (a)(2). According to the BIA, if a person

requests that an agency make records available in its electronic reading room as required by subsection (a)(2), subsection (a)(6)(C)(i) paradoxically provides that if the government decides to "comply" with that request, it must do so by producing the records to the requester itself—not by *actually* complying with the request and the statutory electronic posting requirement. It would be "anomalous," the BIA asserts, to read section 552(a)(4)(B) to provide for a broader judicial remedy for a violation than the agency itself was required to provide. BIA Br. 13.

Section 552(a)(6)(C)(i), however, does *not* provide than an agency must comply with a request *only* by producing records to the requester. Indeed, it is the BIA's reading of subsection (a)(6)(C)(i) that is anomalous, because its premise is that an agency that decides to "comply" with a request that it post records as *required* by subsection (a)(2) does not really have to "comply" with that request (or with the requirement of subsection (a)(2)) by actually posting the records. Nothing in subsection (a)(6)(C)(i) supports that view. The language of that provision says simply that when the government determines to "comply" with a request, "the records shall be made promptly available to such person making such request." 5 U.S.C. § 552(a)(6)(C)(i). Notably, (a)(6)(C)(i) does not say anything about

producing the records to the requester individually. Rather, it uses the very same terms subsection (a)(2) uses: The agency must "make [the records] available." Thus, the natural reading of subsection (a)(6)(C)(i) is that, when a person requests that the agency make records available to her in an electronic reading room as required by subsection (a)(2), the agency must make them available to her in that manner in order to "comply" with that request. This reading gives meaning to (a)(6)(C)(i)'s reference to *compliance* with the request and is also fully consistent with that provision's requirement that records by "made available" to the requester.

It follows that when an agency fails to comply with a request by making records available in the manner required by the statute, and the requester goes to court for a remedy, an order enjoining the agency to comply with subsection (a)(2) provides precisely the relief the agency should have provided itself. There is nothing "anomalous" about that conclusion. On the contrary, it is the only sensible construction of the statute. It comports entirely with the "overall structure" of FOIA's "comprehensive scheme" (BIA Br. 11) by drawing a consistent connection from the affirmative requirement that an agency make records available

in its electronic reading room under subsection (a)(2), to the agency's obligation under subsection (a)(6)(C)(i) to bring itself into compliance with that requirement when a requester asks it to make records available in that manner, to the courts' authority under subsection (a)(4)(B) to enjoin the agency's wrongful withholding when it fails to comply with its obligation to make records available in the manner specified in subsection (a)(2). The BIA's position, by contrast, creates an anomalous disconnect between the rights afforded by the statute and the remedy when the agency violates them.

E. The BIA is equally mistaken in asserting that reading section 552(a)(4)(B) to allow injunctions requiring an agency to make records available under subsection (a)(2) would provide a remedy exceeding that needed to redress the injury to the "plaintiff's own interest in obtaining records," BIA Br. 13, and would allow the plaintiff to assert a "generally available grievance about government … and seek[] relief that no more directly and tangibly benefits him than it does the public at large," *id*. at 15 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992)). A requester who suffers particularized injury from an agency's failure to post indexed records in its electronic reading room as subsection (a)(2)

requires is asserting her own interests, not those of the general public, when she seeks an injunction requiring the agency to make the records available to her in that form. Here, for example, NYLAG's complaint and summary judgment declarations explained at length that it was injured by its inability to access a complete electronic library of BIA's unpublished decisions. *See* J.A. 9–11, 13–14 (Complaint); J.A. 36–39 (Ziesemer Dec.). In seeking injunctive relief to require the online posting of those opinions, NYLAG asserts its own interests and seeks relief that will directly and tangibly benefit *it*, not the public at large—most members of which have no interest in BIA opinions. *See ALDF*, 935 F.3d at 869 (holding that plaintiffs who sought compliance with the reading requirement suffered an injury that was "different from the injuries sustained by other Americans" who would not make use of the reading room). Notably, the BIA does not contest NYLAG's showing that it has a concrete interest in access to an electronic library of BIA unpublished opinions.

Of course, other persons similarly situated to NYLAG would also benefit if the BIA made the records available to NYLAG in an electronic reading room. After all, the BIA could not provide an electronic reading

room to NYLAG while excluding other members of the public. But the circumstance that NYLAG's concrete and particularized injury may be shared by other members of the public does not make NYLAG's injury unredressable, and the courts cannot deny a statutorily authorized form of relief merely because the relief will also benefit others who suffer a comparable injury. *See Massachusetts v. EPA*, 549 U.S. 497, 522 (2007); *FEC v. Akins*, 524 U.S. 11, 23–25 (1998); *Public Citizen v. DOJ*, 491 U.S. 440, 449–50 (1989). Enjoining an agency from withholding records in violation of subsection (a)(2) is fully consistent with the proposition that a remedy must redress a plaintiff's own injuries rather than those of the general public.[1]

Moreover, contrary to the BIA's assertion, a requester's interest in access to agency records in an online reading room cannot be satisfied by producing copies of all the records that would populate that reading room directly to the requester. As the Ninth Circuit explained in *ALDF*,

[1] Notably, even while advancing its own meritless "generalized grievance" argument, the BIA makes no effort to defend the district court's suggestion that an order enforcing subsection (a)(2)'s requirements would constitute an improper "general order[] compelling compliance with broad statutory mandates" under *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004)).

denying online access to records inflicts a different injury on a plaintiff than does the failure to produce records to an individual requester. Therefore, the "real-world" injury inflicted by the "inability to inspect documents in virtual reading rooms," *ALDF*, 935 F.3d at 869, cannot be redressed without an order directing the agency to comply with the reading-room provision, *see id.* at 868–69. A voluminous records dump is no substitute for the statutory entitlement to browse and access indexed records in a government-maintained electronic reading room. In this case, for example, NYLAG has explained that such a massive production of records would exceed its current technical capabilities and impose substantial costs on it. J.A. 38–39 (Ziesemer Dec.). Far from remedying the injury that NYLAG suffers from not having access to BIA opinions in an electronic reading room, such a production would cause it additional injuries.

The BIA does not contest NYLAG's showing. Instead, it says that NYLAG is not "not obliged" to shoulder the burden of accepting the entire library of materials that should be in an electronic reading room, but can request the records it needs on a piecemeal basis. BIA Br. 22. Of course, NYLAG is "not obliged" to request BIA's entire database of opinions. But

under the BIA's reading of section 552(a)(4)(B), doing so would be the only way NYLAG could search and access all of them—as it could if the BIA had indexed them and made them available in an electronic reading room as required by FOIA. Making and waiting for responses to requests for individual opinions—the very existence of which NYLAG has no means of confirming in the absence of an indexed reading room—offers NYLAG no remedy at all for the BIA's noncompliance with subsection (a)(2). In short, the government cannot have it both ways: It cannot proffer the possibility of an order requiring production of copies of all the records to NYLAG as an adequate remedy for the (a)(2) violation and then, when the inadequacy of that remedy is explained, say that NYLAG can instead opt for some other, equally inadequate remedy.

F. Finally, the BIA denies that its reading of the statute would make subsection (a)(2)'s requirements "precatory." BIA Br. 16. Even in the absence of injunctive relief to stop agencies from withholding records in violation of (a)(2), the BIA insists, agencies will have an incentive to comply with the statute because records subject to subsection (a)(2) "may be relied on, used, or cited as precedent by an agency against a party other than an agency" only if they have been made available to the public

in compliance with subsection (a)(2) or the party has been given "actual and timely notice" of their terms. 5 U.S.C. § 552(a)(2). The agency, the BIA asserts, is entitled "to make [the] determination for itself" whether to "pay the price" for not posting the records in its electronic reading room. BIA Br. 22. And if it makes that choice, BIA argues, it can relegate a person injured by its refusal to post the records to a remedy (production of copies of the withheld documents) that does not come close to providing full redress for the detrimental consequences of the noncompliance.

The BIA's view, in other words, is that compliance with the requirement of subsection (a)(2) is really not mandatory. Rather, like Justice Holmes's "bad man" who chooses to pay damages rather than perform under a contract,[2] an agency is free to violate the statute by not posting records if it "pays the price." But subsection (a)(2) does not give agencies a choice: It starts with the command that each agency "shall make available for public inspection in an electronic format" the categories of records that it enumerates. "The term 'shall,' as the Supreme Court has reminded us, generally is mandatory." *In re Barbieri*,

[2] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457 (1897).

199 F.3d 616, 619 (2d Cir. 1999). Moreover, a major category of the records included in subsection (a)(2)—the frequently requested records described in subsection (a)(2)(D)—are not even subject to the incentive provision that, according to the government, provides subsection (a)(2)'s only teeth. If subsection (a)(2) just meant that an agency may not cite or rely on certain of the (a)(2) documents unless it has published them or provided notice of their contents, Congress would not have bothered to begin by providing that placement of (a)(2) records in an electronic reading room is mandatory, let alone to include documents that are not even subject to the "price" of noncompliance. It would have enacted only subsection (a)(2)'s concluding sentences.

Indeed, even the BIA's favored precedent, *CREW I*, rejects the view that subsection (a)(2) leaves it up to the agency to "determin[e] for itself" whether to comply. BIA Br. 22. *CREW I* expressly recognizes that subsection (a)(2) imposes "affirmative obligations to make information available to the public" and "requires" agencies to provide public access to records electronically. 846 F.3d at 1240; *see also id.* at 1240–41 (quoting *Irons v. Schuyler*, 465 F.2d 608, 614 (D.C. Cir. 1972) ("[T]he opinions and orders referred to in Section 552(a)(2), when properly

requested, are required to be made available, and … such requirement is judicially enforceable without further identification under Section 552(a)(3), even though the agency has failed to make them available as required by Section 552(a)(2).")). Likewise, in *CREW II*, the D.C. Circuit reiterated that "FOIA's reading-room provision *mandates* that an agency disclose certain enumerated categories of records," and that the agency "withholds its records 'improperly' it if fails to comply" with that mandate. 922 F.3d at 486 (emphasis added).

By effectively transforming subsection (a)(2)'s reading-room provision from an enforceable mandate to a choice that the agency is free to decline if it determines that the "price" is right, the BIA's position would render subsection (a)(4) "precatory," as *ALDF* concluded. 935 F.3d at 875. That term aptly describes a view of the statute in which the reading-room requirement is transformed into a suggestion that an agency can disregard if it is willing to accept the no-citation-without-notice consequence. And this case illustrates how little incentive that consequence provides for an agency to comply: The BIA has chosen for decades to keep its "nonprecedential" opinions unpublished, and thus unavailable to its litigating opponents. At the same time, the government

cites them in BIA appeals whenever it chooses to do so, *see* J.A. 36, providing "timely" notice (if at all) in the brief or BIA opinion itself. The supposed "price" of having to "timely" notify a party of the unpublished opinions the agency has cherry-picked from the vast array available to it is no price at all.

A reading of FOIA that allows an agency to evade the statute's mandatory disclosure requirements without a meaningful remedy cannot be squared with either section 552(a)(4)(B)'s broad authorization of orders enjoining the withholding of records in violation of the statute's requirements or the statute's goal of "broad disclosure." *Milner v. Dep't of Navy*, 562 U.S. 562, 571 (2011). NYLAG's opening brief detailed the federal courts' repeated acknowledgment of that aim, *see* NYLAG Br. 33–34, as well as the statutory history demonstrating Congress's manifest intent to impose affirmative disclosure obligations on agencies and expand them over time, and to ensure enforcement of those obligations by amending the private right of action to clarify its application to them, *see id.* at 31–33. The BIA does not contest either the statute's overall pro-disclosure orientation or the history demonstrating Congress's consistent movement toward broadening FOIA's affirmative disclosure obligations

and enforcement provision. The BIA's insistence that Congress nonetheless meant to preclude injunctions requiring compliance with subsection (a)(2)'s reading-room requirement—notwithstanding the express grant of authority to enjoin withholding of records in violation of the statute—thus flies in the face of both the statutory language and the fundamental policies undisputedly embodied in FOIA.

II. If FOIA does not provide meaningful relief for a violation of the reading-room provision, the APA must do so.

The BIA does not contest that, under the Administrative Procedure Act's judicial review provisions, 5 U.S.C. §§ 701–706, there is a "strong presumption" in favor of judicial review of unlawful agency action, *Sharkey v. Quarantillo*, 541 F.3d 75, 84 (2d Cir. 2008). The BIA also does not contest the more specific point that the APA provides broadly for relief against unlawful agency action both when no review is available under any other statute *and* when the agency's action is "made reviewable by specific statutes without adequate review provisions." *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97, 102 (2d Cir. 1970).

Here, if the Court were to adopt the BIA's construction of section 552(a)(4)(B), FOIA would not provide an adequate remedy for a reading-

room violation because it would not redress that violation in a meaningful way. Instead, FOIA would relegate a plaintiff to the same remedy that would exist if the statute contained no reading-room provision: an order requiring production of copies of requested records to the requester. Because that relief would not be adequate to remedy a reading-room violation, its availability would not bar relief under the APA.

The BIA's contrary argument rests in large part on a misunderstanding of why the relief available under its construction of FOIA is inadequate. NYLAG's opening brief did not, as the BIA asserts, contend that FOIA relief would be inadequate under the BIA's reading of the statute because it would require exhaustion of administrative remedies as a prerequisite to relief. *See* BIA Br. 25. Indeed, NYLAG exhausted administrative remedies by making a request for disclosure under subsection (a)(2) before filing suit. NYLAG's position is that ordering production of records to an individual requester rather than requiring the agency to comply with the reading-room requirement would not adequately redress the violation because it would not provide the same benefits to the requester as compliance with the statute and would inflict substantial burdens that the requester would not face if the agency

made the records available in an electronic reading room. *See* NYLAG Br. 39–40, 49–50; *see also supra* p. 18–19. The BIA has no answer to this point.

Nonetheless, the BIA suggests that as long as *some* relief is available under another statute, APA review is foreclosed. The BIA invokes the Supreme Court's statement in *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988), that "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action." But on the BIA's reading of FOIA, an order under the APA setting aside the BIA's unlawful refusal to post records to its electronic reading room would not "duplicate" FOIA review procedures because the BIA reads FOIA *not* to allow for such relief. For the same reason, the BIA can find no support in this Court's recognition that the APA does not allow a plaintiff to seek the "same relief" that is available under another statute. *N.Y. City Emps.' Ret. Sys. v. SEC* (*NYCERS*), 45 F.3d 7, 14 (2d Cir. 1995); *see also Larson v. United States*, 888 F.3d 578, 587 (2d Cir. 2018) (holding that the APA does not allow relief that would "duplicate" that available under another statute); *Niagara Mohawk Power Corp. v. FERC*, 306 F.3d 1264, 1268 (2d Cir. 2002) (holding that an APA remedy

is not available when a party can obtain "complete relief" through another right of action).

The BIA asserts that this Court has not held that another statute *must* provide the "same relief" as the APA to bar review, BIA Br. 26, but points to no decisions of this Court that bar APA relief in the absence of another means of obtaining the relief sought. Instead, the BIA relies on D.C. Circuit case law holding that relief available under another statute bars APA review as long as it is relief of the "same genre," even if it is not "identical" to and is "less effective" than APA relief. BIA Br. 23–24 (quoting *Garcia v. Vilsack*, 563 F.3d 519, 522, 524 (D.C. Cir. 2009)). That proposition, even if correct, does not bar review where, as here, the relief offered under another statute would be *ineffective* to vindicate the substantive rights asserted. Moreover, the BIA's own arguments demonstrate that an order requiring real compliance with subsection (a)(2) is not truly relief of the "same genre," in any meaningful sense of those words, as the limited document-production relief that the BIA reads FOIA to authorize. The BIA explicitly argues that an injunction requiring compliance with subsection (a)(2) is not the same "type" of relief available under FOIA. BIA Br. 19. It does not explain how relief can be

of a totally different "type" but still be of the same "genre." The words are synonyms. *See* Merriam-Webster Online Thesaurus, "type," https://www.merriam-webster.com/thesaurus/type (listing "genre" as a synonym of "type").

Finally, the BIA's invocation of decisions of other circuits that have "agreed that FOIA's remedy for disclosure of documents precludes APA relief," BIA Br. 24, is unavailing. In those cases, the relief sought under FOIA was production to the plaintiff of copies of agency records, and the APA claims sought the same relief. To be clear, NYLAG agrees that if the form of relief sought under the APA is *available* under FOIA, a plaintiff must proceed under FOIA. And NYLAG's principal submission in this case is that the relief it seeks *is* available under FOIA, making resort to the APA unnecessary. NYLAG asserts an APA claim in the alternative, in the event that the Court agrees with the BIA that the type of relief it seeks is not available under FOIA. Only if the BIA's reading of FOIA were correct would APA relief be necessary to provide an adequate remedy for a violation of the subsection (a)(2)'s reading-room mandate.

CONCLUSION

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

Respectfully submitted,

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May 28, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief complies with the typeface and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(5), (a)(6), and (a)(7)(B) and this Court's 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 5,969 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/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served on May 28, 2020, through the Court's EFC system on counsel for all parties required to be served.

/s/ Scott L. Nelson
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