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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ANIMAL LEGAL DEFENSE FUND,, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,

Defendants.

No. 3:17-cv-00949-WHO

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Date: May 17, 2017
Time: 2:00 p.m.

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INTRODUCTION

In early February, the United States Department of Agriculture ("USDA"), acting through its component agency ("APHIS," or collectively with USDA, the "agency" or "defendant") temporarily removed from its website certain categories of records pertaining to its administration of the Animal Welfare Act ("AWA"). Citing the need to properly address privacy concerns, the agency emphasized the decision was not final but was a precautionary measure to protect individual privacy during an ongoing review process. Pursuant to that ongoing review, the agency has already reposted many thousands of records to the website.

Unwilling to allow that process to play out, plaintiffs now seek a highly disfavored "mandatory" preliminary injunction that would, if granted, compel the agency to immediately publish thousands of records that the agency has determined could violate personal privacy interests. Plaintiffs cannot meet not the requirements for a preliminary injunction, let alone make the heightened showing necessary to justify a mandatory one. Their claims are jurisdictionally defective and otherwise improper, so they cannot establish a likelihood of success on the merits. Nor can they demonstrate serious and irreparable harm, and certainly not harm more urgent and significant than the agency's competing privacy concerns.

STATEMENT OF ISSUES

Whether the Court should compel defendants, via mandatory preliminary injunction, to terminate an ongoing review process and immediately publish thousands of records.

BACKGROUND

APHIS administers and enforces the AWA and its associated regulations requiring federally established standards of care and treatment for certain animals. Animals covered by the AWA may include those in zoos, circuses, marine mammal facilities; those destined for commercial pet trade; those transported on commercial airlines or other common carriers; and those used for research. Declaration of Kevin Shea ¶ 6 ("Shea Decl.") (attached). APHIS employs inspectors nationwide who conduct inspections to ensure that regulated facilities are in compliance with AWA standards and regulations, documenting any noncompliant items in a

written inspection report. *Id.* ¶¶ 8-10. Deficiencies discovered in inspections may form the basis for letters of warning and other regulatory correspondence, as well as enforcement actions, such as voluntary settlement agreements that may involve monetary penalties or other sanctions. *Id.* ¶¶ 10-13. APHIS may also initiate adjudicatory enforcement actions through administrative complaints initiated by its Office of the General Counsel. *Id.* ¶ 12. These adjudicatory proceedings are resolved by USDA administrative law judges (ALJs) and the USDA Judicial Officer, who issue final decisions on behalf of the Secretary of Agriculture for purposes of judicial review. *Id.* ¶¶ 12, 16.

For years, APHIS made certain AWA compliance and enforcement records available on the APHIS website. *Id.* ¶ 4. APHIS began posting AWA inspection reports and research facility annual reports on its website in the late 1990s or early 2000s, but terminated this practice due to security concerns following the September 11 terrorist attacks. *Id.* ¶ 14. Between 2005 and 2009, the agency was involved in litigation related to annual reports of animal research facilities. *See Humane Society of the United States ("HSUS") v. USDA*, 1:05-cv-00197 (D.D.C. 2005). The lawsuit eventually settled without a substantive ruling, and the agency resumed posting certain annual reports on its website pursuant to the settlement.[1] *Id.* ¶ 15. The agency also resumed posting inspection reports around this time. *Id.* In 2010, APHIS began posting to its website official warnings and enforcement information including pre-litigation settlement agreements, administrative complaints, and decisions and orders issued by USDA ALJs and the Judicial Officer (consent decisions and orders, default decisions, initial decisions and orders, final decisions and orders, and dismissal orders). *Id.* ¶ 16. All categories of records were posted proactively, without waiting for a specific FOIA request. *Id.* ¶ 17. If posted information turned out to be responsive to a FOIA request, APHIS generally referred requesters to the website, rather than processing and releasing records already available on the agency website. *Id.* The agency previously maintained a public search tool, through which anyone could search for information involving the agency's AWA compliance activities – including inspection reports and research

[1] Records that were subject to the prior settlement are now posted on the website.

facility annual reports – through its Animal Care Information System (ACIS). *Id.* ¶ 18. APHIS also maintained publicly accessible copies of regulatory correspondence, enforcement records, and adjudicatory records on its website, separate from the search tool. *Id.* ¶ 19.

Between 2012 and 2016, APHIS began reviewing a Privacy Act System covering AWA records, concerned that records it made publicly available online may contain information implicating substantial privacy concerns. *Id.* ¶¶ 20-21. The agency decided in November 2016 to temporarily remove certain categories of records from its website to allow a document-by-document review for any personal information that may raise privacy concerns. *Id.* ¶ 23. On February 3, 2017, the agency temporarily removed the ACIS search tool from its website, as well as other categories of information it had previously made available online, to facilitate this comprehensive review. *Id.* ¶¶ 24-25. Immediately thereafter, APHIS began the review process to determine if additional redactions are necessary, and to re-post reviewed documents where appropriate. *Id.* ¶ 26. Nearly three-quarters of Animal Care employees have been involved in this effort to review and re-post documents. *Id.* As of this filing, after devoting almost four thousand staff workhours to this endeavor, the agency has re-posted over twenty thousand records – including all of the research facility annual reports, the entire list of licensees, and a substantial portion of the inspection reports. *Id.* ¶¶ 26-29. The agency has also provided a link to documents it once posted that remain accessible elsewhere, such as adjudicatory decisions available on USDA's Office of ALJ website. *Id.* ¶ 31. APHIS anticipates expending hundreds of additional staff hours in this ongoing document review process in the coming months. *Id.* ¶¶ 26, 28. At the same time, the agency continues to process FOIA requests for records previously posted online.

Plaintiffs, various organizations dedicated to animal welfare, brought this action, seeking an order compelling the agency to restore all removed records to its public website. *See* Compl. (ECF No. 1). Plaintiffs claim that APHIS was required by the Freedom of Information Act (FOIA) to make the removed documents publicly available. *Id.* ¶¶ 44-46. Alternatively, plaintiffs claim that the agency violated the Administrative Procedure Act (APA) by removing records and/or failing to post them on the website. *Id.* ¶¶ 59-72. On March 29, 2017, Plaintiffs

filed this motion for a preliminary injunction, *see* Pl.'s Mot. for Prelim. Inj. ("Pl. Mot.") (ECF No. 17), requiring the agency "to continue its years-long practice of allowing public access to the continually updated records in the APHIS databases . . . ." Pl. Mot. 20. In effect, the relief sought would compel the agency to immediately and publicly disclose many thousands of records that the agency has determined could implicate significant privacy concerns in their current form.

ARGUMENT

I. Plaintiffs' Request for a "Mandatory" Preliminary Injunction That Would Effectively Grant Them Full Relief on the Merits Is "Highly Inappropriate"

Under any circumstances, a preliminary injunction is "an extraordinary and drastic remedy" that should not be granted "unless the movant, *by a clear showing*, carries the burden of persuasion.'" *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (emphasis added). A plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008).

Here, plaintiffs seek a highly disfavored "mandatory" preliminary injunction that would require the agency to take action and alter the status quo. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). As worded in their proposed order, plaintiffs seek a preliminary injunction barring the agency "from enforcing its policy announced on February 3, 2017, blocking access to Animal Welfare Act records, and requiring USDA to continue its years-long practice of allowing public access to the continually updated records in the APHIS databases." (ECF No. 18). In actual effect, however, the relief sought would compel the agency to immediately and publicly disclose many thousands of records that the agency has determined could implicate significant privacy concerns in their current form, and to continue publishing similar records in the future.[2]

[2] Plaintiffs' characterization of the relief sought as merely "prohibitory" is meritless and based largely on semantic word-play. Contrary to their suggestion, the "last uncontested status" refers to the status quo "at the time the suit was filed." *N.D. ex rel. parents acting as guardians ad litem v. Hawaii Dept. of Educ.*, 600 F.3d 1104, 1112 n.6 (9th Cir. 2010). Here, the records had been removed from the website when the lawsuit was filed, so the injunction would require the

Such mandatory preliminary relief should be denied "unless the facts and law clearly favor the moving party." *Id.* (citation omitted). Further, such injunctions "are not granted unless extreme or very serious damage will result and are not issued in doubtful cases." *Am. Freedom Def. Initiative v. King County*, 796 F.3d 1165, 1173 (9th Cir. 2015) ("*AFDI*") (citation omitted).

Even more problematic, the mandatory relief sought here would effectively grant plaintiffs full relief on their claims, and is thus not "preliminary" at all. The Ninth Circuit rejected a very similar preliminary injunction – seeking "judgment on the merits in the guise of preliminary relief" – calling it "highly inappropriate." *See Senate of State of Cal. v. Mosbacher*, 968 F.2d 974, 978 (9th Cir. 1992). *See also, e.g., Taiebat v. Scialabba*, 2017 WL 747460, at *3 (N.D. Cal. 2017); *Daily Caller v. U.S. Department of State*, 152 F.Supp.3d 1, 6–7 (D.D.C. 2015).

II. The Mandatory Preliminary Injunction Should Be Denied Because Plaintiffs Cannot Show a Likelihood of Success on the Merits, Let Alone That the Law and Facts "Clearly Favor" Their Position

A. Plaintiffs Cannot Prevail On Their FOIA Claim

FOIA creates three different types of disclosure obligations under 5 U.S.C. §§ 552(a)(1), (a)(2), and (a)(3). The most frequently litigated, § 552(a)(3), provides that agencies must "make . . . records promptly available" in response to specific requests. In addition, FOIA contains two provisions requiring government agencies to affirmatively make certain types of records available to the public. *See id.* § 552(a)(1), (2). The affirmative disclosure provision at issue here – sometimes called the "reading room" provision – requires agencies to make certain records "available for public inspection" by electronic means, *id.* § 552(a)(2), typically on an agency website. FOIA vests jurisdiction in federal district courts to enjoin an "agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." *Id.* § 552(a)(4)(B). However, plaintiffs seeking to enforce disclosure obligations under FOIA must first submit a request for the records sought and exhaust their remedies with respect to that request. *See In re Steele*, 799 F.2d 461, 466 (9th Cir. 1986).

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status quo to be altered by reposting those records that have not already been reposted. In any event, the relief plaintiffs seek would require the agency to "take action." *Garcia*, 786 F.3d at 740.

1. The Court Lacks Jurisdiction to Grant the Relief Sought Because FOIA Does Not Authorize Courts to Order Publication of Records

At the outset, plaintiffs' claim must fail because FOIA does not entitle them to the relief sought here, namely, an order requiring the agency to make records available to the public. The judicial review provision, 5 U.S.C. § 552(a)(4)(B), "is aimed at relieving the injury suffered by the individual complainant, not by the general public." *Kennecott Utah Copper Corp. v. U.S. Dep't of the Interior*, 88 F.3d 1191, 1203 (D.C. Cir. 1996). And contrary to Plaintiffs' suggestion, *see* Pl. Mot. 5, this provision only "authorizes district courts to order the 'production' of agency documents, not 'publication.'" *Id.* (affirming dismissal of claim under § 552(a)(1) for lack of jurisdiction). Thus, "a court has no authority under FOIA to issue an injunction mandating that an agency 'make available for public inspection' documents subject to the reading-room provision." *CREW v. DOJ*, 846 F.3d 1235, 1243 (D.C. Cir. 2017).

2. Plaintiffs Cannot Invoke the Court's FOIA Jurisdiction Because They Do Not Show that the Records Have Been "Improperly Withheld"

Under § 552(a)(4)(B), federal jurisdiction in a FOIA case depends on a showing that an agency has "improperly withheld" agency records from the plaintiff. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980); *see also Spurlock v. FBI*, 69 F.3d 1010, 1015 (9th Cir. 1995). Plaintiffs cannot make this threshold jurisdictional showing. They do not assert, as FOIA plaintiffs typically do, that the agency violated an obligation under § 552(a)(3) to produce records in response to a specific request. Rather, they assert that the agency violated FOIA's reading room provision by removing records from the agency's website that were previously posted there. Pl. Mot. 4-6. But they cite no categorical disclosure obligation under § 552(a)(2) that could apply here and thus cannot show any "improper[]" withholding sufficient to invoke the Court's FOIA jurisdiction.

a. Plaintiffs have not shown that § 552(a)(2)(D) requires disclosure

Plaintiffs wrongly assert that all previously posted records are subject to mandatory disclosure under § 552(a)(2)(D) because they are "frequently requested." That provision applies only to records that: (1) have previously "been released to any person" in response to a FOIA

request under § 552(a)(3); and (2) the agency determines "have become or are likely to become the subject of subsequent requests for substantially the same records," or if the records have been requested "[three] or more times." 5 U.S.C. § 552(a)(2)(D). Thus, no matter how "frequently requested" a record might be, § 552(a)(2)(D) does not even potentially require disclosure until it is actually processed and "released" in response to a FOIA request under § 552(a)(3). *See id.* § 552(a)(2)(D)(i). Plaintiffs do not show that the removed records meet this threshold requirement.

Nor could they make such a showing. By their own admission, the agency posted these categories of records "routinely," *i.e.*, without waiting until they were specifically requested, processed, and released to a person under § 552(a)(3). Pl. Mot. 4-5; Compl. ¶ 1; Shea Decl. ¶ 17 (explaining that the records were posted proactively). And there is no suggestion that these records were "released" in response to a request *after* being posted on the website.[3] To the contrary, the Complaint suggests that before the records were removed from the website, they never needed to be requested (let alone processed and released) because they were already easily accessible to the public. And even when they were requested, Plaintiffs acknowledge, the agency responded "*not* by releasing the records to the requester," but by simply directing the requester to the website. *See* Pl. Mot. 7 (emphasis added); Shea Decl. ¶ 17.

Plaintiffs cite a 2009 letter from APHIS leadership as "evidence" the records were subject to mandatory disclosure under § 552(a)(2)(D), *see* Pl. Mot. 6, but that letter in no way suggests that such posting was legally required. Quite the opposite, it emphasizes that posting records on the agency website has been part of a broader effort to go *beyond* what FOIA legally requires, in the interest of promoting transparency and making records "available online even before we receive a single FOIA request for them." *See* USDA, APHIS' Commitment to Transparency, https://go.usa.gov/x58Mm (last visited Apr. 26, 2017). It cited the President's statement that agencies "need not only comply with FOIA, but should work to share information proactively on

[3] Even if there were scattered instances in which a particular record or records were processed and released in response to individual FOIA requests, it would not necessarily mean those records met all the requirements of 5 U.S.C. § 552(a)(2)(D). Nor would it address the defects in plaintiffs' claim that a mandatory disclosure obligation under that provision applies *categorically*, to all records previously posted, and to all similar records that are obtained and generated in the future.

policies and decisions so that members of the public don't have to use the FOIA to obtain information held by their Government."[4] Furthermore, even if some agency officials have in the past believed that § 552(a)(2)(D) legally required the agency to post any of these categories of records, *see* Pl. Mot. 6 (pointing to 2009 letter and 2014 FOIA response letter), that *belief* would not change the scope of the agency's *actual legal obligation* under the provision.[5]

Perversely, plaintiffs ask the Court to conclude that such proactive disclosure could itself trigger a mandatory obligation under § 552(a)(2)(D). They assert that by posting these records on the website and directing FOIA requesters to them, the agency has in effect "previously released" those records in response to "any relevant FOIA requests." Pl. Mot. 7. But directing FOIA requesters to publicly available records does not somehow convert those already-public records into records that have been "previously released" in response to a FOIA request. Nor does the act of referring requesters to the website constitute a "release" of the already-public records, as plaintiffs' own brief essentially admits. *See id.*

Plaintiffs' argument is not only contrary to the plain language of § 552(a)(2)(D), but it would penalize agencies for engaging in proactive disclosures that go beyond what FOIA legally

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[4] *See also* Presidential Memorandum for Heads of Executive Departments and Agencies Concerning Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009); Memorandum of the Attorney General for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, (March 19, 2009), at 3, available at, https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf (last visited Apr. 26, 2017).

[5] Defendant acknowledges that certain agency officials have, in the past, understood the agency's obligations under § 552(a)(2)(D) to sweep more broadly. For example, the administrative record submitted in the *HSUS* case, discussed above, contains materials suggesting that some agency officials understood § 552(a)(2)(D) to apply to records without regard to whether they were previously released in response to a request. *See HSUS*, 1:05-cv-00197 (DDC), ECF No. 72-2 (Oct. 1, 2008). That view of the provision was (and is) inconsistent with the statutory language, as discussed above, and with guidance issued around that time by the Department of Justice's Office of Information Policy ("OIP"), which is responsible for overseeing agency compliance with FOIA. In 2003, OIP sought to correct misperceptions about the scope of § 552(a)(2)(D) and issued guidance clarifying that the provision "does not even come into play until an agency processes and discloses records under the Act in the first place." FOIA Post (2003): FOIA Counselor Q&A: "Frequently Requested" Records (explaining that if agencies post records before receiving "even a first FOIA request," then the posting is essentially "discretionary," and cautioning agencies not to "confuse it with action taken under subsection (a)(2)(D)") https://www.justice.gov/oip/blog/foia-post-2003-foia-counselor-qa-frequently-requested-records (last visited Apr. 26, 2017).

requires. If the mere act of posting records online could trigger a mandatory legal obligation under FOIA, preventing the agency from ever revisiting the decision, agencies would likely become more circumspect and reluctant to engage in the proactive disclosures. The argument would also subvert the explicit will of Congress, which included this threshold requirement to ensure that the disclosure obligation created under (a)(2)(D) would be no more expansive than the agency's pre-existing obligations to respond to specific FOIA requests under (a)(3).[6]

b. Plaintiffs have not shown that § 552(a)(2)(A) requires disclosure

In the alternative, plaintiffs argue that three categories of disputed records – inspection reports, official warning letters, and voluntary settlement agreements – are subject to mandatory disclosure under § 552(a)(2)(A). That provision applies to "*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). As such, it requires disclosure only of decisions that "result from an adjudicatory process such that [a court] would consider them '*final opinions*' rendered in the 'adjudication of [a] case [ ].'" *American Immigration Lawyers Ass'n v. EOIR*, 830 F.3d 667, 679 (D.C. Cir. 2016) ("*AILA*"). Further, it applies only to decisions "that 'constitute the making of law or policy by an agency'" – *i.e.*, decisions that set some precedent or have some "binding force on the agency in later decisions . . . ." *Id.* (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975)). *See also Skelton v. U.S. Postal Serv.*, 678 F.2d 35, 40 (5th Cir. 1982) (explaining that this FOIA requirement was designed to "help the citizen find agency statements 'having precedential significance' when he becomes involved in 'a controversy with an agency'") (quoting legislative history).

None of the three categories of records Plaintiffs identify reflect decisions of this sort, as their own description of the records makes clear. *See, e.g.*, Compl. ¶¶ 33-35. Inspection reports,

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[6] *See, e.g.*, S. Rep. No. 104-272, at 13 (1996) (stating that "once released in response to a specific request under the FOIA, complying with the new requirement of making the previously released material, even in a redacted form, available for public inspection and copying should not be a burdensome undertaking"); H.R. Rep. No. 104–795, at 21 (1996), reprinted in 1996 U.S.C.C.A.N. 3448, 3464 (stating that the provision will "help to reduce the number of multiple FOIA requests for the *same records* requiring separate agency responses") (emphasis added).

official warning letters, and voluntary settlement agreements are not the product of an adjudicatory process at all, let alone records that could deemed "final opinions" made after such a process. Inspection reports document findings of APHIS inspectors who periodically inspect regulated facilities. The content of such reports may later form the evidentiary basis of a violation *alleged* in an official warning letter, voluntary settlement agreement, or administrative complaint, but they do not constitute a determination that a violation occurred. Similarly, official warning letters and voluntary settlement agreements are based on *alleged* violations and reflect pre-adjudicatory actions that serve as *alternatives* to the initiation of a formal adjudicative proceeding. Shea Decl. ¶¶ 4, 9-13; *see also* Compl. ¶ 35. As they are not part of an adjudicatory process, they are not subject to affirmative disclosure under § 552(a)(2)(a).

Nor do inspection reports, official warning letters and voluntary settlement agreements reflect the sorts of agency action that "constitute the making of law or policy by an agency." *AILA*, 830 F.3d at 679. They have no binding or precedential effect on the agency, nor any effect on regulated entities other than the one involved. For that reason as well, they are not subject to mandatory disclosure under § 552(a)(2)(A). Plaintiffs' reliance on *Willamette Industries, Inc. v. U.S.*, 689 F.2d 865 (9th Cir. 1982), is misplaced, because, *inter alia*, the Ninth Circuit explicitly did not reach the issue of whether § 552(a)(2) applied to the records at issue. *Id.* at 869 n. 3 (because the court ordered production, not publication, "it is irrelevant whether the requested documents are final opinions required to be disclosed under 5 U.S.C. § 552(a)(2)").

3. Plaintiffs Have Not Shown That They Properly Exhausted Their Administrative Remedies Under FOIA

Plaintiffs also cannot establish jurisdiction because they do not claim to have exhausted their administrative remedies for a properly submitted FOIA request seeking the records in dispute. *See In re Steele*, 799 F.2d at 466. Contrary to plaintiffs' apparent assumption, even a plaintiff seeking judicial enforcement of affirmative-disclosure provisions must submit a proper FOIA request and exhaust available administrative remedies under the statute prior to bringing suit. *See id.* ("The complainant must request specific information in accordance with published administrative procedures, *see* 5 U.S.C. § 552(a)(1), (2) & (3), and have the request improperly

refused before that party can bring a court action under the FOIA."). Indeed, the statute's plain language contemplates submission of requests under all three of FOIA's access provisions – including the reading room provision, § 552(a)(2) – and establishes procedures for exhausting administrative remedies with respect to each such request. *See* 5 USC § 552(a)(6)(A) (setting forth time limits applicable to any "request for records made under" § 552(a)(1), (2) or (3)).[7]

Plaintiffs do not allege, much less demonstrate, that they complied with these jurisdictional prerequisites. *See, e.g.*, *Benhoff v. DOJ*, 2016 WL 6962859, at *4 (S.D. Cal. 2016). Although the complaint alleges that plaintiffs submitted some requests for different types of removed records at unspecified times, it does not tie the relief sought in this case to any of those requests, nor does it suggest that any of those requests were exhausted prior to bringing this suit. Compl. ¶ 48. Indeed, it appears impossible that plaintiffs *could* have exhausted their remedies in the 20 calendar days between the time records were removed from the website on February 3 and the time this suit was filed on February 23. *See* 5 U.S.C. § 552(a)(6)(A)(i) & (ii), (C)(i).

Plaintiffs assert that exhaustion of remedies is too time-consuming, but Congress anticipated and addressed such problems in the statute, allowing requesters to file suit immediately if their requests are left unaddressed for more than 20 working days. *Id.* Congress even went further, allowing requesters to seek expedited processing if there are sufficiently compelling reasons why their particular requests should be prioritized over the requests of others. *See id.* § 552(a)(6)(E). If plaintiffs feel they qualify for such prioritized treatment, they should

[7] *See also Irons v. Schuyler*, 465 F.2d 608, 614 (D.C. Cir. 1972) (rejecting claim for records under § 552(a)(2) because plaintiff had not submitted a FOIA request for identifiable records under either § 552(a)(2) or 552(a)(3)); *CREW v. DOJ*, 164 F. Supp. 3d 145, 154 (D.D.C., 2016) (explaining that § 552(a)(2) can be enforced by submitting a request under either § 552(a)(3) or "directly under Section 552(a)(2), so long as the request, like those made under Section 552(a)(3), is for 'identifiable' records"), *aff'd*, 846 F.3d 1235 (D.C. Cir. 2017) (citation omitted); *CREW*, 846 F.3d at 1240–41 (quoting with approval *Irons*' statement that categories of records "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)") (emphasis added); *Prisology, Inc. v. Federal Bureau of Prisons*, 852 F.3d 1114, at *2 (D.C. Cir. 2017) (stating that in all cases involving enforcement of § 552(a)(2), "the plaintiff made a request and the agency denied the request").

seek it through the proper channels, and should do so *before* bringing suit. Instead, they ask the Court to let them bypass the prescribed process altogether and jump to the front of the line – ahead of all other FOIA requesters who (unlike Plaintiffs) have undertaken to exhaust their administrative remedies. *See* 7 C.F.R. § 1.8(d) (stating that requests are processed on a "first-in, first-out" basis); *Morales v. Secretary, U.S. Dep't of State*, No. 16-cv-1333, 2016 WL 6304654, at *4 (D.D.C. Oct. 27, 2016) (stating that relief "would harm others waiting for their FOIA requests to be processed, and would erode the proper functioning of the FOIA system"). This request is especially improper given that the agency is already engaged in a review process designed to ensure records will be reposted to the extent possible, and that process has already resulted in many thousands of the records being reposted. *See* Shea Decl. ¶¶ 28-31.

4. Plaintiffs' FOIA Claim Is Not Ripe

For similar reasons, Plaintiffs' FOIA claim is not ripe. Determining ripeness "requir[es] [a court] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). "A controversy is ripe when a plaintiff is challenging a final agency action, the issue poses purely legal questions and plaintiff has demonstrated hardship absent review." *Long v. Bureau of Alcohol, Tobacco and Firearms*, 964 F. Supp. 494, 498 (D.D.C. 1997) (finding the issue of plaintiffs' requester status with regard to future requests not ripe absent pending FOIA fee waiver request). Plaintiffs' FOIA claim meets none of these prerequisites.

First, the decision challenged does not reflect the agency's final decision about what records should be made available on the website, and it is thus clearly not fit for judicial review. In "cases involving administrative agencies," the ripeness doctrine "recognize[s] that judicial action should be restrained when other political branches have acted or will act." *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 670 (9th Cir. 2004). And "the interest in postponing review is strong if the agency position whose validity is in issue is not in fact the agency's final position." *Gulf Oil Corp. v. Brock*, 778 F.2d 834, 841 (D.C. Cir. 1985). This is especially true where, as here, the agency is in the midst of an ongoing review process that judicial review would

only serve to disrupt. Other ripeness factors only reinforce the conclusion that Plaintiffs' claim is not fit for judicial review: For one, it does not involve "purely legal" issues. The applicability of § 552(a)(2) turns on factual questions about whether particular records have been "released" to a person in response to a specific FOIA request under § 552(a)(3), and whether those same released records have been or likely will be requested three or more times. And even if § 552(a)(2) applied to some records, the scope of any such obligation would still require litigation of factual bases for any exemption claims by the agency.

Any attempt to resolve those factual issues on this complaint would be judicially unmanageable, and would clearly "benefit from a more concrete setting." *Am. Petrol. Inst. v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012). The universe of records at issued is ill-defined and ever-changing, because the ongoing review process means that records may move at any time from the "removed" to the "reposted" category, and because plaintiffs seek prospective relief with respect to future records not yet obtained or created. At the very least, judicial review of such issues would be on "much surer footing in the context of a specific" FOIA request, as courts have "routinely" recognized. *Gulf Oil Corp.*, 778 F.2d at 842.

Finally, plaintiffs would suffer no cognizable hardship from delayed review. The agency has already reposted many records as a result of its ongoing review process, and has stated that it will continue to do so consistent with the need to address privacy concerns. Plaintiffs are also free to file a FOIA request and seek judicial review if they are dissatisfied with the response.

5. Plaintiffs Are Unlikely to Prevail on the Merits of Their FOIA Claim

Finally, even if the Court were inclined to allow plaintiffs' jurisdictionally defective FOIA claims to proceed, plaintiffs could not show they will likely prevail on the merits of that claim such that they would be entitled to the relief sought here. That claim rests on the unspoken assumption that plaintiffs are not only entitled to the records they seek, but that they are *immediately* entitled to *all* such records. Nothing in § 552(a)(2) suggests that any legal obligations arising from the provision are so rigid and inflexible. The agency has determined that the records should be reviewed offline to ensure adequate protection of information that may not

be appropriate for public disclosure. Shea Decl. ¶¶ 20-26. Even if the agency had previously released these records in response to FOIA requests, as § 552(a)(2)(D) requires, that provision does not prohibit an agency from ever revising the information disclosed in those records and making corrections where appropriate. Of course, FOIA does contain certain statutory timelines, but they are triggered by submission of a FOIA request, and plaintiffs here do not tie the relief sought to such a request. And even if they did, the failure to meet statutory timelines simply means that a plaintiff may file suit, not that the agency must immediately turn over all requested records. *See CREW v. FEC*, 711 F.3d 180, 188-89 (D.C. Cir. 2013). Indeed, even where a plaintiff is granted expedited processing, FOIA contemplates that an agency will be allowed adequate time to review and process records, as necessary. *See, e.g.*, *Daily Caller*, 152 F.Supp.3d at 3. In short, plaintiffs have failed to show that the facts and law "clearly favor" their claim of an immediately enforceable entitlement to all previously posted records.

B. Plaintiffs' APA Claims are Not Likely to Succeed

Unwilling to abide by the statutory constraints Congress set forth in FOIA, plaintiffs assert two claims under the APA, as alternative grounds for the same relief. Count Two asserts an APA claim for allegedly unlawful "failure to act," namely, to make available categories of records that in plaintiffs' view are required to be posted on the website. Compl. ¶ 59. Count Three asserts that the agency's "removal of enforcement records" and "databases" from the website is as arbitrary and capricious. *Id.* ¶¶ 72-73. Regardless of how they frame the APA claims, however, plaintiffs cannot prevail on the merits.

1. Judicial Review Is Unavailable Under the APA Because FOIA Provides an Adequate Remedy For Plaintiffs' Alleged Injuries

Congress did not intend the APA to "duplicate existing procedures for review of agency action" or "provide additional judicial remedies in situations where . . . Congress has provided special and adequate review procedures." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (citation omitted). Thus, the APA provides judicial review of "final agency action *for which there is no other adequate remedy in a court* . . . ." 5 U.S.C. § 704 (emphasis added). *See also City of Oakland v. Lynch*, 798 F.3d 1159, 1166-67 (9th Cir. 2015). To be deemed "adequate," an

alternative remedy need not provide relief identical to relief under the APA, so long as it offers relief of the "same genre." *See Garcia v. McCarthy*, 2014 WL 187386, at *13 (N.D. Cal. 2014) (Orrick, J.) (citing *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009)). For example, a remedy will be deemed adequate "where a statute affords an opportunity for de novo district-court review" of the agency action being challenged. *El Rio Santa Cruz Neighborhood Health Ctr. v. HHS*, 396 F.3d 1265, 1270 (D.C. Cir. 2005). Relief also will be adequate "where there is a private cause of action against a third party otherwise subject to agency regulation." *Id.* at 1271.

In this case, FOIA clearly provides an "adequate" remedy that precludes APA review. Plaintiffs seek access to records purportedly subject to FOIA's affirmative disclosure provisions. Regardless of whether they characterize the cause of their injury as the agency's failure to "affirmative[ly]" make records publicly available, or its "wholesale removal" of databases containing those records, *see* Pl. Mot. 9, plaintiffs' claimed injury is essentially the same – *viz.*, an inability to access the records they seek. FOIA clearly provides an adequate remedy for that claimed injury. It is undisputed that plaintiffs could submit a request for those records and, if dissatisfied with the agency's response, seek *de novo* review under FOIA in district court. *See* 5 U.S.C. § 552(a)(4)(B). Thus, FOIA provides plaintiffs with a private right of action and an opportunity for de novo review in district court, amply demonstrating Congress's intent to create an adequate remedy that bars APA review. *See Garcia*, 563 F.3d at 523.

Indeed, the D.C. Circuit recently reached precisely that conclusion, explaining that it had "little doubt that FOIA offers an 'adequate remedy'" for violations of § 552(a)(2). *CREW*, 846 F.3d at 1245 (citing 5 U.S.C. § 704). Considering the statute as a whole, the FOIA offers plaintiff "precisely the kind of 'special and adequate review procedure[ ]' that Congress immunized from 'duplic [ative]' APA review." *Id.* at 1246 (citing *Bowen*, 487 U.S. at 903 (alterations in original)). The D.C. Circuit also squarely rejected the suggestion – advanced by plaintiffs here – that FOIA is "inadequate" because it only authorizes courts to require production to a particular complainant, and does not authorize them to order agencies to make records publicly available on its website or in a database. *Id.* at 1246. So too here, remedies "may be more arduous, and less

effective in providing systemic relief," but "situation-specific litigation affords an adequate, even if imperfect, remedy." *Garcia*, 2014 WL 187386, at *11 (citation omitted).

2. Plaintiffs Do Not Challenge Any Final Agency Action Subject to Judicial Review Under the APA

The APA limits judicial review to final agency action. *See* 5 U.S.C. § 704. Finality "is a jurisdictional requirement to obtaining judicial review under the APA . . . ." *Fairbanks N. Star Borough v. U.S. Army Corps of Eng's*, 543 F.3d 586, 591 (9th Cir. 2008). To be "final," the action must "mark the consummation of the agency's decisionmaking process" and "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations and internal quotations omitted).

The challenged action here meets neither requirement. First, removal of access to the records, whether by removing the searchable database or removing records from the website, does not reflect the consummation of any decision-making process about whether and how records should be made available on the website. The agency made clear the decisions were part of an "ongoing review process," and that "adjustments may be made" because "access decisions were not final." *See* Shea Decl. ¶¶ 25-26. These are not merely "labels," they are accurate descriptions of what the agency has *actually* been doing. *See id.* ¶¶ 23-31. The agency has devoted thousands of hours to this ongoing review, and has now reposted many thousands of the records that were removed. *See id.* ¶¶ 28-31. APHIS is also making programming modifications to the public search tool to ensure privacy concerns are reliably addressed. *Id.* ¶ 24.

Second, the temporary removal of records from the website does not determine any rights or obligations or result in legal consequences. If it did, every modification to the website could be said to have this effect. While the removal may mean that plaintiffs cannot (at least not at this moment) access all the records previously available on the website, that is a "practical effect" of what the agency did, not a "legal consequence."[8] *Fairbanks N. Star*, 543 at 596.

[8] Plaintiffs' reliance on *Navajo Nation v. U.S. Dep't of Interior*, 819 F.3d 1084, 1091 (9th Cir. 2016), is misplaced. There the court found the challenged decision was final not because it delayed the Navajo Nation's access to certain items by a period of months, as plaintiffs assert, but because

3. Plaintiffs' APA Claims Fail for Numerous Other Reasons

Plaintiffs also assert that they are entitled to APA review (under the "arbitrary and capricious" standard) even if § 552(a)(2) does not require disclosure. Pl. Mot. 11. To the contrary, the absence of a disclosure obligation under FOIA means that plaintiffs would lack Article III standing to bring an APA claim at all. An "informational injury" can give rise to standing only if plaintiffs have been deprived of information to which they are statutorily entitled. *See, e.g., Wilderness Soc'y., Inc. v. Rey*, 622 F.3d 1251, 1258-59 (9th Cir. 2010). Further, the absence of a disclosure obligation under FOIA also means there is "no law to apply" under the APA, and it is thus "committed to agency discretion" rather than subject to judicial review. *State of Cal.*, 968 F.2d at 976 (reversing preliminary injunction compelling disclosure because, absent a disclosure obligation under FOIA or other law, decision not to release information is committed to agency discretion and unreviewable under APA). Finally, even if APA review of the decision to temporarily remove the records were possible, plaintiffs could not obtain the relief sought here, namely, an order requiring the agency to make the removed records public and to continue "updat[ing]" the website and/or database with new records. When agency action is set aside as arbitrary and capricious, the only proper course is to remand the matter to the agency for further review. *See San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014). That, of course, is precisely what the agency is already doing in the ongoing review process.

III. Plaintiffs Have Not Established That Irreparable Harm, Let Alone Extreme or Very Serious Damage, Will Result Absent the Mandatory Preliminary Injunction

Since plaintiffs' have not shown a likelihood of success on the merits of their claims, and certainly not that the facts and law "clearly favor" their position, there is no need to consider the remaining factors under *Winter*. *See, e.g., Google, Inc.*, 786 F.3d at 740. In any event, those factors likewise support denial of the preliminary injunction.

Plaintiffs have not demonstrated irreparable harm, let alone shown that "'extreme or very serious damage will result" unless the Court grants their request for a broad, and highly

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it constituted a "legal determination" of the Navajo Nation's "property interests" in those items. *Id.* at 1091-92. The records removal here does not give rise to any such legal consequences.

disfavored, mandatory preliminary injunction. *AFDI*, 796 F.3d at 1173 (citation omitted)); *see also Daily Caller*, 152 F. Supp. 3d at 6 (noting, in denying preliminary injunction, that request for accelerated FOIA production was "striking both in its mandatory nature and in the scope of preliminary relief the plaintiff requests"). Certainly, they do not carry their burden of persuasion "by a clear showing," as they are required to do. *Lopez*, 680 F.3d at 1072.

Plaintiffs spill much ink claiming that access to records from the website is essential to their advocacy work, s*ee* Pl. Mot. 14-18, but they never acknowledge the many thousands of records that APHIS has already reposted on the agency's website as a result of its ongoing review process. Indeed, before plaintiffs filed their preliminary injunction motion, the agency had already restored access to over 20,000 records, including approximately 10,000 inspection reports from the last three years, as well as all previously-posted research facility annual reports. Shea Decl. ¶ 28. Plaintiffs do not explain why the thousands of records that have been restored to the agency website are of no real use to them, but those that remain currently unavailable are somehow "critical to [their] mission." Pl. Mot. 13. Nor do plaintiffs attempt to differentiate between the categories of records that were previously posted in attempting to explain their alleged injuries. They instead ask the Court to infer, from only a few specific examples of records that were taken offline, that they will sustain injury if every single category of records is not immediately reposted. Moreover, the notion that plaintiffs will suffer immediate irreparable harm is substantially undermined by the fact that these categories of records have not always been available on the agency's website, evidently without any serious consequence for plaintiffs. For example, official warning letters and pre-litigation settlement agreements have been posted only since 2010, *see* Shea Decl. ¶ 16, and yet plaintiffs do not claim that they were unable to advance their missions before then.

A. Plaintiffs' Claimed Economic Injuries Do Not Constitute Irreparable Harm

Plaintiffs wrongly claim they are irreparably injured by the need to divert resources to filing FOIA requests, and that sovereign immunity makes those losses irretrievable. Plaintiffs cite *Havens Realty* to suggest that diversion of resources is an injury, but that case addressed Article

III standing, and plaintiffs cite nothing to show that their own resource allocation decisions could constitute the sort of injury that justifies a preliminary injunction. Pl. Mot. 13. *See Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991) (to show irreparable harm "[a] plaintiff must do more than merely allege . . . harm sufficient to establish standing" (citation omitted)). Irreparable harm cannot be based on the mere need to avail oneself of an established administrative process, such as the filing of FOIA requests pursuant to 5 U.S.C. § 552(a)(3). These are "normal incidents of participation in the agency process," and clearly do not constitute irreparable harm, "however substantial and nonrecoverable." *See California ex rel. Christensen v. FTC*, 549 F.2d 1321, 1323 (9th Cir. 1977). Indeed, this is true even where the process requires the plaintiff to pursue further administrative proceedings and litigation. *See id.*

In any event, even if economic losses are irretrievable due to sovereign immunity, plaintiffs must show that any unrecoverable losses are "considerable" in order to establish irreparable harm. *Ariz. Hosp. & Healthcare Ass'n v. Betlach*, 865 F. Supp. 2d 984, 998-1000 (concluding that loss of $800,000 was not "considerable," because it was less than one percent of the plaintiffs' annual revenues).[9] Plaintiffs have not shown that any diversion of resources here is "considerable." While they estimate that each FOIA request takes an hour of staff time to file and more to track, none of the organizations hazards a guess as to the percentage of total staff work hours such diversion constitutes. ALDF asserts without explanation that it will have to file one request per week for records that were previously available online, *see* Pl. Mot. 14, which means one hour of staff time per week. Other plaintiffs do not attempt to calculate how many additional staff hours will be required. Their bare assertion that FOIA requests require manpower is clearly inadequate to demonstrate "considerable" harm. In fact, it is unlikely that the diverted staff time could possibly constitute a "considerable" share of these organizations' total staff workhours or a

[9] Other circuits have likewise rejected the view that economic loss whose recovery is barred by sovereign immunity are irreparable *per se* and instead "require that the economic harm be significant, even where it is irretrievable because a defendant has sovereign immunity." *Air Transp. Ass'n of Am., Inc. v. Export-Import Bank of U.S.*, 840 F. Supp. 2d 327, 335 (D.D.C. 2012).

"considerable" budget expenditure, because the information sought under FOIA, as plaintiffs themselves acknowledge, is used to *aid* in their primary mission-supporting endeavors: advocacy, litigation, public awareness campaigns, and the like. In the case of ALDF, one hour per week is likely a mere fraction of the workload of a few staff persons within a large and multifaceted organization with 170,000 members. Nothing Plaintiffs submit suggests otherwise. ALDF's estimate, moreover, assumes that the records will *remain* unavailable online, ignoring APHIS's ongoing efforts to repost them after appropriate review. *See* Shea Decl. ¶¶ 26-31.

B. Plaintiffs' Non-economic, Informational Injuries Are Not Irreparable

Similarly unavailing is plaintiffs' claim that their missions will be frustrated by lack of *immediate* access to all information about regulated entities' AWA compliance. CAPS and ALDF point to their ongoing advocacy efforts and litigation about the Barkworks pet store chain, which they believe will be rendered more difficult absent immediate access to inspection reports. But courts have long held that "a movant's general interest in being able to engage in an ongoing public debate using information that it has requested under FOIA is not sufficient to establish that irreparable harm will occur unless the movant receives immediate access to that information." *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 15 F. Supp. 3d 32, 46-47 (D.D.C. 2014) ("*EPIC*"); *see also Judicial Watch, Inc. v. Dep't of Homeland Sec.*, 514 F. Supp. 2d 7 (D.D.C. 2007) (rejecting claim that delayed access to records irreparably harms advocacy group's ability to inform the public).

Plaintiffs do not identify any impending deadline or other time-sensitive reason why the Court should compel immediate disclosure to all disputed records. Where courts have found irreparable harm from FOIA delays it is because "Congress is considering legislation" related to the requested records, and "delayed disclosure of the requested materials may cause irreparable harm to a vested constitutional interest" of public participation in the congressional process. *Elec. Frontier Found. v. Office of the Dir. of Nat'l. Intelligence*, 542 F. Supp. 2d 1181, 1187 (N.D. Cal. 2008); *Elec. Frontier Found. v. Office of Dir. of Nat. Intelligence*, 2007 WL 4208311, at *7 (N.D. Cal. Nov. 27, 2007) (explaining that "irreparable harm can exist in FOIA cases"

where the requested records concern "issues of vital national importance [that] cannot be restarted or wound back" (citation omitted)); *cf. Sai v. Transportation Sec. Admin.*, 54 F. Supp. 3d 5, 10-11 (D.D.C. 2014) (rejecting claim that FOIA delay would irreparably harm FOIA requester because he "provide[d] conclusory allegations . . . but no evidence that" the specific records requested would be "vital" for any ongoing public proceeding, such as a "congressional or agency decision-making process requiring public input" (citation omitted)). Plaintiffs here do not contend that the information they seek will be rendered irrelevant if not released "immediately." That the information is potentially of public value, and that Plaintiffs would like – even for reasons arising out of their core missions – to access it immediately is not enough to establish irreparable harm.

Indeed, "under FOIA, it is difficult for a plaintiff to demonstrate 'irreparable harm' that is in fact 'beyond remediation' because he is entitled to obtain all responsive and non-exempt documents at the conclusion of the litigation." *Sai*, 54 F. Supp. 3d at 10 (citation omitted). The claim that a FOIA requester "will be irreparably harmed unless [he] receives the requested records quickly so that the public can participate fully in the ongoing debate is . . . fundamentally flawed because it ignores the well-established statutory FOIA process, which permits government agencies to withhold certain requested documents and to engage in subsequent litigation over them, without regard to the resulting production delay." *EPIC*, 15 F. Supp. 3d at 46; *see also Morales*, 2016 WL 6304654, at *3 (explaining that "being denied immediate access" to FOIA-requested "records is not an *irreparable* harm" because of the remedies available under the statutory scheme); *Daily Caller*, 152 F. Supp. 3d at 13-14 (no irreparable harm where injunction would allow them to access materials "only marginally sooner than the agency has indicated it intends to complete its processing of the plaintiff's request without such compulsion," and where "some records requested by the plaintiff . . . are available on the State Department's website").

Finally, even if plaintiffs' agreements with regulated entities rely on access to online information, any resulting injuries are self-inflicted and therefore not irreparable. *See* 11A Wright & Miller, Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.). For instance, plaintiffs note that the Furry Babies pet store may now need to file FOIA requests to comply with its settlement with

ALDF instead of accessing inspection reports online. *See* Pl. Mot. 15-16. But any harm caused by this change is indirect, resulting from ALDF's "entering a freely negotiated contractual arrangement" rather than from any government action. *Fish v. Kobach*, 840 F.3d 710, 753 (10th Cir. 2016).

C. Injury to Plaintiffs' Goodwill Is Too Speculative To Constitute Irreparable Harm

Plaintiffs claim they will suffer injury to their member and donor goodwill because they will "be[] unable to provide up-to-date information regarding animal cruelty." Pl. Mot. 17. As a general matter, a loss of goodwill or reputation *may* support a finding of irreparable harm, so long as it is not too speculative. *See Rent–A–Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991). However, loss of goodwill or reputation "ha[s] typically supported findings of irreparable harm only where evidence clearly supports such damage." *See Battelle Energy Alliance, LLC v. Southfork Sec. Inc.*, 980 F. Supp. 2d 1211, 1221 (D. Id. 2013) (citation omitted). *See also Goldie's Bookstore v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984) (claimed loss of "untold" customers too speculative to justify preliminary injunction).

Here, plaintiffs have failed to provide any relevant evidence, beyond simply asserting that they will "lose their relevance" and suffer "diminished charitable donations" without access to the databases, and that such harms will be irreparable because the public "will no longer trust the[m]." Pl. Mot. 18. Yet the speculation subsumed in this assertion is two-fold: First, plaintiffs speculate that they will lose goodwill or charitable donations but provide no indication that either a single donor or member has been lost in the more than two months since the databases were removed. *Bird-B-Gone, Inc. v. Bird Barrier Am., Inc.*, 2013 WL 11730662, at *5 (C.D. Cal. Mar. 20, 2013) ("The wide scope of Plaintiff's assertions of irreparable harm starkly contrasts with the lack of evidence presented to support those assertions. Plaintiff does not provide any *evidence* that it lost customers due to Defendant[] . . . . Not a *single* lost sale . . . has been shown."). Second, Plaintiffs assume that any such losses will be permanent, notwithstanding the ongoing review and reposting of records.

Moreover, irreparable loss of goodwill typically occurs when patrons are driven to competitor businesses or organizations. *See, e.g., id.* at *2 ("A loss of business through potential lost sales alone cannot be irreparable harm . . . . Loss of goodwill may include a change in the marketplace resulting from customers establishing relationships with" competitors). But plaintiffs could not plausibly contend that their members or donors will be driven to other animal advocacy organizations, to whom the databases are equally inaccessible. Thus, plaintiffs' proffer of "only high-level assertions, not specific evidence" that the challenged action "has actually *hurt* [plaintiffs'] reputation" is an insufficient demonstration that they "stand[] to suffer immediate, irreparable harm either to [their] reputation or goodwill." *Finjan, Inc. v. Blue Coat Sys., LLC,* 2016 WL 6873541, at *6 (N.D. Cal. Nov. 22, 2016).

IV. The Balance of Hardships and Public Interest Favor the Agency

In assessing the balance of hardships, courts should weigh the impact "on each party of the granting or withholding of the requested relief . . . [and] pay particular regard for the public consequences." *Winter*, 555 U.S. at 24. Plaintiffs, however, refuse to consider the privacy concerns that motivated APHIS's temporary removal of the information. They inaccurately assert that the agency's prior posting of records online was "without consequence." Pl. Mot. 19. *See* Shea Decl. ¶¶ 20-24 (explaining that personal information in online records may allow individuals to be improperly identified by the public, necessitating agency review of the records); *see also Nelson v. Nat'l Aeronautics & Space Admin.*, 506 F.3d 713, 715 (9th Cir. 2007) (balance of hardships tipped in favor of privacy concerns where, "[b]ecause of the nature of the information[,] . . . serious privacy concerns ar[o]se. This court has recognized the right to informational privacy."). Plaintiffs suggest that if no serious harm has been caused by revealing personal information in the databases, ongoing access to it cannot be a hardship. In other words, if no Tom has Peeped in an open window, why close it? Such an absurd notion of privacy has no grounding in the law. *Cf. American Farm Bureau Federation v. EPA,* 836 F.3d 963, 970-972 (8th Cir. 2016) (rejecting in a reverse FOIA action the notion that mere public availability of records about a Concentrated Animal Feeding Operation (CAFO) eliminated any substantial

privacy interest of individuals where the CAFOs were located on the homestead, their information was published in an easily searchable online database, and there was evidence in the record that such individuals had experienced harassment or could have security concerns by the agency's own admission). Furthermore, the agency *is* aware of serious harm caused by public access to unproven allegations of animal abuse. *See* Declaration of E. John Pollak (describing death threats and harassment directed at employees of research facility – including at their own homes – after publication of later-discredited allegations of animal abuse).

In describing their own hardships, plaintiffs incorrectly assert that persons "concerned about animal welfare[] cannot take steps to protect animals," but in fact any member of the public is free to file a FOIA request for records relevant to "public oversight" efforts. Pl. Mot. 19. Plaintiffs cannot plausibly contend that such efforts will be foreclosed unless all previously available records are posted immediately. This leaves only the economic harm claimed by plaintiffs – time spent filing FOIA requests – which is not irreparable harm at all, and is easily outweighed by the real danger that persons whose identities and addresses are improperly revealed may face, and the public interest in the protection of privacy. *See Golden Gate Rest. Ass'n v. City & Cty. of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008) ("Faced with . . . a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly" in favor of the latter.) (citation omitted).

Furthermore, the public interest analysis for the issuance of a preliminary injunction requires us to consider whether there exists some critical public interest that would be injured by the grant of such an injunction. *See Winter*, 555 U.S. at 24. In this case, that critical public interest is the protection of the privacy and safety of individuals whose privacy concerns may be implicated by records posted on online – precisely the sort of public interest about which courts are most concerned in the context of preliminary relief. *See Bernhardt v. Los Angeles County*, 339 F.3d 920, 931 (9th Cir. 2003) ("The public interest inquiry primarily addresses impact on non-parties rather than parties." (citation omitted)); *see also Daily Caller*, 152 F. Supp. 3d at 14 (public interest did not favor preliminary injunction where "[m]any of the documents responsive

to the plaintiff's [FOIA] requests likely include individuals' personal information [and r]equiring the agency to process and produce these materials under an abbreviated deadline raises a significant risk of inadvertent disclosure of records properly subject to exemption under FOIA").

Preliminary injunctive relief in this case would not advance the public interests behind the FOIA, "to ensure an informed citizenry, vital to the functioning of a democratic society." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989). Because all of the records previously posted online remain available via FOIA request, and thousands are now available online again, there is no danger of an uninformed citizenry. Moreover, rather than requesting the reposting of only those records that are directly relevant to their work, plaintiffs request the restoration of *all* records – including those that are outdated or irrelevant to their advocacy. Such relief sweeps far more broadly than the specific injuries identified, and the countervailing privacy concerns are equally broad. *See Bernhardt*, 339 F.3d at 932 (public interest militated against broader injunction but narrower injunction was permissible). The public interest is not served by an injunction of immodest scope, especially when preliminary remedies are "particularly disfavored." *Am. Freedom Def. Initiative*, 796 F.3d at 1173.

CONCLUSION

Accordingly, plaintiff's motion for preliminary injunction should be denied.

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