No. 15-1234

In the

United States Court of Appeals

for the

Eighth Circuit

AMERICAN FARM BUREAU FEDERATION, *et al.*

Plaintiffs-Appellants,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Defendants-Appellees,

and

FOOD & WATER WATCH, *et al.*,

Intervenors-Appellees.

On appeal from a final judgment of the
United States District Court for the District of Minnesota
Case No. 13-cv-1751, Hon. Ann D. Montgomery

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INTRODUCTION

"It is firmly established" that the courts have the "constitutional power to adjudicate [a] case" if the plaintiff "wins under one construction of [the law] and loses under another." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (emphasis omitted). That is an exact description of this case: If FOIA is given the interpretation that AFBF and NPPC advocate, they and their members are entitled to relief. If it is given the interpretation that EPA advocates, they will not get relief. A clearer example of an Article III controversy would be difficult to conceive.

EPA continues to insist that the district court correctly dismissed the complaint for lack of standing. But EPA never attempts to explain how the injuries claimed in this lawsuit are merely "hypothetical" (they are not) or why a decision on the merits would be merely "advisory" (it would not). Instead, EPA and the intervenors perpetuate the district court's conflation of "injury in fact" (which requires the court to assume that AFBF and NPPC's interpretation of the law is correct) with the merits of AFBF and NPPC's claim. But as we explained in the opening brief (at 24-28), that approach rests on the misguided idea that "[a] party [must] *prove* that the agency action it attacks is unlawful … in order to have standing to level that attack." *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 368 (D.C. Cir. 1998). There is no support for such a proposition.

As for the merits, EPA fails to show how its final decision is lawful. It dismissed powerful privacy interests as "*de minimus*" and misconstrued the public interests that are relevant under FOIA. Reversal is therefore in order.

ARGUMENT

EPA claims that this Court's review is limited to "the APA's arbitrary and capricious standard." EPA Br. 27. The intervenors say the same. *See* Int. Br. 11-12. That is incorrect. The APA permits a court to vacate an agency decision when it is *either* "arbitrary and capricious" *or* "not in accordance with law." 5 U.S.C. § 706(2)(A). That latter standard was the basis for this Court's decision in *Campaign for Family Farms v. Glickman*: "USDA's determination" that the plaintiffs' privacy rights in that case were not violated "was not in accordance with law." 200 F.3d 1180, 1187 (8th Cir. 2000).

Under the "not in accordance with law" standard, an agency is entitled to *Chevron* deference, but no more. Thus, deference is warranted only when the agency's judgment reflects an "exercise[of its] generally conferred authority to resolve … ambiguit[ies]" in the statute that it is charged with implementing (*N. Dakota v. EPA*, 730 F.3d 750, 763 (8th Cir. 2013)) or otherwise implicates "matters within [the agency's] area of expertise" (*Mausolf v. Babbitt*, 125 F.3d 661, 667 (8th Cir. 1997)). Deference is *not* warranted when the agency's judgment does not implicate matters within its particular competence—as here where privacy interests are at stake. *Cf. AFL-CIO v.*

FLRA, 786 F.2d 554, 556 (2d Cir. 1986) (according "some deference" to the Federal Labor Relations Authority's interpretation of FOIA in an APA case, but only insofar as the issues involved "the 'complexities' of federal labor relations").

The Court in *Glickman* properly analyzed the privacy interests involved without giving the government any deference. *See* 200 F.3d at 1187-1189. Like the USDA's Exemption 6 analysis in *Glickman*, EPA's Exemption 6 analysis here does not implicate the agency's technical expertise; it therefore also warrants no deference.

I. THE COURT HAS JURISDICTION

A. AFBF and NPPC have standing

1. AFBF and NPPC's members satisfy all three elements of standing

We demonstrated in the opening brief (at 23-29) that AFBF and NPPC and their members have standing. Neither EPA nor the intervenors offer a persuasive response.

a. Injury in fact. "'Injury in fact' is an invasion of a legally cognizable right." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591 (8th Cir. 2009). According to the administrative record and sworn declarations of AFBF and NPPC's members, EPA disclosed private information about AFBF and NPPC's members, which we argue invaded their legally protected privacy rights. The district court concluded that Exemption 6 does not actually pro-

tect the privacy interests asserted here. But as we explained in the opening brief (at 26-28), the court, in doing so, ignored its obligation to "assume, for purposes [of standing], that [the challenged conduct], if proved in a proper case, would be adjudged violative of the constitutional and statutory rights [asserted]." *Warth v. Seldin*, 422 U.S. 490, 502 (1975). *Accord Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1106 (D.C. Cir. 2008).

EPA rejoins (at 30) that "[t]his is not the legal standard on a motion for summary judgment," but that, again, conflates two different issues. EPA is right that the Court need not assume the truth of AFBF and NPPC's *factual allegations*, and that we bear the burden of showing with evidence the facts necessary to establish standing. EPA Br. 37. But we easily met that burden with the standing declarations,[1] the factual content of which has never been disputed. It is the distinct *legal question*—whether the established facts amount to a violation of the law—that the district court should have assumed would be resolved in the plaintiff's favor. *Warth*, 422 U.S. at 502; *Muir*, 529 F.3d at 1106. That is not a "new standard" for standing (EPA Br. 37), but a settled one. Any other approach would mean that one must "*prove* that the

[1] The opening brief refers at two points (at 25-26) to what "the complaint alleges" rather than what "the standing declarations affirm." Because the complaint and declarations are wholly consistent, that is a difference of labels and not substance. The intervenors (but not EPA) argue frivolously that the declarations were late filed and therefore should not be considered. Int. Br. 25-27. In fact, they were timely. *See* A6 n.1.

agency action it attacks is unlawful … in order to have standing to level that attack." *La. Energy*, 141 F.3d at 368.

EPA does not really defend the district court's conflation of standing with the merits. Instead, it picks nits with our citation to *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), because that case addressed a different element of subject-matter jurisdiction. *See* EPA Br. 37. That is a distinction without a difference. The Court in *Steel Co.* explained that "the absence of a valid (as opposed to arguable) cause of action"—which EPA does not deny was the basis for the district court's decision in this case—"does not implicate subject-matter jurisdiction." 523 U.S. at 89. Instead, the settled rule is that the courts "ha[ve] jurisdiction if 'the right of the [plaintiffs] to recover under their complaint will be sustained'" if law is given the construction they advocate. *Id*. That reasoning applies without regard for the element of jurisdiction in dispute.

EPA suggests that AFBF and NPPC's members' "actual claim of injury appears to be that EPA's release of the facility information may make it more likely for citizens to bring litigation." EPA Br. 35; *accord* Int. Br. 22-23. That misrepresents our position. As we explained in the opening brief (at 25), an invasion of personal privacy is an injury in its own right, established expressly by statute (*see* 5 U.S.C. § 552(b)(6)) and federal precedents (*Plante v. Gonzalez*, 575 F.2d 1119, 1135 (5th Cir. 1978)). It is well understood that

"[t]he actual or threatened injury required by [Article] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Warth*, 422 U.S. at 500. The release or threatened release of AFBF and NPPC's members' private information as part of a mass government disclosure is therefore an injury standing alone.

b. Causation. "Causation requires that the injury be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Eddings v. City of Hot Springs*, 323 F.3d 596, 602 (8th Cir. 2003). There is no doubt that causation is satisfied here: AFBF and NPPC claim that EPA's disclosure of their members' personal information directly violated their members' privacy rights.

EPA suggests that, because our theory of injury supposedly turns on the "speculative actions of third parties," we cannot satisfy causation. EPA Br. 35. That, again, misunderstands our theory of injury, which is the harm inherent in the disclosures themselves. It is true, of course, that AFBF and NPPC's members also have reason to be concerned about the practical consequences of the disclosures. *See* Opening Br. 33-36. EPA has admitted as much, acknowledging that public release of CAFO information "could be misused to target the CAFO for inappropriate or illegal purposes," which "might raise security or privacy concerns for CAFO owner/operators, many of whom are family farmers." 76 Fed. Reg. 65,431, 65,438 (Oct. 21, 2011). But

those concerns explain why the privacy interests at stake here should have been given greater weight in EPA's Exemption 6 analysis. They have no bearing on the standing question.

c. Redressability. Redressability requires that the plaintiff "personally would benefit in a tangible way from the court's intervention." *Warth*, 422 U.S., at 508. It must be "likely, as opposed to merely speculative, that the injury will be redressed." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181 (2000). That requirement is also easily met here: The asserted injury can be remedied by an injunction ordering EPA to recall its prior disclosures and prohibiting future disclosures.[2] And a simple declaration that the prior disclosures were protected by Exemption 6 would entitle AFBF and NPPC to a withdrawal of the April 4 Letter and a new decision from EPA whether to withhold or disclose under proper legal standards.

EPA responds by observing that "[t]he original FOIA requesters are not parties to this litigation, and thus the Court has no power to compel the destruction or return of any of the previously-released information." EPA Br. 34; *accord* Int. Br. 14-15. That is a red herring. The requested injunction against EPA would redress AFBF and NPPC's injury because, as EPA itself admits, it "asked the FOIA requesters to voluntarily return the original

[2] EPA complains that our request for an injunction is "overbroad and vague." EPA Br. 34 n.13. That is an issue for the district court to consider in the first instance. *See Holland v. Florida*, 560 U.S. 631, 653-654 (2010).

release and destroy any copies, *and the Agency received returned copies from all of the FOIA requesters*." EPA Br. 19 (emphasis added). *Accord* Nagle Decl. ¶ 42 (A18-19, SA49-50). Thus, it is "likely" that an injunction will remedy the asserted injury. Regardless, disclosures concerning seven States have yet to be made. And a declaration that the exemption applies would, as a practical matter, entitle AFBF and NPPC to a new decision concerning those States' records even absent an injunction forbidding further disclosures.

Thus, there can be no doubt that AFBF and NPPC have demonstrated injury in fact, a causal connection between that injury and the challenged conduct, and the likelihood that a favorable decision will redress the alleged injuries. Their showing is easily enough to establish standing.

2. The district court confused injury-in-fact with the merits of AFBF and NPPC's claims

We demonstrated in the opening brief (at 23-28) that, in granting judgment to EPA, the district court confused Article III's injury-in-fact requirement with AFBF and NPPC's obligation to prove, on the merits of their claim, that their members were adversely affected by EPA's conduct. EPA barely acknowledges that argument. For their part, the intervenors take willing ownership of the district court's error, proclaiming (at 20) that "the question whether Appellants have a legally cognizable injury due to EPA's disclosure of CAFO-related records … is a threshold standing issue." That assertion reflects an elemental misconception of the standing doctrine.

a. Article III's injury-in-fact element requires a plaintiff to demonstrate that she has been "'directly affected by the … practices against which [the] complaint[] [is] directed.'" *Valley Forge v. Americans United*, 454 U.S. 464, 486 n.22 (1982). If a plaintiff has not been directly affected—say, because the challenged conduct is merely "threatened" (*Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)), or because the conduct affected "other, unidentified" third parties and not the plaintiff herself (*Warth*, 422 U.S. at 502)—then the plaintiff lacks standing. The standing rules thus ensure that the plaintiff has "a personal stake in the outcome of the controversy" and prevent courts from giving advisory opinions on "hypothetical" questions. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

That is a different question from whether the plaintiff has stated a meritorious claim. The jurisdiction of the federal courts "is not defeated by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." *Bell v. Hood*, 327 U.S. 678, 682 (1946). In fact, the opposite is true: A "court must *assume* jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief." *Id.* (emphasis added). Thus, so far as standing is concerned, the Court must "*assume*" that the challenged conduct, "if proved in a proper case, would be adjudged violative of the constitutional and statutory rights [asserted]" as a matter of law. *Warth*, 422 U.S. at 502 (emphasis added).

In holding that AFBF and NPPC lack standing here, the district court did not find that the releases were only hypothetical and not actual, or that the releases affected others, and not AFBF and NPPC's members. It held, instead, that the disclosures did not inflict an unwarranted invasion of privacy within the meaning of FOIA Exemption 6. A5-9. That was not a decision on standing. It was, instead, an answer to the question "whether the 'statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief,'" which is manifestly a question concerning the *merits* of the claim. *Braden*, 588 F.3d at 593 (quoting *Warth*, 422 U.S. at 500).

b. EPA puzzlingly suggests that it was our "burden as the non-movant[s] on summary judgment to demonstrate that there were genuine, disputed facts regarding … standing." EPA Br. 31. But, as EPA elsewhere acknowledges, the parties *cross*-moved for summary judgment. *See* Dist. Ct. Dkts. 84, 91, 98; EPA Br. 20. Thus AFBF and NPPC argued (just like EPA) that there are *no* relevant factual disputes. And, indeed, there are none—no one disagrees about what happened, when, or to whom.

In an apparent attempt to pass off the question of whether AFBF and NPPC are entitled to judicial relief as one of "fact," EPA asserts that that our arguments concerning AFBF and NPPC's members' privacy interests are "blatantly contradicted by the record" and that the district court was there-

fore justified in disregarding the standing declarations. EPA Br. 30-31 (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)).

That argument makes no sense. The only question at issue is whether the historical facts—which are established by the administrative record and the standing declarations and are not disputed—are sufficient to support the *legal* conclusion that EPA's releases constituted an "unreasonable invasion of personal privacy" within the meaning of Exemption 6, entitling the plaintiffs to relief. That is self-evidently an "issue of law," "which the district court can decide only after it has assumed jurisdiction over the controversy." *Bell*, 327 U.S. at 683-684. Thus *Scott* has no application here.

Nor does it make any difference that the cases we cited in the opening brief were decisions on motions to dismiss rather than motions for summary judgment. EPA Br. 36-37. Again, we do not argue that the Court must assume the truth of our factual allegations. Rather, Court must assume for purposes of determining standing that EPA's conduct, as established by the undisputed evidence, ultimately "would be adjudged violative of the constitutional and statutory rights [asserted]." *Warth*, 422 U.S. at 502. Absent that assumption, the standing inquiry would *always* collapse in on the merits. That is not the law. *See Braden*, 588 F.3d at 591-592.

B. The case is neither moot nor unripe

The intervenors (but not EPA) additionally assert that this case is (1) moot because EPA has already released certain personal information, and (2) not yet ripe because EPA has not yet released other personal information. *See* Int. Br. 13-18. That *Catch-22* logic is incorrect.

1. Pointing to a passing quotation from *Urban v. United States*, 72 F.3d 94 (8th Cir. 1995), the intervenors first assert that "the Eighth Circuit has established" that, "'[i]n FOIA cases, mootness occurs when requested documents have already been produced.'" Int. Br. 14 (quoting *Urban*, 72 F.3d at 95 (quoting *In re Wade*, 969 F.2d 241, 248 (7th Cir. 1992))).

That is highly misleading. *Urban* was not a reverse FOIA case—it was an "action to *enforce* a Freedom of Information Act (FOIA) request." 72 F.3d at 94 (emphasis added). When the requested documents are released in an action to *enforce* a FOIA request, the plaintiffs receive everything they are asking for, there is nothing left for a court to do, and the case is properly dismissed as moot. *See Wade*, 969 F.2d at 248 ("Production of the documents nullifies the legally cognizable interest the *requesting* party possesses in the outcome of the lawsuit.") (emphasis added).

In reverse-FOIA actions, the opposite is true: When the government releases the requested documents before or during a reverse-FOIA lawsuit, it brings about what the plaintiff, though litigation, seeks to *prevent*. In that

event, there is plenty left for the court to do. As we explained in our discussion of redressability (*supra*, at 7-8), the court can enjoin the agency to recall the improperly disclosed documents and declare that the prior releases were illegal. That is what AFBF and NPPC have requested here (SA16-17), and there is nothing moot about it.[3]

2. Intervenors' arguments concerning ripeness are equally unpersuasive. There is no question that EPA intends to release (unless it is enjoined from doing so) personal information concerning thousands of additional farmers and ranchers in California, Idaho, Minnesota, Missouri, Nevada, Oklahoma, Pennsylvania, and Washington pursuant to the original FOIA requests. Nagle Decl. ¶ 50 (SA54). Nor is there any doubt that it will respond in the same manner to seven new FOIA requests seeking the same information from all thirty-six States. *Id.* ¶¶ 51-53 (SA55-56). As to all such information, EPA committed in the April 4 Letter to "continue to release in totality" information that is either "available to the public on the EPA's or state websites"

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[3] Moreover, EPA did not inform the agricultural stakeholders that it had released family farmers' personal information until one week *after* the disclosure had taken place. SA122-123. Thus, there was no opportunity to litigate the legality of the disclosure prior to the event that the intervernors say rendered it moot. When a claim cannot be "'fully litigated'" before becoming moot, and "'there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again,'" the claim is "capable of repetition but evading review" and "therefore alive and not moot." *United States v. Melton*, 666 F.3d 513, 515 n.3 (8th Cir. 2012) (quoting *Turner v. Rogers*, 131 S. Ct. 2507, 2515 (2011)).

or "subject to mandatory disclosure under state or federal law." A14. That is a reviewable final agency action.

The intervenors insist that EPA "must first *act*" before a reverse-FOIA claim ripens, presumably by releasing the data at issue. Int. Br. 16 (emphasis added). But in APA cases, ripeness requires only a final agency decision, meaning that (1) the agency has concluded its "decisionmaking process" (*i.e.*, the agency's decision "must not be of a merely tentative or interlocutory nature"), and (2) the agency's decision be one "from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

That describes perfectly EPA's commitment, following a "comprehensive and thorough" review of AFBF's and NPPC's objections (A11), to "continue to release in totality" all information that is either "available to the public on EPA's or state websites" or "subject to mandatory disclosure under state or federal law" (A14). There is nothing tentative about that commitment, and legal consequences "will continue" (*id.*) to flow from it. In short, the April 4 Letter is an "unequivocal statement of the agency's position" (*Harris v. FAA*, 353 F.3d 1006, 1010 (D.C. Cir. 2004)) with respect to all of the farm information in its possession.

Against that backdrop, there are no impediments to this Court reaching the merits. EPA suggests that the Court remand to the district court for consideration of the merits "in the first instance." EPA Br. 27 & 38 n.14. That

ignores that the district court *already* considered the merits, in what it mistakenly described as a decision on standing. Thus the Court should proceed to the merits and reverse the district court.

II. THE DISTRICT COURT WAS WRONG ON THE MERITS

We showed in the opening brief that the district court's heedless dismissal of the privacy interests at stake here, measured against EPA's improper consideration of non-cognizable public interests, requires reversal. Neither EPA nor the intervenors offer a compelling response.

A. AFBF and NPPC's members have a substantial privacy interest in the disclosed information

1. The information released to the intervenors and others includes the names of individual farmers, their home addresses, phone numbers, personal email addresses, the GPS coordinates of their farms, and financially related information such as animal headcounts and acreage. *See generally* SA195-228. That information is deeply personal. For most of the families caught up by EPA's mass collection and disclosure effort, their businesses are not just where the work, but also where they *live*—where their children play, where they watch movies on the sofa, where they have company over for dinner, and where they go to bed at night. Because one's privacy interests are at their apex when they concern one's home (*Forest Guardians v. FEMA*, 410 F.3d 1214, 1220 (10th Cir. 2005)), there is no doubt that disclosure of the kind of

detailed information at issue in this case "creates a palpable threat to privacy." *Carter v. Dep't of Commerce*, 830 F.2d 388, 391 (D.C. Cir. 1987).

EPA asserted in the April 4 Letter that AFBF and NPPC's members have only a "*de minimus*" privacy interest in the information at issue, in part because "[t]he privacy interest in Exemption 6 does not extend to information about corporations and businesses" or to information about an individual when "he or she is acting in a business capacity." A12-13.

EPA all but abandons that rationale before this Court. *See* EPA Br. 55-56. That is unsurprising in light if *Glickman*. There, this Court observed that information concerning farmers "in their business or entrepreneurial capacities" frequently overlaps with information concerning personal, "purely private" matters. 200 F.3d at 1188-1189. And the "overly technical distinction" between a farmer "as an individual [versus as] a sole proprietor, or as a majority shareholder in a closed corporation does little to diminish" his privacy interest in information concerning personal matters. *Id*. at 1189.

The intervenors persist in their disagreement on this point. Int. Br. 29-34. But in their principal case, *Washington Post v. Department of Agriculture*, 943 F. Supp. 31 (D.D.C. 1996), the district court expressly "agree[d] that personal privacy concerns necessarily are greater for an individual's home address than for his or her business address." *Id*. at 35. Although the district court ultimately ruled in favor of disclosure in that case, the information

there did not include phone numbers, email addresses, or GPS coordinates, but it did implicate a "significant public interest." *Id.* at 36. As we explain below, the same cannot be said here.[4]

2. EPA does not expressly deny that the kind of information it disclosed in this case is inherently private and personal. Nor could it. Instead, EPA primarily asserts that the previous disclosure of that personal information in various, one-off regulatory filings has destroyed each farm family's right to privacy because "information deemed public by law cannot be withheld under FOIA." EPA Br. 50. That assertion would come as a surprise to all nine Justices who voted for reversal in *Department of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749 (1989).

There, the plaintiffs (like EPA here) argued that, "[b]ecause events summarized in a rap sheet have been previously disclosed to the public" and are "a matter of public record," individuals' "privacy interest in avoiding disclosure of a federal compilation of these events approaches zero." *Reporters Comm.,* 489 U.S. at 759, 762. The Supreme Court did not hesitate to "reject

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[4] The intervenors also acknowledge (at 32) that the D.C. Circuit, in *Multi AG Media LLC v. Department of Agriculture*, 515 F.3d 1224, 1228 (D.C. Cir. 2008), found that there can be a protected privacy interest in business information that is "traceable to an individual," though in their view, that interest is "slight." They attempt to distinguish both *Mutli Ag* and *Consumers' Checkbook Center v. HHS*, 554 F.3d 1046 (D.C. Cir. 2009), with the *ipse dixit* that this case does not involve information concerning farmers' "financial circumstances." As we explained in the opening brief (at 34), that is mistaken.

[that] cramped notion of personal privacy." *Id.* at 763. According to the Court, the law recognizes a right not only to prevent the public disclosure of facts that remain wholly private, but also to control of "the degree of dissemination" of facts that, although in the public record, nevertheless concern private matters. *Id.* EPA's position in this lawsuit cannot be reconciled with that clear holding.

EPA cites several cases that it says support its contrary conclusion (*see* EPA Br. 50-51, 54), but none does so. In *Leadership Conference on Civil Rights v. Gonzales*, the district court expressly distinguished the "work telephone numbers" at issue in that case from truly "intimate information, *such as a home address.*" 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (emphasis added). The district court's decision in *National Western Life Insurance* predates *Reporters Committee* by almost a decade. For its part, the D.C. Circuit, in *Cottone v. Reno*, 193 F.3d 550 (D.C. Cir. 1999), failed to acknowledge *Reporters Committee*, much less to square its holding with that case. In *Eagle v. Morgan*, 88 F.3d 620 (8th Cir. 1996), this Court addressed the scope of privacy protections under the very different substantive due process dcotrine, not FOIA—a fact that EPA fails to mention. Finally, the decision in *Inner City Press v. Board of Governors*, 463 F.3d 239 (2d Cir. 2006), concerned Exemption 4 and certain SEC securities filings, which do not implicate the same kind of personal "privacy concerns" at issue here. *Id.* at 252.

Turning to *Reporters Committee* and attempting to distinguish it on the facts, EPA incorrectly asserts that the rap sheets requested in that case "includ[ed] non-conviction data *protected from disclosure* by law" (EPA Br. 51-52) and were held to be protected for that reason. In fact, the FOIA requesters in *Reporters Committee* sought the disclosure of criminal history information *only* "insofar as it is a matter of public record"; any non-public data on the rap sheets was expressly excluded from the plaintiffs' FOIA requests. 489 U.S. at 757. The Supreme Court acknowledged that exclusion and found the rap sheets to be exempt from disclosure all the same. *Id*. No less can be said here—especially given that many of the farms and ranches swept up by EPA's data collection are small farms that neither qualify as CAFOs nor hold NPDES permits, and therefore are not required to disclose any information under the CWA in the first place.

EPA also says that *Reporters Committee* is distinguishable because the information at issue here "has already been compiled and disseminated to the public in the same form as the EPA's FOIA release," whereas the information in *Reporters Committee* was practically obscure. EPA Br. 54. That is a striking misrepresentation. In fact, data from just six of the twenty-nine States is "identical in content and format" to EPA's disclosure; information from another seven States is "almost identical." A13 & nn. 8-9. Information from the remaining *sixteen* States is neither.

As to those thirteen States with "identical" or "almost identical" information already on the web, Exemption 6 applies because there is no conceivable public interest in the disclosures, as we explain in greater detail below. *See infra*, at 23-24. As to all of the other States, EPA's disclosure of private farm-family information is *exactly* like the disclosure of a government compilation of "stray pieces of personal information that might be found on private sites like Whitepages.com or Facebook" (*see, e.g.*, perma.cc/654T-VAPM (Louisiana)), which not even EPA here defends. EPA Br. 54; *cf. id.* at 32-33. All the more so with respect to "non-CAFO facilities" that do not discharge and do not hold NPDES permits (EPA Br. 58 n.19).

At bottom, EPA's conclusion that there are only "*de minimus* personal privacy interests" at stake in this case (EPA Br. 55) cannot be squared with governing Supreme Court precedents.

B. Releasing the requested information would not contribute to the public's understanding of EPA's operations

As the Supreme Court repeatedly has made clear, "the only relevant public interest in the FOIA balancing analysis [is] the extent to which disclosure of the information sought would 'shed light on an agency's performance of its statutory duties.'" *DOD v. FLRA*, 510 U.S. 487, 497 (1994) (alteration marks omitted) (quoting *Reporters Comm.*, 489 U.S. at 773). That purpose is served by the disclosure of information concerning agency activities; it is not served "by disclosure of information about private citizens that is

accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *Reporters Comm.*, 489 U.S. at 773.

We explained in detail why that settled rule makes it impossible for EPA to establish a cognizable public interest in this case (Opening Br. 45-50), but EPA essentially ignores our arguments. Instead, it recycles the same unconvincing public-interest rationales that it gave in the April 4 Letter. "A bad argument does not improve with repetition." *Carr v. United States*, 560 U.S. 438, 462 (2010) (Alito, J., dissenting).

EPA first asserts (without explanation) that farmers' and ranchers' names, addresses, phone numbers, email addresses, and GPS coordinates "*relate[] to environmental impacts from the handling and storage of manure, litter, and process wastewater from [farm] operations*." EPA Br. 1 (emphasis added). It thus claims that disclosure of farmers' and ranchers' names, addresses, phone numbers, email addresses, and GPS coordinates "*illustrates the activities EPA is undertaking to identify and regulate facilities as required by the Clean Water Act and its implementing regulations*." EPA Br. 60 (emphasis added).

Those are befuddling assertions. Such information tells third parties how to *contact* farmers and ranchers, *find* their property on a map, and *visit* them at home. It says nothing at all about how farmers are handling manure, litter, or wastewater; nothing at all about which farms require NPDES

permits; and nothing at all about how EPA is implementing the CWA. EPA evidently disagrees, but simply saying so does not make it so.

EPA elsewhere suggests that environmental activists, using the disclosed information, will be able to "verify," by subsequent investigation, whether EPA is "properly implementing [its] regulatory program." EPA Br. 58-59. But as we explained in the opening brief (at 48 n.10), the government has elsewhere disavowed the "derivative use" theory of public interest, and other courts of appeals have rejected it. EPA does not expressly disagree.

EPA asserts that "Congress placed a premium on citizen involvement when it drafted the Clean Water Act," and that disclosure of farm-family information will advance "Congress' clear policy determination" that such involvement should be encouraged. EPA Br. 57. "Nowhere, however, does the [CWA] amend FOIA's disclosure requirements or grant information requesters under the [CWA] special status under FOIA." *FLRA*, 510 U.S. at 499. "Therefore, … the fact that respondents are seeking to vindicate the policies behind the [CWA] is irrelevant to the FOIA analysis." *Id*. We made that point in our opening brief (at 47-48), too, and EPA again fails to answer.

EPA also asserts that the disclosures serve the public interest because "the collection of accurate and complete information on CAFOs is critical to the EPA's ability to properly implement the Clean Water Act." EPA Br. 57. That simply misses the point—the question under the FOIA balancing test is

whether the public interest is served by EPA's *disclosure* of the information, not by the collection of it.

EPA next observes that it voluntarily "committed to gathering [CAFO] information" as part of a settlement agreement with environmental groups, and that the disclosures permit "the public to confirm whether EPA is doing what it said it would do." EPA Br. 58. That is no explanation for the FOIA disclosures here. EPA has no statutory authority, much less a duty, to collect CAFO information from the States with respect to any farms or ranches, much less "non-CAFO facilities" that do not hold NPDES permits. EPA Br. 58 n.19. EPA makes much of the fact that GAO published a report in 2008 declaring that EPA would be better off with a "systematic and coordinated process for collecting and maintaining accurate and complete information" on CAFOs. EPA Br. 7. That may be so—but GAO isn't Congress, and its reports aren't laws. Policing EPA's extra-statutory promise to environmental groups thus cannot justify the disclosures at issue here.

Finally, we explained in the opening brief (at 49) that there can be no public interest in the disclosure of information that is already publicly, electronically available. We cited four cases in support of that contention, but EPA attempts to distinguish just one—and unconvincingly so. It asserts, in particular, that *Forest Guardians* is distinguishable because that case involved a request for an electronic copy of information that already had been

released as part of a "previous identical hard-copy production." EPA Br. 59. That is no basis for distinction at all. EPA openly admits that information available on thirteen States' websites is "identical in content and format" or "almost identical" to EPA's disclosure. A12 & nn. 8-9. EPA's disclosure of such information is thus "cumulative" (EPA Br. 59) in precisely the same way as the information at issue in *Forest Guardians*. Accordingly, "no public interest exists" in the disclosure of information from those thirteen States, and Exemption 6 necessarily applies. *Forest Guardians*, 410 F.3d at 1219.

In the end, there is no public interest of any kind to weigh against the invasion of personal privacy resulting from the disclosures in this case. And "[w]hen," as here, "the subject of [the requested information] is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of 'what the Government is up to,' the privacy interest … is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir." *Reporters Comm.*, 489 U.S. at 780. EPA's contrary conclusion is not in accordance with Supreme Court precedent.

III. THE CASE SHOULD BE REMANDED WITH INSTRUCTIONS TO ENTER A PERMANENT INJUNCTION

A. We established that an injunction is warranted here because EPA's official FOIA procedures and the Privacy Act both required it to withhold the information at issue. Opening Br. 50-55. EPA responds, in the main, by asserting that our arguments on this score are "waived" because we did not

make them before the district court. EPA Br. 39-42. *Accord* Int. Br. 49-50. That is at most a reason to remand to the district court to consider what remedies are appropriate under the circumstances. It also is mistaken.

To begin with, both EPA and the intervenors offer an overly restrictive view of waiver. *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (parties may press a claim on appeal "without being limited to the manner in which the question was framed below"). But either way, our arguments are not made "for the first time on appeal." EPA Br. 40.

AFBF and NPPC argued before the district court that EPA will, as a matter of policy, "withhold or redact information that falls within the scope of the exemption" and thus "has adopted Exemption 6 as its standard for determining whether to withhold personal information." Dist. Ct. Dkt. 104, at 21. That is the same argument we made in our opening brief before this Court, concerning EPA's official procedures; we simply cited a different source to support the observation. *See* Opening Br. 52.

AFBF and NPPC also argued that "EPA [failed] properly [to] consider[] any of [the] restrictions [of the Privacy Act of 1974], or the policies behind them, when it released the personal information at issue here" (Dist Ct. Dkt. 86, at 14) and that it had otherwise attempted to "circumvent" the "applicable Privacy Act protections" in this case. *Id.* at 25. That, too, is consistent with the Privacy-Act argument that appears in the opening brief. *See* Opening Br.

54 (the "disclosures were retrieved from EPA's records systems and released without consent, which the Privacy Act forbids"). Thus, both issues were presented to the district court and preserved for this Court's review.

B. On the merits, EPA says that EPA's FOIA policy is irrelevant because it is merely "nonbinding guidance," and courts "have required a plaintiff to demonstrate an independent source of *law* outside of the FOIA in order to succeed on a reverse FOIA claim." EPA Br. 44 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979); *Glickman*, 200 F.3d at 1185). Neither *Glickman* nor *Chrysler* stands for that proposition. *Chrysler* says only that a FOIA disclosure that violates the Trade Secrets Act is necessarily one made "not in accordance with law." 441 U.S. at 318 (quoting 5 U.S.C. § 706(2)(A)). And *Glickman* says only that "an agency has discretion to disclose information within a FOIA exemption, unless *something independent of FOIA* prohibits disclosure." 200 F.3d at 1185 (emphasis added). Neither speaks to the relevance of an official, published agency policy.

To be sure, EPA's official FOIA procedure "lack[s] the force of law" (*Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000)), but we have never argued otherwise. Our point is that it would be arbitrary and capricious (and thus a violation of the APA) for EPA to disclose information in contravention of its own published internal policies. EPA observes that its official procedure contains a disclaimer disavowing the policy's establishment of any rights or

obligations. EPA Br. 44. Perhaps—but that hardly means that EPA can enforce or disregard its own official procedures, willy-nilly.

Although EPA does not deny that its official FOIA procedures are still in force, it does describe them as "outdated," citing for support a Department of Justice website (perma.cc/G4ZB-C5E5) from August 2014. EPA Br. 44-45. That ignores the facts. Although EPA's FOIA manual was initially drafted in 2005, the first page of the document states, plain as day, that it was re-approved by EPA's Chief Information Officer on September 30, 2014—more than one month *after* the "current Department of Justice FOIA guidance" cited on page 45 of EPA's brief. *See Procedures for Responding to Freedom of Information Act Requests* 1 (July 7, 2005), perma.cc/8J73-8YTS.

EPA also claims that the 2014 DOJ guidance "specifies that withholding is mandatory under Exemption 6 only where the information is also protected by the Privacy Act." EPA Br. 45. That is a striking misrepresentation. With respect to the Privacy Act, the guidance offers only a truism—that, when "information is also protected by the Privacy Act of 1974, it is not possible to make a discretionary release." And in the immediately following sentence, it states that, when the Privacy Act does not apply, "[a]gencies should be mindful of the need to conduct a balancing under these exemptions" before making a decision whether to release or withhold. That is just what EPA's official FOIA procedures prescribe—they require that, when the balancing

test tips in favor of privacy, the information should be withheld because "disclosure would harm [the] interest protected by … the exemption[]." *Procedures for Responding* 10.

C. As for the Privacy Act itself, both EPA and the intervenors claim that it is inapplicable because the records at issue concern "facilities" rather than "individuals." EPA Br. 43. *See also id*. at 44 (the Privacy Act is inapplicable because "all of the information pertains directly to facilities" and are not "records about individuals"); Int. Br. 51 (similar). As we already have explained, this case is not about the privacy rights of "corporations" or other business "organizations" (EPA Br. 43)—it concerns the privacy rights of individual farmers and their families. *See* Opening Br. 54-55.

None of the cases cited by EPA (at 43) supports a contrary conclusion. In *St. Michael's Convalescent Hospital v. California*, 643 F.2d 1369 (9th Cir. 1981) and *Dresser Industries v. United States*, 596 F.2d 1231 (5th Cir. 1979), large companies asserted Privacy Act rights in their corporate capacities, concerning corporate matters; no individual interests were at stake. And in *SAE Productions v. FBI*, 589 F. Supp. 2d 76, 83 (D.D.C. 2008), a corporate consulting firm sued under the Privacy Act to obtain private government files concerning its CEO; the court simply held that the corporation lacked standing to assert the rights of its CEO.

The appellees finally claim that EPA's PCS and ICIS-NPDES databases are not "systems of records" within the meaning of the Privacy Act because, although information can be retrieved from those systems using personal identifiers, there is no evidence that the information was retrieved that way *in this case*. EPA Br. 43-44; Int. Br. 52-53 (citing *Henke v. U.S. Dep't of Commerce*, 83 F.3d 1453, 1460 n.12 (D.C. Cir. 1996)). That misreads *Henke*, which says only that an agency must, in practice, retrieve records using personal identifiers, not that it do so in any particular case. 83 F.3d at 1460 n.12. The Privacy Act thus applies here.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for appellants certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 7,000 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

/s/ *Michael B. Kimberly*

CERTIFICATE OF SERVICE

I certify that on August 3, 2015, the foregoing brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

I further certify that, within five days of receiving notice that the brief has been accepted for filing, I will file ten paper copies of the foregoing brief with the Clerk of Court by overnight delivery and will serve one paper copy on each case participant by overnight delivery at the addresses listed below:

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