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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SUMMARY OF THE CASE

This case concerns the U.S. Environmental Protection Agency's disclosure, under the Freedom of Information Act, of detailed personal information concerning tens of thousands of family farmers throughout the Nation—details including personal email addresses and phone numbers; home addresses and GPS coordinates; and other data from which sensitive personal financial information can be inferred. Appellants—the American Farm Bureau Federation and National Pork Producers Council—have argued that the information is protected from mandatory disclosure by law because its dissemination would unreasonably invade personal privacy. The merits of that contention implicate a complex interplay between FOIA, the Privacy Act, the Clean Water Act, and EPA's regulations and policies implementing all three. Also at issue are questions concerning Article III standing.

Oral argument in this appeal, with its large administrative record and complex legal issues, will enable the parties to fully address the Court's questions and concerns. Appellants respectfully request 30 minutes of argument time per side.

CORPORATE DISCLOSURE STATEMENT

Neither the American Farm Bureau Federation nor the National Pork Producers Council issues stock or is a subsidiary of any other corporation.

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INTRODUCTION

This is a case about personal privacy. In response to several FOIA requests from environmental activist groups, EPA is releasing personal details about tens of thousands of family farmer and ranchers throughout the Nation, including their names, home mailing addresses and GPS coordinates, family phone numbers, personal email addresses, and the numbers of acres they farm and animals they keep. The clear purpose of the FOIA requests is to put that information in the hands of animal rights and environmental activists (some of whom have a track record of trespassing and other kinds of harassment), to assist them in their efforts to bring private lawsuits against family farmers.

Appellants the American Farm Bureau Federation (AFBF) and National Pork Producers Council (NPPC) objected to EPA's disclosure of this private personal information. They explained, in particular, that family farms are not just places of business, but *homes*, where farmers live and raise their families. Thus, AFBF and NPPC argued, disclosure of the information would be a "clearly unwarranted invasion of personal privacy" within the meaning of FOIA Exemption 6, 5 U.S.C. § 552(b)(6). They argued that the information should therefore be withheld.

After an initial disclosure, EPA admitted that the information requested by the environmental groups would ordinarily have been

protected by Exemption 6 and, consequently, amended its initial release with very modest redactions. But the agency concluded that farm families have, for the most part, surrendered any privacy interest in their personal phone numbers, home addresses, email addresses, and other data because they (mandatorily) disclosed that information to various state regulatory agencies—some of which, in turn, have posted it in various forms on the Internet. EPA thus concluded that the requested information is not private at all, and thus not protected by FOIA Exemption 6. On that basis, EPA disclosed expansive electronic spreadsheets collected directly from state agencies, containing the requested personal information. And it is threatening to release yet more from additional States.[1]

EPA's conclusion was contrary to law. It is well settled that privacy interests are at their apex when they relate to the home, as they do here. It makes no difference that some farmers have disclosed personal information in state or federal regulatory permit applications—there is a common-sense distinction between the ability to access isolated public records, on the one hand; and the dissemination of a massive compilation of records that increases public focus on that information, on the other.

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[1] The district court entered a protective order sealing all information that was previously disclosed and preventing EPA from releasing any further information until the conclusion of this litigation. Dist. Ct. Dkt. 66. After entering final judgment, the district court amended the protective order to apply through the conclusion of the appellate process. Dist. Ct. Dkt. 131.

Nor is there any merit to the suggestion that citizens lack a privacy interest in information that appears on the Internet. That theory is one that might appeal to George Orwell,[2] but it is not one that has a basis in law or common sense. "'In an organized society, there are few facts that are not at one time or another divulged to another,'" and "[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." *DOD v. FLRA*, 510 U.S. 487, 500 (1994) (quoting *DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763 (1989)).

The district court upheld EPA's final action without engaging any of these issues. Worse, it committed a fundamental error by conflating the merits of AFBF and NPPC's claim with their standing to bring suit. The decision below should be reversed, and the case should be remanded with instructions to enter a permanent injunction.

JURISDICTIONAL STATEMENT

AFBF and NPPC invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 2201, and 2202. The district court entered a final judgment on January 28, 2015. *See* Dist. Ct. Dkt. 16. AFBF and NPPC filed a

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[2] *See 1984*, at 281 (Signet 1961) ("[I]f you want to keep a secret, you must also hide it from yourself.").

timely notice of appeal on January 29, 2015. *See* Dist. Ct. Dkt. 18. This Court's jurisdiction rests on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. AFBF and NPPC argued below that the disclosure of personal information concerning tens of thousands of family farmers throughout the Nation violated the legally protected privacy interests of their members. The district court disagreed, holding that AFBF and NPPC's members were not injured because their privacy interests are not, in fact, protected by FOIA Exemption 6. But in doing so, the court framed the matter in terms of Article III standing rather than the merits of the FOIA claim, ultimately concluding that it lacked jurisdiction to hear the case.

The first question presented is whether the district court erroneously conflated Article III's requirement of injury-in-fact with the elements of the plaintiffs' cause of action. The answer is *yes*, and the most apposite cases are *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015 (8th Cir. 2012); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009); *Muir v. Navy Federal Credit Union*, 529 F.3d 1100 (D.C. Cir. 2008); and *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998).

2. FOIA Exemption 6 permits agencies to refuse to disclose information if its dissemination would constitute a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Determining whether any

particular information is protected by Exemption 6 requires balancing the privacy interests that will be infringed against the benefit to the public of the proposed disclosure. To trigger the balancing test, the privacy interest must be "substantial," meaning more than *de minimis*. And "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.'" *FLRA*, 510 U.S. at 497 (quoting *Reporters Comm.*, 489 U.S. at 773).

The second question presented, which comprises two parts, is (a) whether the district court erred in holding that AFBF and NPPC's members lack a substantial privacy interest in the information at issue, and (b) if so, whether EPA's decision that the public's interest in disclosure outweighed the privacy interests at stake was contrary to law. The answers to both questions are *yes*, and the most apposite cases are *DOD v. FLRA*, 510 U.S. 487 (1994); *DOJ v. Reporters Committee for Freedom of Press*, 489 U.S. 749 (1989); *Campaign for Family Farms v. Glickman*, 200 F.3d 1180 (8th Cir. 2000); *ACLU v. DOJ*, 750 F.3d 927 (D.C. Cir. 2014); and *Forest Guardians v. FEMA*, 410 F.3d 1214 (10th Cir. 2005).

3. Even when Exemption 6 is found applicable, the agency ordinarily may make a discretionary disclosure. The final question presented is whether the Privacy Act or EPA's internal procedures *require* withholding

the information at issue, such that a permanent injunction is warranted. The answer is *yes*, and the most apposite case is *Glickman*.

STATEMENT OF THE CASE

A. Factual background

The background leading up to this litigation concerns EPA's repeated attempts over the past decade to expand the scope of its regulatory authority beyond what is granted by the Clean Water Act and to regulate animal feeding operations even when those operations are not discharging effluents into the waters of the United States.

1. The 2003 and 2008 CAFO Rules

Sections 301(a) and 402 of the CWA work together to establish the National Pollutant Discharge Elimination System (NPDES), a permit program that limits the discharge of industrial and agricultural wastes into the Nation's waters. As a baseline matter, Section 301(a) prohibits the discharge of any pollutant from a "point source" into the waters of the United States. 33 U.S.C. §§ 1311(a) & 1362(6), (12). A "point source" includes "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged," including any "concentrated animal feeding operation," or "CAFO." 33 U.S.C. § 1362(14). EPA has defined as CAFOs any areas where specified numbers of livestock or poultry are "stabled or confined and fed or maintained" for 45 days or longer during

the year, and where "[c]rops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season." 40 C.F.R. § 122.23(b)(1), (2), (4).

Section 402(a)(1) authorizes EPA to issue a permit allowing the "discharge of any pollutant, or combination of pollutants, notwithstanding [Section 301(a)]," so long as the discharge meets certain requirements specified by the permit. 33 U.S.C. § 1342(a)(1). Permits typically impose limitations on a discharge by establishing maximum rates, concentrations, or quantities of specified constituents at the point where the discharge enters the waters of the United States. *See* 33 U.S.C. § 1342(a)(1), (2); *see also generally Friends of the Earth, Inc. v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 174-176 (2000).

In 2003, EPA promulgated a rule that expressly required all CAFOs to apply for NPDES permits, regardless of whether or not they were discharging into navigable waters. 68 Fed. Reg. 7176, 7266 (Feb. 12, 2003). EPA justified this approach on the theory that every CAFO presumptively has the "potential to discharge." *Id*. at 7266-7267.

The Second Circuit vacated the 2003 CAFO Rule in *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005). The court reasoned that "[t]he Clean Water Act authorizes the EPA to regulate, through the NPDES permitting system, only the discharge of pollutants," and not point

sources generally. *Id*. at 504. "Thus, in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance." *Id*. at 505.

Having failed in their first attempt to expand the scope of their regulations to include non-discharging farms, EPA promulgated a new rule in 2008. 73 Fed. Reg. 70,418 (Nov. 20, 2008). In place of the 2003 Rule's duty to apply for a permit, the 2008 Rule required that a farm apply for a permit if it discharges or "proposes to discharge" pollutants. *Id.* at 70,423. The 2008 Rule provided that any farm will, by definition, "propose to discharge" if it is "designed, constructed, operated, or maintained such that a discharge would occur." *Id*. Each family farmer was required under the 2008 Rule to make an "objective [case-by-case] assessment" of whether it proposed to discharge, considering such factors as climate, hydrology, and topology. *Id*. at 70,424. If a farmer concluded that a discharge would not occur but was later proven wrong, he could be held liable not only for the unpermitted discharge, but also for the failure to apply for a permit. *Id*. at 70,426.

The Fifth Circuit vacated the 2008 CAFO Rule in *National Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011), for substantially the same reasons that the Second Circuit vacated the 2003 CAFO Rule. Citing this Court and the D.C. Circuit's precedents with approval, the Fifth Circuit explained that the CWA "does not empower the agency to regulate point sources themselves," but only "the discharge of pollutants." *Id*. at 750. In other words, "'before any discharge, there is no point source' and the EPA does not have any authority over a CAFO." *Id*. at 751.

2. The CAFO Reporting Rule & EPA's data collection

At the same time, certain environmental groups objected that the 2008 CAFO Rule had not gone far enough. Nagle Decl. ¶ 16 (SA34).[3] While AFBF and NPPC's challenge to the 2008 Rule was pending in the Fifth Circuit, EPA entered into a settlement agreement with the environmental groups. *Id*. As part of that settlement, EPA agreed to propose a new rule. Rather than requiring farms to apply for NPDES permits, the so-called "CAFO Reporting Rule" would have required all large- and medium-sized CAFO farmers (discharging or not) to provide the agency with location and contact information and details concerning the type and number of animals and the size of the property—the same kind and quantity of information required by NPDES permit applications, which, of course,

[3] We cite the Separate Appendix as SA# and the Addendum as A#.

EPA could no longer insist that non-discharging CAFOs submit. *See* 76 Fed. Reg. 65,431 (Oct. 21, 2011); *see also* Nagle Decl. ¶ 18 (SA35).

EPA agreed that it would release the information it compiled under the CAFO Reporting Rule to the public. Nagle Dec. ¶ 16 (SA34). In proposing the CAFO Reporting Rule, however, EPA expressly recognized that the dissemination of such information would "raise security or privacy concerns . . . [for] family farmers." 76 Fed. Reg. at 65,438.

Various groups (including appellants) objected to the CAFO Reporting Rule, which EPA withdrew in 2012. Nagle Decl. ¶ 21 (SA37); 77 Fed. Reg. 42,679 (July 20, 2012). In its stead, EPA committed "to work with its federal, state, and local partners to obtain existing information" on family farms from state authorities, rather than collecting the information directly, itself. 77 Fed. Reg. at 42,682; *see also* Nagle Decl. ¶ 21 (SA37). To that end, EPA entered into a Memorandum of Understanding with the Association of Clean Water Administrators (ACWA), a professional organization whose membership includes state and interstate water pollution control administrators. 77 Fed. Reg. at 42,681; SA92-93.

With ACWA's cooperation, EPA undertook a comprehensive effort to gather information, beginning with a series of forty-four conference calls with state employees to collect information on family farms from state files. Nagle Decl. ¶¶ 28-30 (SA39-41). As a result of those calls, EPA

obtained government-compiled information from twenty-seven States. *Id.* ¶ 29 (SA40-41). Beyond information collected in response to its conference calls, EPA collected information from eight other States' websites, and it searched its own systems of records for information from two other States. *Id.* ¶ 30 (SA41). It also searched its own systems of records to identify "information gaps" in the data it had received from the States. *Id.* Although EPA has described all of the data it collected as "CAFO information," it has acknowledged that it received "additional information about non-CAFO facilities as well." Nagle Decl. ¶ 29 n.1 (SA40). EPA has acknowledged further that its data collection efforts were designed to obtain information on *all* family farms "whether or not they have NPDES permits." *Id.* ¶ 16 (SA34).

As a result, EPA now has comprehensive information on tens of thousands of family farms throughout thirty-seven States. The information includes the names of individual farmers (*e.g.*, SA195, SA204, SA220, SA224); their home addresses (*e.g.*, SA197, SA208, SA212, SA223); their cellular and home phone numbers (*e.g.*, SA200, SA204, SA223, SA228); their personal email addresses (*e.g.*, SA209); the GPS coordinates of their farms, which typically are their homes (*e.g.*, SA198, SA213, SA218, SA222); and information including animal headcounts and acreage, from which sensitive financial information can be inferred (*e.g.*, SA196, SA204,

SA210, SA226). *See generally* SA195-SA228 (small excerpt of sealed disclosures).[4] Because many family farmers live on their farms, that information is highly personal in nature—many of the phone numbers ring in their family kitchens, many of the GPS coordinates point to their front doors, and many of the email addresses are directed to their living room computers. *See* Lunemann Decl. ¶ 6 (SA20); Grommersch Decl. ¶ 6 (SA181); Anderson Decl. ¶ 6 (SA184); Rydberg Decl. ¶ 6 (SA187); Trebesch Decl. ¶ 6 (SA190); Krohn Decl. ¶ 6 (SA193).

3. The FOIA requests

Once EPA compiled its enormous trove of personal information about family farms, environmental groups began filing FOIA requests. Earthjustice submitted a FOIA request to EPA seeking a host of information about farms, including "records relating to and/or identifying existing sources of information about CAFOs, including the AFOs themselves." SA99. The following month, the Natural Resources Defense Council and Pew Charitable Trusts jointly filed a similar FOIA request seeking detailed farm information, including "[t]he legal name of the owner of the

[4] The disclosures were made in the form of electronic Excel spreadsheets, some of which were thousands of pages long. The excerpts reproduced in the appendix, which have been excerpted and formatted to fit on letter-sized pages, represent a miniscule sample of the data that EPA released. These very limited excerpts are intended only to give the Court a general sense of the scope and content of the disclosures and are not remotely comprehensive.

CAFO . . . their mailing address, email address, and primary telephone number" and "[t]he location of the CAFO's production area, identified by latitude and longitude and street address." SA106.

EPA responded to the requests by releasing all of the data concerning CAFOs and other farms that it had received from twenty States. Nagle Decl. ¶¶ 34-35 (SA44-45). EPA also released the data it had collected on its own from state websites, EPA records systems, and EPA regional offices. *Id*. The information was released as a collection of Excel spreadsheets comprising a complete compilation of the data, organized on a state-by-state basis. Nagle Decl. Ex. 16 (filed in the district court under seal).

EPA failed to conduct a review of the information prior to its release to identify personal information or consider whether such information should be released under FOIA Exemption 6, the Privacy Act, and agency regulations. Nagle Decl. ¶¶ 37-38 (A15-16; SA46-47).

EPA notified AFBF, NPPC, and other agricultural groups of the FOIA requests one week after the initial disclosure, after business hours on a Friday. SA122-123. AFBF and NPPC objected to the releases. SA125-126. They argued, among other things, that EPA had failed to consider FOIA Exemption 6, which prohibits the agency from releasing personal information when disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Although EPA insisted

that all of the information it released was "publicly available," it agreed to reexamine the release. SA127-128.

In a letter dated April 4, 2013, EPA issued its final decision concerning the disclosure of farmers' personal information under FOIA, largely rejecting AFBF and NPPC's objections. A11-14. The agency gave three principal reasons for finding that the disclosed information does not implicate substantial privacy interests (A12):

1. most of the information is "widely available within the public domain" from "states' websites" and from "the Agency's publicly available ECHO databases";

2. much of the information "is available through mandatory disclosure requirements of the NPDES regulations or similar state permit program disclosure laws"; and

3. as to other information, "[t]he privacy interest in Exemption 6 does not extend to information about corporations and businesses" or to individuals "acting in a business capacity."

EPA further asserted that "[e]ven if there were a substantial privacy interest" in the data at issue, "that interest is outweighed by the public's interest in disclosure." A13. EPA asserted primarily that the disclosures would serve the public interest because it would further the CWA's purpose: There is a "key role [for] and informed citizenry [to play] in helping achieve the goals of the Act." Nagle Decl. ¶ 63 (A23, SA72). Such "public participation," EPA explained, is bound to be "more effective if members of the public have access to . . . CAFO information" (*id.* ¶ 64

(A23-24, SA72-73)) so that they can "more effectively monitor . . . discharges from agricultural operations" (*id.* ¶ 66 (A25, SA74)).

Even under its narrow interpretation of Exemption 6, EPA conceded in the April 4 Letter that when "personal names, phone numbers, email addresses, [and] individual mailing addresses" were "neither available on the EPA or state websites nor subject to mandatory disclosure requirements under federal or state permitting programs," that information "implicate[d] a substantial privacy interest that outweighs any public interest in disclosure." A12. On that basis, the agency agreed to "redact portions of the data provided by ten states." A14; *see, e.g.*, SA214-215.[5]

After admitting its error, EPA asked the FOIA requesters to return their copies of the prior releases and provided them with a new, partially redacted batch of data. Nagle Decl. ¶ 42 (A18-19, SA49-50). The amended release withheld some personal information of certain farmers in ten States. *Id.* ¶ 76 (SA80). The personal information from the other nineteen States remained unredacted. *Id.* ¶¶ 19, 56-59 (SA35-36, SA58-70).

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[5] Shortly after the completion of summary judgment briefing below, EPA also revised its proposed NPDES Electronic Reporting Rule to "address comments regarding the privacy interests of unpermitted" farms. 79 Fed. Reg. 71,066, 71,075 (Dec. 1, 2014). In particular, it proposed to "mask all facility identifying information for this subset of facilities," including the names, GPS coordinates, individual contact names, and telephone numbers. *Id.*

Later that month, EPA again amended its response to the FOIA requests, admitting that it should have redacted additional information under its own Exemption 6 analysis. Nagle Decl. ¶ 49 (A20, SA54). EPA's second response enclosed a disk with another redacted release and requested the return of previously released disks containing prior releases. *Id*. EPA did not, however, revise or reconsider its policies governing the release of farmers' personal information.

Since releasing the redacted information in April 2013, EPA has collected additional information pertaining to farmers in six other States. Nagle Decl. ¶ 50 (A20, SA54). Several pending FOIA requests seek the release of that information. *Id*. ¶ 51(d) (A21, SA55).

B. Procedural background

AFBF and NPPC filed this "reverse" FOIA lawsuit under the Administrative Procedure Act, challenging EPA's disclosure of family farmers' private information. *See Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1184 (8th Cir. 2000) ("reverse FOIA actions . . . are brought under the APA . . . to prohibit disclosure"). They "seek to prohibit the public disclosure of personal information identifying citizens, such as their names, home addresses, home contact information, and GPS coordinates of their homes." Compl. ¶ 66 (SA13) (emphasis omitted). AFBF and NPPC allege, in particular, that "EPA . . . is refusing to apply FOIA Exemption 6

in circumstances where it should be used to protect the personal information of farmers," in contravention of the law. *Id.* ¶ 71 (SA14).

After several environmental groups intervened (Dist. Ct. Dkt. 52), the parties cross-moved for summary judgment (Dist. Ct. Dkts. 84, 91, 98). In support of its own motion, and in opposition to EPA and the intervenors' motions, AFBF and NPPC filed declarations of six family farmers. Dist. Ct. Dkts. 87-1, 105-1. The declarants explained that they or their loved ones lived on their farms, and that the information compiled and released (or proposed to be released) by EPA was both personal and private. Lunemann Decl ¶ 6. (SA20); Grommersch Decl. ¶ 6 (SA181); Anderson Decl. ¶ 6 (SA184); Rydberg Decl. ¶ 6 (SA187); Trebesch Decl. ¶ 6 (SA190); Krohn Decl. ¶ 6 (SA193). Of particular importance, while some of the declarants stated that they have individual NPDES permits, others did not. *Compare* Lunemann Decl. ¶ 4 (SA19); Anderson Decl. ¶ 4 (SA183); Trebesch Decl. ¶ 4 (SA189); Krohn Decl. ¶ 4 (SA192) *with* Grommersch Decl. ¶¶ 4-5 (SA180); Rydberg Decl. ¶¶ 4-5 (SA186-187).

The district court granted summary judgment to EPA and the intervenors. The court reasoned that AFBF and NPPC had "fail[ed] to establish how the EPA's [release and] potential release of already public information constitutes a loss of control over [their members'] personal information." A6. The court incorrectly believed that all of the information was already

public because "[a]ll six declarants acknowledge that they provided the physical address and a description of their farms to government officials as part of the NPDES permit process," which is "required to be public by law." *Id*. (citing 40 C.F.R. § 123.41(a)).

The district court rejected AFBF and NPPC's argument that "a farmer's privacy interest in his personal information does not evaporate simply because the farmer is required to disclose certain information to obtain a permit." A6-7. On this score, the district court concluded that *Department of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749 (1989), "is distinguishable on several grounds." A7. Although the Supreme Court held in *Reporters Committee* that individuals continue to have a protected privacy interest in personal information that is publicly available in "scattered . . . bits" of data that are "difficult to obtain," the district court believed that holding to be obsolete because it was reached "well before widespread use of the internet." *Id*. That distinction mattered, in the district court's view, because "the information Plaintiffs seek to protect can be found on the internet," making it "easily accessible and widely available." A8.

Having determined that AFBF and NPPC's members lack a protected privacy interest in the information at issue, the district court did not, however, grant judgment on the merits. Instead, it concluded that AFBF

and NPPC had "fail[ed] to demonstrate an actual or imminent injury" (A6), and that "prohibiting the EPA's distribution of already public information will [not] redress the speculative injuries [that AFBF and NPPC] currently allege" (A9). The court therefore granted judgment to EPA and the intervenors on the ground that "Plaintiffs do not have constitutional standing in this matter." A9.

SUMMARY OF THE ARGUMENT

I. The district court erred in dismissing this lawsuit for lack of standing. AFBF and NPPC alleged that EPA's disclosure of personal information about family farms has violated their members' privacy rights, which are protected by FOIA Exemption 6. That is a self-evident description of an actual, concrete, and particularized invasion of a legally protected interest. This is not a case in which AFBF and NPPC's members have a mere academic interest in the subject matter of this case; an opinion on the merits would not be merely advisory. On the contrary, AFBF and NPPC's members have a direct stake in the outcome of this litigation because they claim that they are being adversely affected by EPA's disclosures of their private information.

In nevertheless dismissing for lack of standing, the district court sided with EPA *on the merits*, concluding that—because the requested information has already been publicly disclosed in applications for regula-

tory permits—AFBF and NPPC have not shown that their members were, in fact, injured by the disclosures. But, on its face, that holding is a determination on the merits that the disclosures were not a "clearly unwarranted invasion of personal privacy" within the meaning of FOIA Exemption 6, and not a determination that appellants lack standing. The court's conclusion is wrong on its own terms, as we demonstrate in Section II. But besides that, it is a decision on the merits of AFBF and NPPC's underlying claim, and it must be evaluated as such.

II. On the merits, the district court (and EPA before it) was wrong to hold that farm families have forfeited any privacy interest in their personal data. As a threshold matter, there is no denying that there is a strong privacy interest in information concerning the home, like that at issue. And it is no answer to say that the information here actually concerns businesses rather than individuals. For the large majority of family farmers, their businesses *are* their homes. The information sought by the FOIA requesters thus does not point to lifeless office buildings or nameless secretaries' desks, as "business" information may in other cases. Rather, it points to front doors and kitchen telephones; to front yards and home computers. As this Court held in a similar case involving family farms, Exemption 6 does not tolerate overly technical distinctions between businesses and homes in circumstances like these.

Nor is it an answer to say that farm families have already disclosed personal information in public permit applications. The Supreme Court has repeatedly held that the availability of personal information in scattered public records does not destroy an individual's privacy expectations concerning that information, especially when it stands to be disclosed as part of a massive government compilation of data. Nor does it matter that state regulatory agencies have made some of the information available online. Personal information is ubiquitous on the Internet; if the mere appearance of information on a website destroyed any continuing privacy interest in that information, privacy would be dead. The Supreme Court's FOIA precedents foreclose that conclusion.

Against the substantial privacy interests at stake, EPA must weigh the public's interest in the disclosures. But the only relevant consideration on that score is whether disclosure of family-farmer information will shed light on EPA's performance of its statutory duties. It plainly will not—dissemination of private information like farmers' phone numbers and home addresses sheds not one photon of light on *EPA*'s conduct.

In fact, there is just one purpose that disclosure of the requested information will serve: to put in the hands of environmental activists information that will help them to investigate and harass family farms on their own, in their efforts to bring private lawsuits against family farmers.

EPA has admitted as much. But facilitating interest-group litigation is simply not a cognizable public-interest consideration under FOIA. The balance of interest thus weighs decisively in favor of finding that the requested information is protected by Exemption 6.

III. Exemption 6 does not, on its own terms, require EPA to withhold protected information; rather, it exempts protected information from mandatory disclosure, leaving to the agency's discretion the question of whether to withhold or disclose. There are two circumstances, however, in which an agency *must* withhold information subject to Exemption 6: when the agency, in exercise of its discretion, adopts a categorical rule requiring withholding, and when the information is protected by the Privacy Act. Both circumstances apply here. The Court accordingly should reverse the district court's order dismissing this case for lack of jurisdiction and remand with instructions to enter a permanent injunction.

STANDARD OF REVIEW

This Court "review[s] the district court's grant of summary judgment based on standing de novo." *Oti Kaga, Inc. v. S.D. Hous. Dev. Auth.*, 342 F.3d 871, 877 (8th Cir. 2003). In cases "under the Administrative Procedure Act (APA)," this Court "'review[s] the district court's [merits] decision de novo, making [its] own independent review of the [agency]'s decision.'" *St. Luke's Methodist Hosp. v. Thompson*, 315 F.3d 984, 987 (8th Cir. 2003)

(quoting *Shalala v. St. Paul-Ramsey Med. Ctr.*, 50 F.3d 522, 527 (8th Cir. 1995)). Under the APA, courts review agency actions to determine whether they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a).

ARGUMENT

I. AFBF AND NPPC HAVE ARTICLE III STANDING

In granting judgment on grounds that AFBF and NPPC failed to establish that their members suffered a constitutionally cognizable injury, the court impermissibly conflated standing with the merits. In actuality, the district court's decision represents a judgment on the merits, and it should be understood as such.

1. "The heart of standing . . . is the principle that in order to invoke the power of a federal court, a plaintiff must present a 'case' or 'controversy' within the meaning of Article III of the Constitution." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591 (8th Cir. 2009). Article III standing thus requires that the plaintiff have a "personal stake in the outcome of the controversy," so as to avoid advisory opinions concerning abstract disagreements. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975), and citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974)).

To ensure that federal courts do not engage in advisory decision-making, Article III requires that plaintiffs allege "'(1) injury in fact, (2) a causal connection between that injury and the challenged conduct, and (3) the likelihood that a favorable decision by the court will redress the alleged injury.'" *Iowa League of Cities v. EPA*, 711 F.3d 844, 869 (8th Cir. 2013) (quoting *Young Am. Corp. v. ACS, Inc.*, 424 F.3d 840, 843 (8th Cir. 2005) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992))). In an APA case like this one, the three standing factors additionally "reflect[] the statutory requirement that a person be 'adversely affected' or 'aggrieved,' and . . . serve[] to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem." *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973).

"The standing inquiry is not, however, an assessment of the merits of a plaintiff's claim." *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1023 (8th Cir. 2012). Thus, in evaluating the three standing elements, courts must "take care not to conflate a standing inquiry with a merits inquiry." *Beyond Sys., Inc. v. Kraft Foods, Inc.*, 777 F.3d 712, 716 (4th Cir. 2015); *accord Braden*, 588 F.3d at 591 (courts must not "conflate Article III's requirement of injury in fact with a plaintiff's potential causes of action"). Instead, to avoid "'decid[ing] the questions on the merits for or

against the plaintiff, [the Court] *must . . . assume that on the merits the plaintiffs would be successful in their claims*'" (*Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1106 (D.C. Cir. 2008) (emphasis added)) and ask, against that assumption, whether the elements of standing are satisfied.

2. There is no serious question that each of the three standing requirements is satisfied here. The complaint alleges that EPA's disclosures invaded the protected privacy interests of AFBF and NPPC's members. "Release of this information to FOIA requesters," the complaint explains (and the Court must assume for purposes of evaluating standing), "is a clearly unwarranted invasion of farmers' privacy" within the meaning of FOIA Exemption 6. Compl. ¶ 16 (SA4).

That plainly describes an "actual," "concrete and particularized" "invasion of a legally protected interest." *Lujan*, 504 U.S. at 560. Not only is the asserted privacy interest expressly protected by 5 U.S.C. § 552(b)(6), but "[p]rivacy of personal matters is an interest in and of itself," protected by both the Constitution and the common law. *Plante v. Gonzalez*, 575 F.2d 1119, 1135 (5th Cir. 1978). And because AFBF and NPPC's allegations relate to both past disclosures and threatened future disclosures of specific information, the invasion of the legally protected privacy interests of AFBF and NPPC's members is undeniably "concrete" and "actual." *Lujan*, 504 U.S. at 560.

This is not a case, in other words, in which the alleged injuries are merely "conjectural or hypothetical." *Lujan*, 504 U.S. at 560. AFBF and NPPC's members have a "direct stake in the outcome of a litigation" because the complaint alleges (and the Court must assume) that they are being "adversely affected" by disclosure of their private information. *SCRAP,* 412 U.S. at 689 n.14. When plaintiffs "'are directly affected by the laws and practices against which their complaints are directed,'" that "surely suffice[s] to give the parties standing to complain." *Valley Forge Christian College v. Am. United for Separation of Church and State*, 454 U.S. 464, 486 n.22 (1982).

Thus, AFBF and NPPC obviously have, through and on behalf of their members, a satisfactory stake in the outcome of this litigation.[6]

3. In holding otherwise, the district court asserted that all of the data in question "was already publicly available from state databases," and that "EPA's distribution of already public information does not

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[6] AFBF and NCCP's standing is based on the "associational standing" doctrine, which requires that their "'members would otherwise have standing to sue in their own right, the interests at stake are germane to [AFBF and NCCP's] purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Iowa League*, 711 F.3d at 869 (quoting *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 181 (2000)). There is no dispute that all three requirements for associational standing are satisfied here. Accordingly, the inquiry is limited only to whether AFBF and NPPC's *members* satisfy the elements of *individual* standing.

establish an injury" because it does not implicate AFBF's or NPPC's members' privacy interests. A3, 8.

Each aspect of that conclusion—both the underlying factual predicate and the legal conclusion drawn from it—is unequivocally wrong, as we demonstrate in Section II. For now, however, it suffices to observe that the district court's reasoning was addressed, on its face, not to the question of standing, but to the merits of the underlying controversy.

The question whether AFBF and NPPC's members actually *do* have a protected privacy interest is precisely the question put at issue by the complaint. For its part, the court simply rejected AFBF and NPPC's interpretation of Exemption 6, holding that the disclosure of the information at issue was *not* a "clearly unwarranted invasion of personal privacy" within the meaning of 5 U.S.C. § 552(b)(6). But that conclusion goes to whether EPA's disclosure violated the law, and not to whether AFBF and NPPC's members have a concrete stake in the outcome of this case.

The district court thus committed an error that this Court has often warned against: It "conflate[d] Article III's requirement of injury in fact with [the] plaintiff's potential cause[] of action." *Braden*, 588 F.3d at 591. That was mistaken because, although "federal standing 'often turns on the nature and source of the claim asserted,' it 'in no way depends on the merits of the [claim].'" *ASARCO Inc. v. Kadish*, 490 U.S. 605, 624 (1989)

(quoting *Warth*, 422 U.S. at 500). *See also Braden*, 588 F.3d at 591 (similar) (citing *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152-154 (1970)). Were it otherwise, "a party [would have to] 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) (emphasis omitted). That would make no sense.

The settled rule, instead, is that a "district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (quoting *Bell v. Hood*, 327 U.S. 678, 685 (1946)). That is a perfect description of this case: Appellants would be entitled to relief if Exemption 6 were given the interpretation they advocate. They accordingly have alleged all the facts necessary to satisfy Article III standing, including injury in fact.[7]

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[7] The intervenors argued alternatively that the case is either moot or not yet ripe. Intervenors' MSJ 15-20 (Dist. Ct. Dkt. 93). That is incorrect. The case is not moot because (1) in light of the protective order (*see supra* n.1), EPA can correct (and already has corrected) erroneous disclosures by recalling improperly disclosed information (Nagle Decl. ¶¶ 42, 49 (A18-A20)), and (2) there are additional requests for disclosures of information that has not yet been released (*id.* ¶ 51(d) (A21)). The case is ripe because EPA has undertaken a final agency action, which AFBF and NPPC challenge as a violation of the APA.

II. EPA'S DETERMINATION THAT THE REQUESTED INFORMATION IS NOT PROTECTED BY EXEMPTION 6 WAS CONTRARY TO LAW

The district court thus erred by dismissing AFBF and NPPC's claim as a matter of standing. "A party need not prove that the agency action it attacks is unlawful . . . in order to have standing to level that attack." *La. Energy*, 141 F.3d at 368 (emphasis omitted).

Here, in actuality, the district court's dismissal was predicated on a judgment concerning the *merits* of AFBF and NPPC's claim. But even properly understood as a merits decision, the judgment below must be reversed: The disclosure was a manifest invasion of privacy that in no way serves FOIA's goal of shedding light on government operations. EPA's conclusion that FOIA Exemption 6 does not apply to the disclosed data was therefore not in accordance with law. And because EPA's own procedures prohibit the release of data covered by Exemption 6, a permanent injunction is warranted.

But first, some background on FOIA: Congress enacted FOIA "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). Consistent with that purpose, "the government is required," as a default under FOIA, "to release all requested information upon the demand of any member of the public." *In re DOJ*, 999 F.2d 1302, 1305 (8th

Cir. 1993). Recognizing that certain information should be kept private, however, "Congress carefully structured nine exemptions from the otherwise mandatory disclosure requirements in order to protect specified confidentiality and privacy interests." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220-221 (1978); *see* 5 U.S.C. § 552(b)(1)-(9).

At issue here is so-called Exemption 6, which permits an agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Courts "employ a two-prong inquiry in deciding whether the government has correctly withheld records under Exemption 6." *Cook v. Nat'l Archives & Records Admin.*, 758 F.3d 168, 174 (2d Cir. 2014); *accord, e.g.*, *Prudential Locations LLC v. HUD*, 739 F.3d 424, 429 (9th Cir. 2013) (per curiam).

First, the court must determine whether the information at issue is a "personnel and medical file[]" or "similar file[]." 5 U.S.C. § 552(b)(6). The Supreme Court has given that language a broad reading, explaining that it is satisfied whenever "information which applies to a particular individual is sought from Government records." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982); *see also Cook*, 758 F.3d at 175 ("a record is a 'similar file' if it contains personal information identifiable to a particular person").

Second, if the first requirement is satisfied, the Court "must balance the privacy interest of the individual against the public interest in disclosure." *Glickman*, 200 F.3d at1185; *accord, e.g.*, *Cook*, 758 F.3d at 174. That balancing inquiry requires the court to evaluate "the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny." *Reporters Comm.*, 489 U.S. at 772 (internal quotation marks omitted).

On the privacy side of the scale, the disclosure must threaten to "compromise a substantial, as opposed to *de minimis*, privacy interest." *Cook*, 758 F.3d at 176 (internal quotation marks omitted). Courts routinely find substantial privacy interests in such information as telephone numbers (*e.g.*, *Performance Coal Co. v. DOL*, 847 F. Supp. 2d 6, 17-18 (D.D.C. 2012); *Wade v. IRS*, 771 F. Supp. 2d 20, 26 (D.D.C. 2011)), email addresses (*e.g.*, *Elec. Frontier Found. v. Office of Dir. of Nat'l Intelligence*, 639 F.3d 876, 888 (9th Cir. 2010); *Performance Coal*, 847 F. Supp. 2d at 17-18), and facts concerning the financial condition and financial affairs of individuals (*e.g.*, *Checkbook Ctr. for Study of Servs. v. HHS*, 554 F.3d 1046, 1056 (D.C. Cir. 2009); *Kensington Research & Recovery v. U.S. Dep't of Treasury*, 2011 WL 2647969, at *8-9 (N.D. Ill. 2011)).

On the public-interest side of the scale, "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.'" *FLRA*, 510 U.S. at 497 (quoting *Reporters Comm.*, 489 U.S. at 773). That purpose is served by disclosure of information concerning agency conduct, but *not* "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. Also irrelevant is the extent to which disclosure might serve the purpose of some *other* statute. *FLRA*, 510 U.S. at 499.

Measured within this framework, the disclosures here constitute a clearly unwarranted invasion of privacy protected by Exemption 6.

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

We begin with the question whether AFBF and NPPC have demonstrated the invasion of a substantial privacy interest, which served as the basis for EPA and the district court's decision. They assuredly have.

1. The information disclosed by EPA in this case is undeniably both private and personal. It includes the names of individual farmers (*e.g.*, SA195, SA204, SA220, SA224); their home addresses (*e.g.*, SA197, SA208, SA212, SA223); their cellular and home phone numbers (*e.g.*, SA200,

SA204, SA223, SA228); their personal email addresses (*e.g.*, SA209); the GPS coordinates of their farms, which typically are their homes (*e.g.*, SA198, SA213, SA218, SA222); and information including animal head-counts and acreage, from which sensitive financial information can be inferred (*e.g.*, SA196, SA204, SA210, SA226). *See generally* SA195-SA228 (small excerpt of sealed disclosures).

It is settled that the disclosure of "information such as names, addresses, and other personal identifying information," like the data at issue, "creates a palpable threat to privacy." *Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 391 (D.C. Cir. 1987). Thus, in *FLRA*, the Supreme Court did not hesitate to hold that there is a "not insubstantial" privacy interest in "home addresses" and telephone numbers, notwithstanding that such information is often "publicly available through sources such as telephone directories and voter registration lists." 510 U.S. at 500. *Accord Bibles v. Or. Natural Desert Ass'n*, 519 U.S. 355, 356 (1997) (per curiam) (summarily reversing the Ninth Circuit for upholding the disclosure of a Bureau of Land Management mailing list).

Other courts likewise have recognized the strong privacy interests that arise "in the context of an individual residence." *Forest Guardians v. FEMA*, 410 F.3d 1214, 1220 (10th Cir. 2005). "'In our society, individuals generally have a large measure of control over the disclosure of their own

identities and whereabouts,'" and "'there are few things which pertain to an individual in which his privacy has traditionally been more respected than his own home.'" *Id.* (quoting *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 35 (D.C. Cir. 2002) and *Heights Community Congress v. Veterans Admin.*, 732 F.2d 526, 529 (6th Cir. 1984)). No less can be said about the family farm.

That is all the more true because the disclosed information includes such facts as animal headcount and acreage, from which a farmer's financial condition and income can easily be deduced. It hardly requires stating that "an individual has a substantial privacy interest under FOIA in his financial information, including income." *Consumers' Checkbook,* 554 F.3d at 1050. And, in the farming context, financial information includes such facts as irrigation practices and farm acreage, which could "in some cases allow for an inference to be drawn about the financial situation of an individual farmer." *Id.* (quoting *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1230 (D.C. Cir. 2008)).

2. In response to these concerns, EPA stated in its decision-making process its belief that "[t]he privacy interest in Exemption 6 does not extend to information about corporations and businesses" like commercial farms or to information about an individual when "he or she is acting in a business capacity." A12-13 (citing *Sims v. CIA*, 642 F.2d 562, 575 (D.C.

Cir. 1980)); *see also* Nagle Decl. ¶ 62 (A22, SA71). But that is self-evidently mistaken.

It is well recognized that business information is often "easily traceable to an individual," particularly when the information concerns "individually owned or closely held" businesses. *Multi Ag Media*, 515 F.3d at 1228. Thus, in certain circumstances, disclosure of business records *can* "jeopardize[] a personal privacy interest that Exemption 6 protects." *Id.*; *accord Consumers' Checkbook,* 554 F.3d at 1050.[8]

That is the case here. Most businesses' mailing addresses lead to offices or factories; their telephones are answered by receptionists and secretaries; and their GPS coordinates point to parking lots or security-guard booths. But family farms are fundamentally different—for the great majority of them, *their businesses are their homes*. Their driveways lead not only to their fields and their hen houses, but also to the swing sets where their children play. Their business telephone numbers are answered not by nameless receptionists in florescent-lit offices, but by their spouses in their family kitchens, and their children in their upstairs bedrooms. EPA relies on bureaucratic euphemisms like "CAFO" to obscure

[8] *Sims* does not suggest otherwise. There, the D.C. Circuit held that disclosure of information that has an "essentially business nature" but is not "associate[d] . . . with any aspect of [individuals'] lives" is not protected by Exemption 6. 642 F.2d at 574. That does not remotely describe the information at issue here.

these facts, to make family farms sound like impersonal objects of government regulation. But the reality is that detailed information about the *farm* is one-and-the-same as detailed information about the *farmer* and his "personal and family life." *Sims*, 642 F.2d at 575. That such information happens also to describe how farmers make their livings is wholly irrelevant—this is the heartland of Exemption 6.

This Court came to precisely that conclusion in *Glickman*, which likewise involved a reverse-FOIA suit challenging the disclosure of information concerning family farms. There, this Court declared that the "substantial privacy interest" that farmers have in information about their farms "is not diminished" by the fact that the information concerned the farmers "in their business or entrepreneurial capacities." 200 F.3d at 1188. "An overly technical distinction between individuals acting in a purely private capacity and those acting in an entrepreneurial capacity," this Court explained, "fails to serve the exemption's purpose of protecting the privacy of individuals." *Id.* at 1189. "Whether petitioners sold pork as an individual, a sole proprietor, or as a majority shareholder in a closed corporation does little to diminish the fact that [the] disclosure" there revealed private facts about individual farmers. *Id.* Just so here.

If anything, the fact that the disclosed information concerns farmers as both individuals and businesses is a *greater* reason to find the infor-

mation protected, not the other way around. That is because "whether disclosure of a list of names is a significant or a *de minimis* threat depends upon the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue." *Ray*, 502 U.S. at 176 n.12 (internal quotation marks omitted).

Here, the release of the names, addresses, and other personal information has associated individual homes and families with farming operations, which subjects them—as is the precise point of the release (Nagle Decl. ¶¶ 63-66 (A23-25, SA72-74))—to added scrutiny by activist groups with a documented history of trespassing and other kinds of harassment. For example, Kathlyn Phillips—in her declaration supporting the intervenors' motion to intervene—describes her "aerial and ground investigations" of farms. Phillips Decl. ¶¶ 6, 15 (SA22, 24). Consistent with that description, Rick Grommersch described an instance when self-professed members of an "environmental activist group," aided by GPS, trespassed on his land "to take pictures" of his family farming operations. Grommersch Decl. ¶ 11 (SA181). EPA thus rightly acknowledged in the preamble to the CAFO Reporting Rule that disclosing personal data about farms would pose "security and privacy concerns for . . . family farmers." 76 Fed. Reg. at 65,438.

EPA's release of the data at issue has put targets on the front doors of thousands of family farms across the country. And it is a central purpose of Exemption 6 to forestall the "harassment" that might result from the disclosure of their personal information. *See, e.g.*, *Long v. OPM*, 692 F.3d 185, 197 (2d Cir. 2012); *Moore v. Bush*, 601 F. Supp. 2d 6, 14 (D.D.C. 2009); *Hall v. DOJ*, 552 F. Supp. 2d 23, 30 (D.D.C. 2008); *O'Keefe v. DOD*, 463 F. Supp. 2d 317, 324 (E.D.N.Y. 2006). Against this backdrop, to suggest that the association of private residences with farming operations is a basis for finding detailed information about the farm *less* private would turn Exemption 6 on its head.

B. EPA's dismissal of family farmers' privacy interests was arbitrary, capricious, and contrary to law

Both EPA and the district court brushed these powerful privacy interests aside because they believed that the disclosed data was already "within the public domain" (A12) and comprised "already public information" (A6). EPA gave, and the district court adopted, two reasons for thinking that the disclosed data is already public: *First*, the CWA requires public dissemination of the information at issue, and *second*, the information is widely available over the Internet. Neither of those rationales holds up to scrutiny.

1. The Clean Water Act's permit disclosure requirements do not apply to many of the farms at issue

Take first the suggestion that the relevant information was already mandatorily made public by the Clean Water Act. Observing that "[a]ll six declarants acknowledge that they provided the physical address and a description of their farms to government officials as part of the NPDES permit process," the district court concluded that "[t]his information is required to be public by law." A6 (citing 40 C.F.R. § 123.41(a)).

But it simply is not true that all six declarants admitted to having provided information on their farms "as part of the NPDES permit process." In fact, Rick Grommersch (SA180) and David Rydberg (SA186) both explained that they submitted information to state authorities under independent *state* laws and regulations, not as part of the NPDES program. And EPA itself has acknowledged that its collection efforts were designed to capture information on "all owners or operators of CAFOs, whether or not they have NPDES permits." Nagle Decl. ¶ 16 (SA34); *cf. id.* ¶ 19 (SA35) (similar). It goes without saying that NPDES permit disclosure rules do not apply to information collected *outside* the NPDES program. In fact, some of the disclosures cover more than just non-permitted farms. The Arkansas database—which includes nearly 30,000 entries, spanning almost 3,500 printed pages—includes such facilities as hospitals,

rice mills, landfills, drycleaners, automotive body shops, campgrounds, and shoe factories. *See* SA199-202.

In short, many farms are not covered by NPDES permits (because they do not need them), and thus not all farm families have been required to disclose their personal data in NPDES permit applications. The district court's contrary conclusion (A6) was flat wrong.[9]

2. Even farms subject to mandatory disclosure under the NPDES program maintain a privacy interest in their personal information

For its part, EPA cited the mandatory disclosure of NPDES permit information under the CWA as a rationale for disclosing data concerning farms in just four States (Oregon, North Dakota, South Dakota, and Wyoming), where state authorities do not publish farm information on the Internet. A12 & n.11; *see also* Nagle Decl. ¶ 58(a)-(d) (SA62-63). But even supposing that all of the farms in those States *were* subject to regulatory disclosure requirements, that would be no basis for justifying the disclosures even for the farms in those States. It was long ago settled that

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[9] To be sure, 40 C.F.R. § 123.41(a) says that the States must make available to EPA on its request "information obtained or used in the administration of [the State's NPDES] program," which, once collected, "EPA *may* make . . . available to the public without further notice" (emphasis added). But—even assuming for the sake of argument that the CWA authorizes EPA to collect and disclose such information—that language is permissive, not mandatory. Because EPA has not, as a matter of fact, released the information at issue pursuant to Section 123.41(a), that provision has no application here.

individuals have a continuing privacy interest in their personal information, regardless of whether it was once made public.

In *Reporters Committee*, certain journalists sought the disclosure of the FBI's database of fingerprints and other criminal identification records, which included information provided to the FBI by state and local law enforcement agencies. 489 U.S. at 751, 757. The court of appeals in that case had "held that Exemptions 6 and 7(C) were inapplicable" to the request because "criminal-history information that is a matter of public record" does not implicate a substantial privacy interest. *Id*. at 759. It thus concluded that the database "should be made available to the general public." *Id*.

The Supreme Court did not hesitate to reverse. There is a "basic difference," the Supreme Court explained, between the technical availability of "scattered bits" of information that "may have been at one time [disclosed in a] public [document]" and that "might [now] be found after a diligent search," on the one hand; and the release, in response to a FOIA request, of a comprehensive "federal compilation" of information bringing together the contents of thousands of such documents in a single repository, on the other hand. *Reporters Comm.*, 489 U.S. at 767. That is because, although an individual file might be "public" in the literal sense, its contents nevertheless enjoy "practical obscurity." *Id*. at 780.

The difference between the availability of one-off public records and the disclosure of massive compilations of records thus turns on the common-sense "distin[ction] between the mere *ability* to access information" from public sources, and "the likelihood of actual public *focus* on that information" when it is disclosed as part of a sprawling FOIA response. *ACLU v. DOJ*, 750 F.3d 927, 933 (D.C. Cir. 2014). For that reason, the "'threat to privacy implicit in the accumulation of vast amounts of personal information'" by the government necessitates recognition of a continued privacy interest "in the nondisclosure of certain information even where the information may have been at one time public." *Reporters Comm.*, 489 U.S. at 767, 770 (quoting *Whalen v. Roe*, 429 U.S. 589, 605 (1977)).

That describes the facts here precisely: Although a farmer's personal information may not be "wholly 'private'" because it was once included on an individual state or federal NPDES permit application, that "does not mean that [the farmer] has no interest in limiting [further] disclosure or dissemination of the information" as part of the massive compilation of information being released in response to the FOIA request subject to challenge here. *Reporters Comm.,* 489 U.S. at 770. EPA's contrary conclusion in its decision-making process below (A12; Nagle Decl. ¶ 58(a)-(d) (SA62-63)) was plainly inconsistent with *Reporters Committee*.

3. Citizens do not lose their privacy interests when their personal information is posted on the Internet

Perhaps for those reasons, EPA made little effort to determine whether any other particular farms were required to publicly disclose information under the NPDES program or any other state permitting programs. Instead, it relied, in the main, on its observation that the information was available on state agencies' websites. In EPA's view, any time information is "widely available" on the Internet, "enforcement of [Exemption 6] cannot fulfill its purposes" because the information is no longer "private." A12 (citing *Niagara Mohawk Power Corp. v. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 2009)); *see also* Nagle Decl. ¶¶ 42, 45 (SA49-52). That very troubling conclusion is plainly wrong.

EPA's position that citizens have no privacy interest in information available on the Internet would come as a surprise to most Americans. On that theory, virtually no one's home address or telephone number would be subject to protection under Exemption 6 because the White Pages now makes them available online. *See, e.g.*, perma.cc/L54P-CHH4. Neither would many people's personal email addresses, which are often made public on Facebook. For that matter, in EPA's view, the cost of home-owners' houses, and the sizes of their mortgages and property tax bills, would be wholly unprotected by Exemption 6 because many States have

made real-property searches available on their websites. *See, e.g.*, perma.cc/5S3L-ACLZ.

It would be absurd to suggest that all such information may now be compiled and disclosed by federal government agencies for the benefit of public interest groups simply because the information is available on the Internet. No, "[EPA]'s argument that such personal information is not 'private' because the information is widely available to the public and easily accessible is foreclosed by Supreme Court precedent." *Forest Guardians*, 410 F.3d at 1220. As the Supreme Court has held, "[i]t is true that home addresses often are publicly available through sources such as telephone directories and voter registration lists, but '[i]n an organized society, there are few facts that are not at one time or another divulged to another,'" and "[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." *FLRA*, 510 U.S. at 500 (quoting *Reporters Comm.*, 489 U.S. at 763).

That is no less true in the Internet age than it was at the times when *FLRA* and *Reporters Committee* were decided. As the D.C. Circuit more recently explained in *ACLU*, the availability of information on the web—regardless whether it is from "readily accessible . . . computerized government services like PACER," or "a simple Google search for [a] per-

son's name"—does not make an individual's privacy interest in that information "disappear." 750 F.3d at 932. Citizens have not "surrender[ed their] reasonable expectation of privacy to the Internet." *Id* at 933.

That is so for the same basic reasons that explain the Supreme Court's decision in *Reporters Committee*: There is a crucial "distin[ction] between the mere *ability* to access information" on some obscure state agency website, and "the likelihood of actual public *focus* on that information" when it is disclosed as part of a huge FOIA disclosure. *ACLU*, 750 F.3d at 932. The threat to privacy here arises, in other words, not just from the nature of the information taken in isolation, but from the governmental compilation and mass disclosure of the information, which has been released in a manner that is designed to bring public scrutiny to it. *See Ray*, 502 U.S. at 176 n. 12. Both EPA and the district court wholly disregarded these points and were wrong to brush aside the very serious privacy interests at stake here.

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

Against the strong privacy interests at issue, the court must weigh the public's interest in the releases. But the public's interest in information about private family farmers is hardly measurable, and it does not come close to tipping the balance in favor of disclosure.

As we noted earlier, "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.'" *FLRA*, 510 U.S. at 497 (quoting *Reporters Comm*, 489 U.S. at 773). "That purpose is served by disclosure of" information concerning *agency* conduct, "but not '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.'" *Union Leader Corp. v. U.S. Dep't of Homeland Sec.*, 749 F.3d 45, 54 (1st Cir. 2014) (quoting *Reporters Comm.*, 489 U.S. at 773).

In defending its decision to release information about private family farms collected from regional offices and state agencies, EPA explained that disclosure would help the public "understand[] how the Agency and authorized state are implementing requirements under the CWA," because information concerning "the number, size and location of animal feeding operations in relation to water bodies is integral to understanding how well the EPA is using the full range of the tools available to it." A13.

Hogwash. Learning the name, address, phone number, email address, latitude and longitude, and size of Kim Anderson's pig farm (SA183) or David Rydberg's beef farm (SA186) sheds not even the dimmest ray of light on EPA's "performance of its statutory duties." *Reporters Comm.*, 489

U.S. at 773. While in some cases the disclosed information reveals which farms are permitted and which are not, there is no information from which to discern whether any particular farmer is discharging, properly implementing a nutrient management plan, or managing the farm to prevent discharges.

In fact, there is just *one* purpose that disclosure of private family-farm information serves: to put in the hands of environmental activists information that leads them to farmers' front doors and helps them investigate family farms on their own, in their private efforts to bring private lawsuits against family farmers. *Cf. Waterkeeper Alliance, Inc. v. Hudson*, 2012 WL 6651930 (D. Md. Dec. 20, 2012) (entering a defense judgment in a CWA citizen lawsuit spearheaded by Kathy Phillips, and finding that plaintiffs had not acted "responsibly" in bringing suit).

EPA has admitted as much, explaining that, paramount among the "public interest" considerations weighing in favor of disclosure here was EPA's view that there is a "key role [for] an informed citizenry [to play] in helping achieve the goals of the Act." Nagle Decl. ¶ 63 (A23, SA72). Such "public participation," EPA explained, is bound to be "more effective if members of the public have access to . . . CAFO information" (*id.* ¶ 64 (A23-24, SA72-73)) so that they can "more effectively monitor . . . discharges from agricultural operations" (*id.* ¶ 66 (A25, SA74)). In other

words, public interest groups' ability to bring citizen suits against family farmers is made easier when they are given reams of private and personal information about farmers, including GPS coordinates pointing to their front doors.

That may be so, but providing public interest groups with information concerning private individuals to help those groups file lawsuits is not a cognizable public interest under FOIA. Again, FOIA's sole purpose is to expose *the government* to public scrutiny. *Ray*, 502 U.S. at 173. Thus, "the fact that [the intervenors] are seeking to vindicate the policies behind the [CWA] *is irrelevant to the FOIA analysis*." *FLRA*, 510 U.S. at 499 (emphasis added). Instead, the only question for purposes of the Exemption 6 balancing test is whether disclosure of home addresses and phone numbers will shed light on EPA's performance. It very plainly will not.[10]

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[10] The government has elsewhere disavowed the "derivative use" theory of public interest (*see Ray*, 502 U.S. at 178-179), and the Second, Fourth, Ninth, and Tenth Circuits have all rejected it in varying degrees. *See Associated Press v. DOD*, 554 F.3d 274, 290 (2d Cir. 2009); *Forest Serv. Emps. for Envt'l Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1027-1028 (9th Cir. 2008); *Sheet Metal Workers Int'l Ass'n v. U.S. Air Force*, 63 F.3d 994, 998 (10th Cir. 1995); *Am. Fed'n of Gov't Emps. v. United States*, 712 F.2d 931, 932 (4th Cir. 1983). Application of the derivative use theory here would be especially inappropriate because "'[a]ny additional public benefit the requesters might realize through [their derivative use] is inextricably intertwined with the invasions of privacy that [the disclosures] will work." *Sheet Metal Workers*, 63 F.3d at 998 (quoting *Painting Indus. of Haw. Mkt. Recovery Fund v. U.S. Air Force*, 26 F.3d 1479 (9th Cir. 1994)).

Beyond that, EPA's insistence that the disclosed information is "already public" and "within the public domain" (A12) cuts strongly against its claim that there is a public interest in the disclosure. If FOIA requesters can already obtain from public sources "'the information they seek,'" there is little "'marginal additional usefulness'" (however that usefulness is defined) in the disclosure of such information under FOIA. *Forest Serv. Emps. for Envt'l Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1027 (9th Cir. 2008) (quoting *Painting Indus. of Hawaii Market Recovery Fund v. Dep't of Air Force*, 26 F.3d 1479, 1486 (9th Cir. 1994)). *See also Dep't of Military Affairs v. FLRA*, 964 F.2d 26, 29-30 (D.C. Cir. 1992) (similar, and collecting cases). As the Tenth Circuit put it in *Forest Guardians*, "no public interest exists" in the disclosure of information that is already publicly, electronically available. 410 F.3d at 1219. In such a circumstance, further disclosure "would not, by any stretch of the imagination, facilitate Plaintiff's understanding of 'what the[ ] government is up to.'" *Id*. (quoting *FLRA*, 510 U.S. at 497).

Thus, in a case like this one, "a very slight privacy interest would suffice to outweigh the relevant public interest." *FLRA*, 510 U.S. at 500. Thus, the outcome of the balancing analysis is not a close call: "When," as here, "the subject of a [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. That describes this case exactly. The information is therefore protected by Exemption 6. It was contrary to law for EPA to conclude otherwise, and the district court erred in failing to so hold.[11]

III. EPA'S INTERNAL PROCEDURES AND THE PRIVACY ACT BOTH REQUIRE ENTRY OF A PERMANENT INJUNCTION

A determination that Exemption 6 applies admittedly does not end the matter. FOIA's nine exemptions from mandatory disclosure "were only meant to *permit* the agency to withhold certain information, and were not meant to *mandate* nondisclosure." *Chrysler Corp. v. Brown*, 441 U.S. 281, 293-294 (1979) (emphases added). Thus, even when Exemption 6 is found applicable, an agency ordinarily retains "discretion to disclose [the ex-

[11] To be clear, it is neither our burden nor this Court's obligation to review each of the tens of thousands of data entries, one by one, to determine whether its individual disclosure would be a clearly unwarranted invasion of privacy. As the Supreme Court held in *Reporters Committee*, "categorical decisions may be appropriate," and "individual circumstances [may be] disregarded" when, as here, "the balance characteristically tips in one direction." 489 U.S. at 776. In these circumstances, "it is perfectly appropriate to conclude as a categorical matter that 'production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy,'" without need for line-by-line "ad hoc balancing." *Id.* at 779. *Accord In re DOJ*, 999 F.2d at 1308 (in an Exemption 7 case, holding that FOIA's exemptions do not require "a detailed justification relating to each alleged confidential source" and "permit the government to proceed on a categorical basis in order to justify nondisclosure").

empted] information." *Id.* at 294. But there are two exceptions to that general rule, and both are applicable here.

1. An agency, in exercise of its Exemption 6 discretion, may adopt a regulation or rule of procedure that categorically requires withholding. That was the case in *Glickman*. There, the Department of Agriculture had adopted an internal "discretionary release balancing test" to determine when Exemption 6-protected information should be released. 200 F.3d at 1185. But the test was "almost exactly the same test used to determine whether the petition fell within FOIA's personal privacy exemption in the first place" and differed only in that it tipped the scales further in favor of withholding. *Id.* Thus, this Court concluded, a determination that certain requested information "is subject to FOIA's personal privacy exemption necessarily must also be a determination that USDA should not disclose the petition under its discretionary release regulation." *Id.*

EPA has just such a policy. When it comes to the "withholding of records under a FOIA exemption," EPA procedures list only six exemptions as subject to case-by-case "discretionary" judgments, including "Exemptions 2, 5, 7 (excluding 7(c)), 8 and 9." *See Procedures for Responding to Freedom of Information Act Requests* 10 (July 7, 2005), perma.cc/8J73-8YTS. As to those six "discretionary exemptions" alone, EPA procedures require agency employees reviewing FOIA requests to make case-by-case

judgments and to "withhold records, or portions of records, when they reasonably foresee that disclosure would harm an interest protected by [the applicable] exemption[] or when disclosure is prohibited by law." *Id.* The corollary is that, for Exemptions 1, 3, 4, 6, and 7(c), EPA's policy is *not* to make case-by-case judgments and, instead, to categorically withhold information when any such exemption is found to apply. *Id.*

That corollary is understandable, because there would be no way for EPA to determine that Exemption 6 applies and not also to determine, per force, that "disclosure would harm [the] interest protected by . . . the exemption[]." *Procedures for Responding* 10. After all, deciding that Exemption 6 applies entails concluding that disclosure would be a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Thus any disclosure of information covered by Exemption 6 would necessarily harm the privacy interest that the exemption is designed to protect.

This case is therefore indistinguishable from *Glickman*. "[A] determination in this case that the [information requested] is subject to FOIA's personal privacy exemption necessarily must also be a determination that [EPA] should not disclose the petition under its discretionary release [procedure]." 200 F.3d at 1185. Because Exemption 6 applies here, EPA, "under its own [procedures], may not release the requested information as a matter of discretion." *Id.* at 1189. Thus, this Court should "remand to the

District Court for entry of a permanent injunction prohibiting [EPA] from releasing the information sought by" the FOIA requesters (*id.*) and requiring that it recall its prior disclosures.

2. Even if EPA had not adopted a categorical policy against the disclosure of Exemption 6-protected information, the Privacy Act would apply to prevent the same. That law provides that "[n]o agency shall disclose any record which is contained in a system of records" except "with the prior written consent" of "the individual to whom the record pertains, unless disclosure of the record would be . . . *required* under [FOIA]." 5 U.S.C. § 552a(b)(2) (emphasis added). "The net effect of the interaction between [the Privacy Act and FOIA] is that where the FOIA requires disclosure, the Privacy Act will not stand in its way, but where the FOIA would permit withholding under an exemption, the Privacy Act makes such withholding mandatory upon the agency." *News-Press v. DHS*, 489 F.3d 1173, 1189 (11th Cir. 2007); *accord Cent. Platte Natural Res. Dist. v. Dep't of Agric.*, 643 F.3d 1142, 1148 (8th Cir. 2011).

EPA has acknowledged that it retrieved large amounts of information on individual family farms from its own systems of records. For example, EPA stated that it "retrieved CAFO information directly from its own data systems and websites," including "the Integrated Compliance Information System-NPDES ('ICIS-NPDES')," "the Permit Compliance

System ('PCS')," and the "Enforcement and Compliance History Online ('ECHO')" system. Nagle Decl. ¶¶ 24-25 (SA38-39).

EPA admitted that it searched those systems of records for information on farms in Maine and New York. Nagle Decl. ¶ 30 (SA41). More broadly, the agency "compared the CAFO information it had received from the states and retrieved from the states' websites with information retrieved from the PCS, ICIS-NPDES, and ECHO searches" to identify "information gaps" in the data it had received. *Id.* Thus, EPA conceded that the disclosures it has released included "information collected from . . . EPA's data systems." *Id.* ¶ 34 (SA44); *see also id.* ¶¶ 42 n.9, 44, 54, 57 (SA49-50, SA56-61). Those disclosures were retrieved from EPA's records systems and released without consent, which the Privacy Act forbids. 5 U.S.C. § 552a(b)(2).

In its decision-making process, EPA explained that it did not believe the Privacy Act was applicable because "the Privacy Act only applies to 'individuals,' which has been interpreted by the Office of Management and Budget to not protect information on persons in their 'entrepreneurial capacity.'" A13. But, again, this Court rejected that reasoning in *Glickman*: adhering to "[a]n overly technical distinction between individuals acting in a purely private capacity and those acting in an entrepreneurial capacity" would disserve the privacy interests that the statutory scheme is

meant to protect. 200 F.3d at 1189. That is especially so in this case, where there is no practical difference between family farmers' businesses and their homes.

EPA also asserted that the records at issue "were not stored within a 'system of records' and were not retrievable by a personal identifier." A13-14. But that is demonstrably false. Records are retrievable from the ICIS and PCS systems (perma.cc/R6L3-BLUU) and the ECHO system (perma.cc/6GK7-J7V4) using personal identifiers like the farm's name and address—which, again, are coterminous with most farmers' *personal* name and address. Information on individual farm families is thus retrieved by reference to individual identifying information. *See Doe v. Dep't of Veterans Affairs*, 519 F.3d 456, 463 (8th Cir. 2008) ("[T]he definition for system of records focuses on . . . the ability to retrieve the information by some type of identifying particular that is assigned to an individual.")

The Privacy Act thus applies to all such information—and "[i]n instances where a FOIA exemption prohibits disclosure, 'the Privacy Act makes such withholding mandatory upon the agency.'" *Cent. Platte*, 643 F.3d at 1148 (quoting *News-Press*, 489 F.3d at 1189). On that basis, too, this Court should remand with instructions to enter a permanent injunction requiring EPA to recall its prior disclosures and prohibiting any further releases of family-farm information.

CONCLUSION

The final judgment of the district court should be reversed, and the case should be remanded with instructions to vacate EPA's final decision and to enter an injunction requiring EPA to recall its prior disclosures and prohibiting any further releases of family-farm information.

April 24, 2015

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 13,001 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.

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CERTIFICATE OF SERVICE

I certify that on April 24, 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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