IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AMERICAN FARM BUREAU FEDERATION and NATIONAL PORK PRODUCERS COUNCIL, Appellants, v. U.S. ENVIRONMENTAL PROTECTION AGENCY and GINA McCARTHY, Appellees, AND FOOD & WATER WATCH et al., Intervenors.	Case No. 15-1234 MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 29, Federal Rules of Appellate Procedure, National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") hereby moves this Court for an order allowing it to file the attached *amicus curiae* brief in support of Plaintiffs-Appellants, American Farm Bureau

Federation and National Pork Producers Council. In support of this motion, NFIB Legal Center states:

MOVANT'S INTEREST

1. The NFIB Legal Center is a nonprofit, public-interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses.

2. NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and

reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

3. The NFIB Legal Center monitors litigation of concern to the small business community and identifies cases that have statewide or national significance. The NFIB Legal Center has identified this case as having such significance.

CONSENT OF THE PARTIES

4. The NFIB Legal Center has obtained affirmative consent from Plaintiffs-Appellants to the filing of the proposed *amicus curiae* brief.

5. On April 15, 2015, the NFIB Legal Center sought consent from Defendant-Appellee, U.S. Environmental Protection Agency (EPA), for the filing of the proposed *amicus curiae* brief. EPA's counsel responded, stating that "EPA takes no position on the proposed *amicus* brief."

6. On April 15, 2015, the NFIB Legal Center sought consent from Defendant-Intervenors, Food & Water Watch, Environmental Integrity Project, and Iowa Citizens for Community Improvement ("Intervenors"). In response,

Intervenors stated only that "[t]he intervenors will not object to the *amicus* brief."

REASONS FOR AND RELEVANCE OF NFIB LEGAL CENTER'S *AMICUS CURIAE* BRIEF

7. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses. NFIB Legal Center files here out of concern that EPA's proposed disclosure will impact many small businesses—likely including NFIB members.

8. More generally, NFIB Legal Center files here out of concern that the rule espoused by the EPA, and Intervenors, would eviscerate statutory protections for individual small business owners who retain privacy interests in general information relating to their business. Specifically, NFIB Legal Center files here to safeguard those interests because the EPA and Intervenor's proposed rule would hold that small business owners maintain no privacy interests in information relating to their business operations where the business has disclosed such

information as a condition of receiving necessary local or state permits.

9. NFIB Legal Center maintains that the disclosure of such information through discrete state and local filings does not extinguish a business owner's privacy interests against the compilation and release of that information in a single comprehensive federal file. As such, NFIB Legal Center seeks to file here in order to protect small business owner's privacy interests under the Freedom of Information Act and the Privacy Act.

10. NFIB Legal Center submits that its *amicus curiae* brief will aid the court in offering analysis of the doctrinal underpinnings of our Article III standing jurisprudence. Specifically, the proposed *amicus curiae* brief explains that the District Court erred in assuming the standing inquiry is concerned with the magnitude of the injury asserted. The proposed *amicus curiae* brief explains that any consideration of the magnitude or severity of the injury is appropriate only when considering the merits of the claim.

11. Further, NFIB Legal Center submits that its *amicus curiae* brief will aid the court in offering information and analysis that may be useful to the Court in understanding the close—often intrinsically intertwined—relationship between a small business owner's personal finances and the vitality of his or her business enterprise. Specifically, NFIB Legal Center points to data from the NFIB Research Foundation, and other sources, demonstrating that the owner's personal financial position is very often contingent upon the successes or failures of the business. This should be especially helpful in this matter because courts recognize that information about a business should not be disclosed publically if it sheds light on the owner's personal finances—at least for closely held corporations and similar small businesses.

CONCLUSION

For the foregoing reasons, the National Federation of Independent Business Small Business Legal Center hereby requests the Court to grant leave to file an *amicus curiae* brief in

support of Plaintiffs-Appellants, American Farm Bureau Federation and National Pork Producers Council.

Respectfully submitted,

s/ Aaron R. Gott

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25, I hereby certify that I electronically filed this motion with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system on May 1, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: May 1, 2015

s/ Aaron R. Gott

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No. 15-1234

United States Court of Appeals for the Eighth Circuit

American Farm Bureau Federation,
National Pork Producers Council,

Plaintiffs,

v.

U.S. Environmental Protection Agency, Gina McCarthy,

Defendants,

and

Food & Water Watch, Environmental Integrity Project, and Iowa Citizens for Community Improvement,

Intervenors.

BRIEF OF AMICUS CURIAE NATIONAL FEDERATION OF INDEPENDENT BUSINESS – SMALL BUSINESS LEGAL CENTER

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CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to Rule 26.1 and Eighth Circuit Rule 26.1A, Amicus Curiae National Federation of Independent Business Small Business Legal Center makes the following disclosures:

The NFIB Small Business Legal Center is a 501(c)(3) public interest law firm. We are affiliated with the National Federation of Independent Business, a 501(c)(6) business association, which supports the NFIB Small Business Legal Center through grants and exercises common control of the NFIB Small Business Legal Center through officers and directors. No publicly-held company has 10% or greater ownership of the NFIB Small Business Legal Center.

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INTERESTS OF *AMICUS CURIAE*

Amicus curiae the National Federation of Independent Businesses Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Businesses (NFIB) is the nation's leading small business association, representing members in Washington, D.C. and all fifty state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses.

NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs ten people and reports gross sales of about $500,000 per year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. In this case, NFIB Legal Center is concerned that EPA's proposed disclosure will impact many small businesses—likely including NFIB members. But more generally, NFIB Legal Center files here out of concern that the rule espoused by the Environmental Protection Agency (EPA) and Defendant-Intervenors would eviscerate statutory protections for individual small-business owners who retain privacy interests in general information relating to their business. Specifically, NFIB Legal Center files here to safeguard those interests because the EPA and Defendant-Intervenor's proposed rule would hold that small-business owners maintain no privacy interests in information relating to their business operations where the business has disclosed such information as a condition of receiving necessary local or state permits. NFIB Legal Center maintains that the disclosure of such information through discrete state and local filings does not extinguish a business owner's privacy interests against the compilation and release of that information in a single

comprehensive federal file. As such, we file here to protect small-business owner's privacy interests under the Freedom of Information Act.

QUESTIONS PRESENTED

1. Is the imminent loss of privacy a concrete injury sufficient to establish Article III standing where a federal agency proposes to release information that it has amassed on an individual or business?

2. Does a small-business owner have a protected privacy interest against disclosure of sensitive information relating to his or her business under the Freedom of Information Act's privacy provisions where the release would reveal personal information—such as the owner's home address, personal email, home telephone number, GPS location, etc.—or shed light on his or her personal finances?

3. Is there a public interest in the disclosure of private information where an agency lacks independent statutory authority to collect and make that information public and where

disclosure sheds no light on the agency's compliance with any statutory duty?

SUMMARY OF ARGUMENT

The Privacy Act and Exemption 6 of the Freedom of Information Act (FOIA) protect individuals from disclosure of private information. Here we argue that individuals do not waive those privacy rights simply because they have chosen to engage in an entrepreneurial endeavor. The fact that a small business owner might disclose information as a condition of obtaining a necessary state or local permit, or license, does not mean that the owner has waived federal protections against the disclosure of personal information.

We recognize that the FOIA is an important accountability and transparency tool for government. Congress enacted it so citizens could legally force federal agencies to release information about government administration. Accordingly, where the information may reasonably shed light on an agency's performance (or non-performance) of its statutory duties, FOIA requests are in the public interest. But if the disclosed information is unrelated to the

agency's compliance with the law, then disclosure is impermissible—at least where it implicates privacy concerns.

The Privacy Act generally prohibits disclosure of private information. This statutory protection safeguards individuals from any disclosure that may shed light (to any degree) on their personal financial position. Because even basic information about a small business reflects the owner's personal finances, small-business owners can invoke the privacy provisions of FOIA and the Privacy Act to challenge a proposed disclosure. The proposed disclosure is impermissible unless the requesting party can demonstrate that the public's interest in the information outweighs the owner's asserted privacy interests.

Where—as in this case—the information sought is unrelated to the agency's compliance with the law, the privacy concern must necessarily prevail. EPA lacks authority to regulate agricultural businesses that have not applied for a NPDES permit or discharged pollutants into navigable waters. Since the information sought says nothing about whether EPA has failed to enforce NPDES standards on permit holders or whether EPA has failed to

enforce the CWA's prohibition on the discharge of pollutants, this disclosure is not in the public interest.

Furthermore, if EPA lacks statutory authority to collect and disseminate the information that Defendant-Intervenors seek, it is improper to allow EPA to disclose this information through the FOIA process. The court should not dismiss the privacy interests at stake simply because EPA may have—through its own diligence and exertion—gathered and compiled the information sought from various public mediums. Moreover, the fact that such information is technically available from dispersed public sources does not extinguish the right of affected individuals to seek redress in court, for they suffer a fresh injury.

ARGUMENT

I. SMALL-BUSINESS OWNERS HAVE PROTECTED PRIVACY INTERESTS IN BASIC INFORMATION ABOUT THEIR BUSINESS OPERATIONS

FOIA is intended as a tool to hold government accountable to the people. *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (explaining FOIA was intended "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."); *John Doe Agency v. John Doe Corp.*, 493 U.S.

146, 152 (1989). To this end, FOIA generally requires federal agencies to disclose documents and files within their control. Significantly, however, Congress also recognized that countervailing interests may justify or require withholding information. *See Beck v. Dep't of Justice*, 997 F.2d 1489, 1490-91 (D.C. Cir. 1993). For example, Exemption 6, 5 U.S.C. § 552(6), allows agencies to withhold private information, while the Privacy Act, U.S.C. § 552a(b)(2), further protects privacy interests by prohibiting the agency from releasing that information.

The Department of Justice explains that although "the privacy interest under Exemption 6 only pertains to individuals," small-business owners may nonetheless assert a privacy interest in challenging the disclosure of financial information in business records or "when a record reflects personal details regarding an individual, albeit within the context of a business record . . . ." Department of Justice Guide to the Freedom of Information Act: Exemption 6, U.S. Department of Justice, 417 (2009 Ed.) ("FOIA

Guidance").[1] Courts have affirmed that an "individual's privacy interests [are] not diminished" simply because the information also says something about that person's business. *Id*.[2]

A. Information About a Sole-Proprietorship, Partnership, or Closely-Held Corporation Reflects the Owners' Personal Financial Situation

Small-business owners come from all walks of life, but they usually have one thing in common: they have invested substantial personal resources and a great deal of energy into their business. When their businesses fail, they often fall on hard times themselves because they have invested so much into the company or otherwise assumed personal liabilities to further their enterprise.[3] Many small-business owners take out personal loans

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[1] *Available* online at http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption6_0.pdf (last visited 4/21/15).

[2] *Citing Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1187-89 (8th Cir. 2000); *Forest Guardians v. U.S. Forest Serv.*, No. 99-0615, slip op. at 39-45 (D.N.M. Jan. 29, 2001); *Hill v. USDA*, 77 F.Supp. 2d 6, 8 (D.D.C. 1999), *summary affirmance granted*, No. 99-5365, 2000 WL 520724, at *1 (D.C. Cir., 2000).

[3] David M. Madden, *Dissecting Chapter 7 Bankruptcy for Businesses*, 22 DCBA Brief 34 (2010) (observing that "[t]here are many different kinds of business debts for which individuals can be held personally liable[,] [and that] … Small business owners and officers commonly personally guaranty business debts, such

to launch their enterprise—risking personal liability if the business fails. *See Credit, Banks and Small Business – The New Century*, 19 NFIB Research Foundation (Jan. 2003)[4]; Brent Gleeson, *4 Realistic Ways To Fund Your Small Business*, Forbes (Aug. 29, 2013); *see also Credit, Banks and Small Business*, at 19 (observing that "owners prefer conventional loan sources for their financing, but will employ less conventional sources [such as personal loans from family or friends] when their options are limited."). Many small-business owners also incur personal credit-card debt or accept a second mortgage on their family home when their business faces cash-flow issues.[5] So for small-business

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as business lines of credit, credit cards, and even some vendor contracts and other business debts.").

[4] *Available* online at http://www.nfib.com/Portals/0/PDF/AllUsers/The%20New%20Century-Credit,%20Banks%20and%20Small%20Business.pdf (last visited 4/21/15) (analyzing trends in small business financing and observing that "[b]anks have traditionally been the primary supplier of working capital for small firms, but [that] other institutions [like integrated financial services companies, such as American Express] have become increasingly active in the small business loan market…").

[5] *Small Business Credit Access, and a Lingering Recession*, at 12 NFIB Research Foundation (Jan., 2012), *available* online at http://www.nfib.com/Portals/0/PDF/AllUsers/research/studies/small-business-credit-study-nfib-2012.pdf (reporting that "Nineteen (19) percent of small-business owners are currently using the

owners, their personal financial position is usually inherently intertwined with and contingent upon the vitality of their business.

This means that information shedding light on a small business will usually reflect the owner's personal financial position. Courts acknowledge this fact by recognizing that documents revealing financial information about a small business are protected from disclosure under FOIA's privacy provisions. *See Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1228 (D.C. Cir. 2008) ("where their records reveal financial information easily traceable to an individual, disclosing those records jeopardizes a personal privacy interest that Exemption 6 protects.").

Likewise, information discussing one's business operations or from which one might extrapolate inferences about the business' financial position will usually shed a degree of light on the owner's finances as well. Even if this information only allows for

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proceeds from a mortgage to help finance the[ir] firm and a non-mutually exclusive 15 percent are currently using their real estate for business collateral" and finding that 49 percent of small business owners use personal credit cards for business purposes—with "[o]ne in 10 (11%) of small business owners charg[ing] an average of $10,000 a month on their personal card(s))."

inferences about the owner's financial position, it nonetheless sheds a public light on private matters. *Consumers' Checkbook Ctr. for the Study of Servs. v. U.S. Dep't of Health & Human Servs.*, 554 F.3d 1046, 1051 (D.C. Cir. 2009) ("[T]he requested information need not reveal completely an individual's personal finances to implicate substantial privacy concerns."); *see, e.g.*, *W. Watersheds Project v. Bureau of Land Mgmt.*, No. CV 09-482-CWD, 2010 WL 3735710, at *7 (D. Idaho Sept. 13, 2010) (recognizing that Exemption 6 applies where the FOIA seeks information relating to a "family owned or closely held business" if disclosure would reveal "individual home addresses, [or] … might result in inferences being made regarding the named individual's financial position."); *cf. United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982) (emphasizing a broad application of Exemption 6's coverage of "similar files" to include protections for "those kinds of files the disclosure of which might harm the individual.").

This case presents a quintessential example of a proposed information release that would disclose personal information.

Much can be inferred about a business' potential to generate income from basic information about the size and location of a farm or ranch. *See Consumers' Checkbook*, 554 F.3d at 1050 (observing that disclosure of information on "irrigation practices, farm acreage, and the number and width of rows of tobacco and cotton" implicated substantial privacy interests because it would 'in some cases allow for an inference to be drawn about the financial situation of an individual farmer'") (quoting *Multi AG Media*, 515 F.3d at 1226). This in turn sheds light on the personal financial position of the owner because most small-business farmers and ranchers derive their income nearly exclusively from their businesses. *Cf.*, *Glickman*, 200 F.3d at 1189 ("An overly technical distinction between individuals acting in a purely private capacity and those acting in an entrepreneurial capacity fails to serve the exemption's purpose of protecting the privacy of individuals.").

B. Small-Business Owners Are Entitled to Challenge a Disclosure Revealing Personal Information

i. Any Minimal Showing of Loss of Privacy Satisfies Article III's Injury-in-Fact Requirement

The District Court erred in assuming that individuals lack standing to challenge the disclosure of private information simply because the information might be found in a search of some public source. The release of private facts is always sufficient for Article III standing purposes. Even if the information is already available somewhere in the public domain, the re-release of that information effects a fresh injury, which gives affected individuals standing to challenge the disclosure in federal court.

There is no question that a party must demonstrate a resulting concrete injury to challenge government conduct. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006); *Allen v. Wright*, 468 U.S. 737, 750 (1984). This requirement ensures that litigants have a real interest in the dispute because federal courts have jurisdiction to hear only cases and controversies. *Brandon v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591 (8th Cir. 2009). For this reason, the Supreme Court held in *Lujan v. Defenders of Wildlife* that environmental activists lacked standing to challenge a federal policy that they alleged caused harm to endangered species abroad. 504 U.S. 555, 560 (1992). The activists failed to

demonstrate how the policy would affect them, specifically, in any concrete manner. *Id*. at 564. Their "someday intentions" to visit these potentially affected exotic creatures was insufficient.[6]

Yet *Lujan* made clear that plaintiffs would have met the injury-in-fact requirement if they had alleged concrete plans frustrated by the government's actions—meaning that any concrete and particularized injury will suffice for standing. *Lujan*, 504 U.S. at 562-63. An avid bird-watcher might thus allege an injury sufficient to challenge a policy threatening a bird that he or she has specific plans to see because the challenged policy might frustrate those concrete plans. *See Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (affirming that even aesthetic interests "are sufficient to lay the basis for standing… [so long as] the party seeking review be himself among the injured."). *Lujan* accordingly shows that a litigant has standing to challenge a government action so long as the challenged action adversely impacts them in a particular manner. *Lujan*, 504 U.S. at 562–64.

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[6] "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Id*.

The allegation that EPA's proposed disclosure would adversely impact a specific individual or business should satisfy the injury-in-fact requirement. *See U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 763 (1989) (recognizing that the common law protected a right of privacy for individuals, and that this protected the individual's right to "control of information concerning his or her person."). Indeed, there is no constitutional requirement that the asserted privacy concern must be of any requisite gravity or significance. *See United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973); *Am. Bottom Conservancy v. U.S. Army Corps of Engineers*, 650 F.3d 652, 656 (7th Cir. 2011) (emphasizing that "[t]he magnitude, as distinct from the directness, of the injury is not critical to the concerns that underlie the requirement of standing . . . .") (citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 183 (2000)). For Article III purposes, it is enough that an individual or business objects to specific plans to make their affairs known to the public because that interferes with their ability to safeguard their reputation, and to live, or operate, in

peace outside the public eye. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975) (emphasizing that standing "in no way depends on the merits of the [] contention that particular conduct is illegal."); *Equity Lifestyle Properties, Inc. v. Cnty. of San Luis Obispo*, 548 F.3d 1184, 1189, n. 10 (9th Cir., 2007) ("The jurisdictional question of standing precedes, and does not require, analysis of the merits.").

Thus, any inquiry into the significance of the asserted privacy interest goes to the *merits*—not to standing. *See Reporters Comm.*, 489 U.S. at 763 (explaining that the extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the allegedly private fact and the extent to which the passage of time rendered it private.").

ii. Individuals Have a Substantial Privacy Interest in Opposing the Disclosure of Any Information Shedding Light on Their Personal Finances or Other Private Matters

The Privacy Act, in conjunction with FOIA's Exemption 6, *prohibits* an agency from disclosing private information *unless* the public interest in disclosure outweighs the asserted privacy concerns. FOIA Guidance at 419 ("If no public interest exists, the

information should be protected; as the D.C. Circuit has observed, 'something, even a modest privacy interest outweighs nothing every time.'") (citing *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989)). This means that once a privacy interest is asserted, the burden shifts to the party seeking disclosure to justify the release. *See Seized Prop. Recovery Corp. v. U.S. Customs and Border Prot.*, 502 F.Supp 2d 50, 56 (D.D.C. 2007) ("If no public interest is found, then withholding the information is proper, even if the privacy interest is only modest.").

EPA and Defendant-Intervenors seek to release information about agricultural businesses that contain personal information about the owners. For example, EPA proposes to publically release information detailing the physical addresses and GPS coordinates of farms and ranches. This, however, would reveal private information about small business farmers and ranchers—many of whom live on site with their families. For these individuals, disclosure threatens their personal privacy because it reveals the location of their personal residence. This is enough to shift the

burden to EPA and Defendant Intervenors to justify why the public interest demands disclosure. *Id.* at 1229-1230 (emphasizing that after identifying a privacy interest, it is necessary to move onto the balancing test wherein it is appropriate—only at that juncture—to consider whether the asserted privacy interests are "substantial" or "*de minimis*").[7]

Moreover, one does not waive FOIA's privacy protections simply by choosing to engage in a commercial endeavor. *Hersh & Hersh v. U.S. Dep't of Health & Human Servs.*, No. C 06-4234 PJH, 2008 WL 901539, at *8 (N.D. Cal. Mar. 31, 2008) (holding Exemption 6 inapplicable with regard to "*business* addresses, phone numbers, and job titles of Guidant employees[,]"—only after balancing the asserted privacy interests against the public interest in disclosure—but affirming that "[t]o the extent… the information withheld or redacted includes… private home addresses, home telephone numbers, social security numbers, etc.,

[7] We acknowledge that FOIA's general presumption favoring disclosure applies where the party seeking disclosure points to a legitimate public interest that would be served. *Multi AG Media*, 515 F.3d at 1227. But, this presumption is only applicable once the Court determines that disclosure would in fact advance the public interest in some way. *Id.* at 1229-30.

the exemption applies to shield such information from disclosure."); *see also U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 502 (1994) (affirming that when a disclosure would reveal an individual's home address, the court must balance the individual's privacy interests against the public interest in disclosure—even where the record indicates that the individual has engaged in economic conduct); *cf. Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926) (holding government cannot manipulate protected rights out of existence by conditioning the right to engage in business on waiver).

C. Privacy Interests Do Not Disappear Simply Because the Information may be Gathered From Dispersed Nonfederal Public Sources

The decisions in *Waterkeeper Alliance, Inc. v. Environmental Protection Agency*, and *Nat.'l Pork Producers Council v. U.S. Environmental Protection Agency*, made clear that EPA lacked authority to impose affirmative obligations on agricultural businesses under the Clean Water Act until they either voluntarily apply for a NPDES permit or illegally discharge pollutants into navigable waters. 399 F.3d 486 (2d Cir. 2005); 635 F.3d 738 (5th Cir. 2011). Given that EPA lacked the authority to

compel the reporting of this information through a mandatory NPDES program, it isn't clear whether the agency could compel agricultural businesses to self-report anything.[8] And with this

[8] EPA previously proposed a mandatory reporting rule that would have required "Concentrated Animal Feeding Operations (CAFOs)" to self-report the sort of information at issue here. NPDES CAFO Reporting Rule, EPA-HQ—OW-2011-0188, 76 Fed. Reg. 65431 (Oct. 21, 2011) ("CAFO Reporting Rule"). At the time, Plaintiffs filed comments raising several objections, including on the ground that EPA lacked "authority to publicize the [] personal names and home addresses [of farmers and ranchers], especially when doing so would infringe upon their privacy interests." NPDES Electronic Reporting Rule, EPA-HQ-OECA-2009-0274-0375, Comments of the American Farm Bureau Federation and National Pork Producers Council (Jan. 30, 2015). EPA subsequently withdrew the CAFO Reporting Rule, after concluding that it could obtain the information it sought by working in collaboration with state and local partners. NPDES CAFO Reporting Rule, EPA-HQ-OW-0188, 77 Fed. Reg. 42679, 42682 (July 20, 2012).

In proposing the CAFO Reporting Rule, EPA relied on Section 308 of the CWA, 33 U.S.C. § 1318, which provides that EPA may collect information from the "owner or operator of any point source." CAFO Reporting Rule, 76 Fed. Reg. 65431. But this provides only *limited authority*. By the plain terms of the statute, the information sought must relate to agency efforts in one of the following categories: "(1) [D]eveloping or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance; (2) Determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) [Carrying out] any requirement established under [section 308]; or (4) Carrying out [other sections

significant question lingering, it is not surprising that EPA chose to work with state and local authorities to collect the information sought. One might just as well question EPA's authority to obtain sensitive information through backchannels.

After devoting substantial energy and resources toward the endeavor, EPA succeeded in assimilating comprehensive profiles on these businesses. Because the agency was able to draw that information from "public" state and local sources, EPA argues that the affected business owners cannot assert privacy interests in non-disclosure. *See Am. Farm Bureau Fed'n & Nat. Pork Producers Council v. U.S. Envtl. Prot. Agency*, No. CIV. 13-1751 ADM/TNL, 2015 WL 364667, at *4 (D. Minn. Jan. 27, 2015) (accepting the theory that "distribution of already public information does not establish an injury…").

But Exemption 6 and the Privacy Act, protects against the *disclosure of federal files*—not state or local files. 5 U.S.C. § 552(f)(2)(A) (2006). It is an abuse of the process to allow EPA to

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of the Act, including section 402]." *Amicus* maintains that EPA would not have had authority to enforce the proposed CAFO Reporting Rule because the information sought would not relate to any of these authorized purposes.

circumvent federal privacy protections by relying on the fact that the agency has gathered information from state and local filings where—as it appears in this case—the federal agency may have lacked statutory authority to gather and amass that information in the first place.[9]

Plaintiffs have already explained that individuals retain a protected privacy interest in information that is—although technically available to the public—practicably obscure. *Amicus* agrees—a federal agency cannot defeat protected privacy interests by pulling and cataloging sensitive information on individuals from dispersed state and local records. *See Reporters Comm.*, 489 U.S. at 764-65. State records might well disclose all sorts of private information, but that does not mean private citizens are without recourse against the *federal collection and disclosure* of that information. *Id.* at 763 (observing that "[i]n an organized society, there are few facts that are not at one time or another divulged to another[,]" but that individuals nonetheless retain a

[9] EPA's posited authority to gather and publicize such information under 33 U.S.C. 1318 is highly dubious, most especially with regard to information gathered on farmers and ranchers who do not qualify as CAFOs.

privacy interest at common law against further disclosure—and that "the extent of the protection accorded a privacy right … rest[s] in part on the degree of dissemination of the allegedly private fact and the extent to which the passage of time [has] rendered it private [once more]."). [10] Indeed, state or local records may indicate the make and model of one's vehicle. They might disclose the size and color of one's home. Or they might include information that sheds light on a business owner's personal finances. Can it really be that individuals have no privacy interest in preventing the disclosure of such information if compiled in some federal database?

It is unfathomable that Congress would not have intended for Exemption 6 and the Privacy Act to protect against the disclosure

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[10] The District Court assumed that *Reporters Comm.* has been obviated by the advent of the internet. *Amicus* disagrees. If anything, the ubiquitous presence of the internet in our everyday affairs makes *Reporters Comm.*'s essential holding all the more important. *See American Civil Liberties Union v. U.S. Dept. of Justice*, 750 F.3d 927 (D.C. Cir. 2014) (citing *United States v. Jones*, 132 S.Ct. 945, 957 (2012) (Sotomayor, J., concurring) (suggesting that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties," as that "approach is ill suited to the digital age.").

of such comprehensive private information. *Id.* at 764 ("The common law recognized that one did not necessarily forfeit a privacy interest in matters made part of the public record, albeit the privacy interest was diminished . . . ."). Indeed, EPA's theory runs contrary to the well-established rule that once a privacy interest is asserted—even a modest privacy interest—the burden is on the party seeking disclosure to demonstrate that the public interest outweighs the cited privacy concerns. *See Horner*, 879 F.2d at 879. It may be appropriate to consider the extent to which the information may (or may not) be available to the public because such considerations might appropriately weigh into a balancing of competing public and private interests. *Reporters Comm.*, 489 U.S. at 764. But privacy interests are not extinguished under Exemption 6 simply because the information might be attained through alternative sources. W. Keeton, D. Dobbs, R. Keeton, & D. Owens, Prosser & Keeton on Law of Torts § 117, p. 859 (5th ed. 1984) ("[M]erely because [a fact] can be found in a public recor[d] does not mean that it should receive widespread publicity if it does not involve a matter of public

concern"). Privacy concerns may be weakened or diminished to the extent the information is publically available through other forums, of course. But that likewise weakens the public interest in disclosure. *See Van Bourg, Allen, Weinberg & Roger For and on Behalf of Carpet,* 728 F.2d 1270, 1273 (9th Cir. 1984) (considering four factors when determining whether a disclosure constitutes a "clearly unwarranted invasion of personal privacy:" (1) the plaintiff's interest in disclosure, (2) the public's interest in disclosure, (3) the degree of the invasion of personal privacy, and (4) the availability of any alternative means of obtaining the requested information). To the extent one engages in this balancing test, it is necessary to consider whether the public interest is served in disclosure of private information that federal agents obtained through potentially *ultra vires* acts. *See Free Speech Coalition v. Gonzales*, 406 F.Supp. 2d 1196, 1212 (D. Colo., 2005) (recognizing that the public interest is not served where government agents act "outside their authority").

II. An Essential Requirement for Disclosure of Personal Information is that the Information be in the Public Interest

A. To be in the Public Interest, Disclosure Must Shed Light on an Agency's Performance of Statutory Duties

Exemption 6 and the Privacy Act prohibit disclosure *unless* EPA or Defendant-Intervenors can point to some public interest that might be advanced through disclosure because Plaintiffs have asserted a substantial privacy interest. FOIA Guidance at 417. If the party seeking disclosure establishes a public interest then it is necessary to weigh that interest against Plaintiff's cited privacy concerns.[11] In the absence of any demonstrated public interest, however, the scales tip decisively against disclosure. *See Horner*, 879 F.2d at 879.

The public interest is advanced in disclosure of information that may shed light on the workings of the federal government

[11] "In order to determine whether Exemption 6 protects against disclosure, an agency should engage in the following two lines of inquiry: first, determine whether the information at issue is contained in a personnel, medical or 'similar' file covered by Exemption 6; and, if so, determine whether disclosure 'would constitute a clearly unwarranted invasion of personal privacy' by balancing the privacy interest that would be compromised by disclosure against any public interest in the requested information." *Id.*

because the Freedom of Information Act was intended to hold federal actors accountable to the public. *Rose*, 425 U.S. at 361; *John Doe Agency*, 493 U.S. at 152. But no public interest is advanced if disclosure says nothing about whether federal authorities have complied with the law. *DOD v. FLRA*, 510 U.S. 487, 497 (1994); *Reporters Comm.*, 489 U.S. at 773. Accordingly, in this case Exemption 6 prohibits disclosure because the requested information says nothing whatsoever about whether EPA has complied with its statutory duties.

EPA utterly lacks regulatory authority over agricultural businesses unless and until they illegally discharge pollutants into the waters of the United States. *Waterkeeper Alliance, Inc.* 399 F.3d at 504–05; *Nat.'l. Pork Producers Council*, 635 F.3d at 753. And since the requested information says nothing about whether these entities have discharged pollutants into jurisdictional waters, the information reveals nothing about EPA's compliance (or non-compliance) with its statutory obligation to enforce the Clean Water Act.

B. There Can be No Public Interest in Requiring Disclosure of Information to Advance an Agency's *Ultra Vires* Goals

The requested information is unrelated to any lawful EPA program. Whether EPA has either the authority to require self-reporting of the sort of information at issue here, or to acquire such information through backchannels, is a significant open question. Nevertheless, EPA has devoted energy and resources to search for and compile information on these businesses. *See e.g.*, Nagle Decl. ¶ 21 (SA37) (EPA held 44 conference calls with state agencies in the process of collecting this information). EPA now seeks to go one step further—in proposing to release this information to environmental organizations.

EPA contends that FOIA requires release of the requested information. But if compilation and disclosure of information in itself constitutes an *ultra vires* act, then it is highly improper for the agency to ratify public disclosure under the pretext that it now *technically* maintains the information requested. *See Reporters Comm.*, 489 U.S. at 772 (emphasizing that the balancing inquiry must consider "the nature of the requested document and its relationship to the basic purpose of the Freedom of Information

Act[,]" which is to hold government accountable to the people.) (internal quotation marks omitted). And because the public interest is served in holding federal agencies to the strict limits of their jurisdictional powers, the court must weigh those considerations in determining whether there is a public interest in disclosure. *See Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (affirming that "upholding constitutional [principles] serves the public interest); *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 690 (6th Cir. 2014) *cert. denied sub nom. Liberty Coins, LLC v. Porter*, 135 S. Ct. 950 (2015) ("[I]t is always in the public interest" to enforce constitutional precepts); *Perry v. Schwarzenegger*, 702 F. Supp. 2d 1132, 1138 (N.D. Cal. 2010) (same).

If Congress chose not to confer power on an agency to collect and make certain information available to the public, then it is improper for that agency to invoke FOIA to authorize the release of that information. No public interest is served where an agency seeks to use FOIA to accomplish ends it lacks independent authority to accomplish. *Cf.*, *Fed. Mar. Comm'n v. Aktiebolaget*

Svenska Amerika Linien, 390 U.S. 238, 244 (1968) (opining that "[b]y its very nature an illegal [act] is . . . 'contrary to the public interest' "). To allow disclosure of private information in such a scenario would not only frustrate the goal of protecting privacy interests—it would fundamentally pervert the FOIA process. FOIA is intended to serve as a tool to keep federal agencies in check—to ensure their accountability to the public. *Rose*, 425 U.S. at 361. FOIA cannot allow an agency to manipulate that process to advance *ultra vires* goals in collaboration with private interest groups.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges this Court to reverse the decision of the District Court.

Dated: May 1, 2015

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CERTIFICATE OF COMPLIANCE

I certify that this brief contains 5700 words, as indicated by Microsoft Word, in accordance with Fed. R. App. P. 32(a)(7).

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25, I hereby certify that I electronically filed this brief with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system on May 1, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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