No. 03-50288
Consolidated With No. 03-50919

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN DOE #1, for and on behalf of themselves and a class of others similarly situated; JOHN DOE #2, for and on behalf of themselves and a class of others similarly situated; TEXAS FARM BUREAU; THE AMERICAN FARM BUREAU FEDERATION; JOHN DOE #3;
Plaintiffs-Appellees

v.

ANN M. VENEMAN, in her official capacity as Secretary of the United States Department of Agriculture; WILDLIFE SERVICES; ANIMAL AND PLANT HEALTH INSPECTION SERVICE; UNITED STATES DEPARTMENT OF AGRICULTURE,
Defendants-Appellants

v.

ANIMAL PROTECTION INSTITUTE
Intervenor Defendant-Appellant

On Appeal from the United States District Court
for the Western District of Texas, Waco Division

BRIEF FOR PLAINTIFFS - APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described by Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Plaintiffs-Appellees

John Doe #1, John Doe #2, John Doe #3 and a class of all other individuals and entities who have been cooperators in Wildlife Services' programs since January 1, 1990.

Texas Farm Bureau and its members

The American Farm Bureau Federation and its members

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to FED. R. APP. P. 34(a), Plaintiffs-Appellees respectfully request oral argument. They believe that oral argument will assist the Court in deciding this appeal, which presents a number of complex issues that are closely intertwined with the substantial factual record developed in the district court.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

1. Whether the district court correctly enjoined the Government from releasing to the public personally identifying information about people who participate in Government wildlife damage control programs that animal rights extremist organizations actively oppose.

2. Whether the district court abused its discretion by entering a categorical injunction.

3. Whether the Privacy Act authorizes the district court's award of attorneys' fees and costs.

STATEMENT OF FACTS

The Wildlife Services Program and Cooperators' Personal Information

The issue in this case is whether the Federal Appellants (Government) can disclose personal information identifying ranchers, farmers, and others who use Wildlife Services, a program within the United States Department of Agriculture's (USDA) Animal and Plant Health Inspection Service (APHIS). Wildlife Services' major function is to help control the predation of livestock by wildlife such as coyotes, bears, bobcats, feral hogs, and mountain lions. R1212. Animal predators cause ranchers tens of millions of dollars in losses each year, and can pose a threat to both humans and endangered species. R1212-13.

Most of Wildlife Services' work occurs on private land. R1212. Private parties, state governments and other federal agencies who call upon and work with Wildlife Services to address wildlife problems are called Cooperators. R1213.

Wildlife Services enters into written agreements with all Cooperators (Cooperator Agreements). R1214. It has over 85,000 Cooperator Agreements throughout the United States. *Id*. Wildlife Services has assured Cooperators that the information they provide to Wildlife Services will be maintained in confidence. R1214-15. Without these assurances, Wildlife Services likely could not gain access to private property because the protection of personal identifying information is an important issue for Cooperators. R1213-15.

Cooperator Agreements and other Wildlife Services records contain personal information about Cooperators, including Cooperator name, Cooperator address, Cooperator telephone number, ranch or farm name, property owner name, property owner address, land class and size, and the number of the Cooperator Agreement. R1214. They may also contain other information, such as the species of wildlife to be managed, the methods that will be used and identification of "restricted use pesticides" to be applied on the property. *Id*.

Wildlife Services maintains paper copies of Cooperator Agreements, and information from them and other Wildlife Services paper records is retrieved by personal identifiers such as a Cooperator's name or address. R1215-16. In

addition to paper records, Wildlife Services maintains a computer database named the Management Information System ("MIS"), which incorporates information from Cooperator Agreements. *Id*. Wildlife Services retrieves information about Cooperators from the MIS by individual Cooperator name or other personal identifiers. *Id*.

In some cases, Wildlife Services uses or recommends lethal techniques to reduce predator damage. R1217. At least two such techniques, the Livestock Protection Collar (LPC) and the M-44 cyanide ejector mechanism (M-44), involve the placement of devices on Cooperator property that contain chemicals classified as "restricted use pesticides" under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). R1217-18. Because these chemicals are lethal, the district court voiced concern that disclosing information about them could direct terrorists to their location. R1608.

Wildlife Services And Its Experience With Animal Rights Groups

"Animal rights" groups, including Intervenor Defendant-Appellant Animal Protection Institute (API), oppose Wildlife Services and its methods. R1218. Their fervor has intensified over time such that during the 1990s, Wildlife Services saw "an increasing amount of what [Wildlife Services] considered serious threats ... from animal rights organizations." *Id.*

Wildlife Services personnel or property were threatened, intimidated, harassed or attacked on 35 occasions from 1990 through 2000. R1218. Wildlife Services believes that there is a "very real and present danger of further violence against [it] and others … nationwide." R1219. Its concerns about the health and safety of its employees are so serious that Wildlife Services does not even identify some of its offices with signage or other identification. *Id.* Wildlife Services also has "serious concern[s]" about the "safety and security" of Cooperators, and "little doubt that [extremists] would perpetrate further violence against ... individuals or groups involved with us." *Id*. Thus, Wildlife Services has remained "extremely concerned about releasing any information ... that would better enable terrorists to target us or [C]ooperators." *Id*.

Other agencies also recognize the threat posed by these extremist groups. In a report to Congress about the effects of animal rights terrorism, the USDA and the Department of Justice stated that "the frequency and severity of extremist animal rights activity in the United States [had] expanded significantly," "fueled by a desire to achieve more tangible results by confrontational publications such as *A Declaration of War: Killing People to Save Animals and the Environment.*" R198-202; 8R71-73 (Tr. Ex. 6) (documenting 313 attacks on animal-related facilities, including private farms).

The Government's Disclosure Policies Regarding Requests For Personally Identifying Information

The Government began to receive requests for personal Cooperator information in the early 1990s. R1221. The number of requests has increased exponentially over time and requesters now seek more confidential information. *Id*.

Prior to the spring of 1998, the Government withheld Personal Information about Cooperators pursuant to 5 U.S.C. §552(b)(6) (Exemption 6). *Id*. In March 1998, the Government modified this long-standing policy in a memo from Kenneth Cohen of the USDA Office of General Counsel (OGC). R1222. Cohen generally instructed USDA agency heads to release lists of names and addresses when inclusion on the list reflects a business capacity and the only other information sought is limited to the status of inclusion on the list. *Id*. He defined "business capacity" to include farming, ranching, outfitting and similar activities of a commercial nature, thus establishing a USDA policy that ranchers and farmers generally are not entitled to any privacy interest. *Id*.

This policy proved difficult to apply. APHIS "struggled mightily" to draw a meaningful distinction between a Cooperator who was engaged in an activity directly connected to a business organization and one who was not. R1224-25. By its own admission, the Government could not reliably determine from the records whether a Cooperator was a business. *Id*.

Wildlife Services opposed the Cohen Memo policy, and asked that it be reconsidered in order to "respect the privacy of our [C]ooperators." R1225-26. It reported that the release of this information was of "grave concern to those ... in Wildlife Services and to the citizens to whom [it provided] services." R1227-28. Wildlife Services cited specific incidents of harassment and worse by animal rights groups, including actions it linked to previous releases of personally identifying Cooperator information under FOIA. *Id*. Wildlife Services explained that "we do believe, and have evidence that some animal interest groups would like this information in order to intimidate, harass or otherwise bring public scrutiny to those using our services." *Id.* Wildlife Services advised OGC that "by releasing the names and addresses of our cooperators to animal interest groups … we believe that they are, or could be, subjected to harassment and intimidation. This will only get worse as more and more names and addresses are released." *Id.* Wildlife Services was concerned that it "could very easily be the avenue of the information that would result in maybe the burning of someone's ranch." *Id.* In response to these concerns, OGC acknowledged that Cooperators' personal information may be withheld under Exemption 6. R1229.

API's FOIA Request

On November 18, 1997, API requested Application Data Reports from Wildlife Services regarding the use of LPCs in every state where the LPC is or has

been used (API Request). R1230 (citing Ex. 17a). API identified no public interest in the information sought. *Id*.

On December 2, 1998, APHIS disclosed 94 pages of Application Data Reports from California, Utah, Virginia and West Virginia. *Id*. (citing Ex. 17b). APHIS generally withheld personally identifying Cooperator information, including ranch names and home addresses, under FOIA Exemption 6; however, APHIS released Cooperator Agreement numbers. R1230.

On May 27, 1999, APHIS provided API with 622 pages of LPC application data reports from Texas and New Mexico. *Id*. APHIS again generally redacted personally identifying Cooperator information. *Id*. APHIS again released Cooperator Agreement numbers. *Id*.

The information provided to API tells a lot about Wildlife Services' activities. R1230. Wildlife Services' personnel believe that the withheld Cooperator information does not shed any additional light on its activities. *Id*.

On June 24, 1999, API filed an administrative appeal, stating that it wanted the requested information in order to tell members of the public where LPCs were located. R1230-31. Without waiting for this appeal to be resolved, API filed suit in the District Court for the District of Columbia to compel the release of the withheld information (DC Litigation). R1231. OGC attorney Ruth Ann Azeredo reviewed the record and advised APHIS that, based on the Cohen Memo, she did

not see any reason to withhold any of the documents. R1231-32. She instructed APHIS to send unredacted records to the Assistant U.S. Attorney assigned to the DC Litigation. *Id.*

Plaintiffs Texas Farm Bureau and American Farm Bureau Federation became concerned about the release of personal Cooperator information to API. R1232-34. They and others objected to the Government's decision to release personally identifying Cooperator information, and requested that it withhold the information pending an opportunity to explore the matter and their legal options. *Id*. However, to settle API's pending lawsuit, the Government decided to move forward with the release. *Id*.

Plaintiffs filed their complaint on November 1, 1999. The district court certified a class of plaintiffs including all individuals or entities who have been Cooperators since 1990. R472, 955.

Forest Guardians' FOIA Request

On January 7, 1999, Forest Guardians requested from APHIS the MIS for Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, Washington and Wyoming from 1990 to the present (FG Request). R1234-36. The FG Request was extremely broad, and the records that were responsive to it were extremely voluminous. *Id*. On March 25, 1999, Forest Guardians filed suit in the District

Court for the District of New Mexico to compel APHIS to disclose the requested information (New Mexico litigation). *Id*.

By July 1999, both sides agreed to settle the New Mexico litigation. *Id*. APHIS began releasing to Forest Guardians partial records sets from the MIS. *Id*. On October 13, 1999, APHIS sent MIS reports from six states. *Id*. It withheld personally identifying Cooperator information from those records pursuant to Exemption 6. *Id.* APHIS also redacted such information from records it disclosed to Forest Guardians on October 26, 1999. *Id*.

The temporary restraining order entered by the district court in this case in November 1999 interfered with the Government's disclosures to Forest Guardians by prohibiting the release of potentially identifying information about Cooperators in the LPC program. *Id*. Nonetheless, on November 29, 1999, APHIS sent Forest Guardians another set of partial records. *Id*. This time OGC instructed APHIS *not* to withhold personally identifying Cooperator information. *Id*. APHIS released identifying information about Cooperators on 170 separate records. *Id*. The records pertained directly to individuals, and included their names, addresses, telephone numbers, property acreage and agreement numbers. *Id*. Simultaneously, APHIS released another 45 pages of records that identified Cooperators by "Ranch Common Name" and Cooperator Agreement number. *Id*.

Forest Guardians agreed to settle the New Mexico litigation by accepting MIS records from non-LPC states, with the understanding that Exemption 6 would not be used to withhold Personal Information. *Id*. Shortly thereafter, Plaintiffs in this case learned of APHIS's intentions and filed their first amended complaint. *Id*. If Plaintiffs had not filed their amended complaint, and if the district court had not granted the expanded injunctive relief, the Government would have released all personally identifying Cooperator information contained in the MIS about Cooperators in virtually all western states. *Id*.

SUMMARY OF ARGUMENT

The judgment of the district court should be affirmed. The court had jurisdiction to review the Government's decisions to disclose personal information about Cooperators in response to the API and FG Requests, as well as the disclosure policy on which the Government based its decisions. The FG Request is not moot because the Government has promised to release additional information to Forest Guardians depending on the outcome of this appeal.

Exercising this jurisdiction, the district court held that the Government's disclosure decisions violate the Administrative Procedure Act, the Privacy Act, and FIFRA. As the Government now concedes, this holding is correct. Because FIFRA prohibits any government agency from releasing restricted-use pesticide application data that would identify Cooperators, that data is exempt from

disclosure under FOIA Exemption 3. In addition, Cooperators' personal information is exempt from disclosure under Exemption 6. Cooperators have a substantial privacy interest in information that identifies them as participants in a controversial wildlife program, and there is no substantial public interest warranting disclosure. Finally, because the exempt information is contained in systems of records, the Privacy Act bars the Government from disclosing it.

The district court did not abuse its discretion by enjoining the disclosure of personal information from three categories of documents like those requested by API and Forest Guardians. In addition, the injunction's definition of "personal information" properly tracks FIFRA and gives the Government sufficient notice of what must not be disclosed.

Finally, the district court's fee award should be affirmed. Plaintiffs have standing to recover fees under the Privacy Act given the unchallenged finding that the Government's disclosure of their identifying information adversely affected them.

STANDARD OF REVIEW

Plaintiffs adopt the Government's statement of the standard of review; except, however, that the scope and form of an injunction are reviewed for abuse of discretion. *Rolex Watch USA, Inc. v. Meece*, 158 F.3d 816, 823 (5th Cir. 1998). In addition, application of the factors relevant to setting an attorneys' fee award is

reviewed for abuse of discretion, and a determination of reasonable hours and rates for clear error. *No Barriers, Inc. v. Brinker Chili's Tex., Inc.*, 262 F.3d 496, 500 (5th Cir. 2001).

ARGUMENT

I. The District Court Had Jurisdiction To Review The Government's Decisions To Disclose Personal Information.

The Government and API (collectively "Defendants") begin their attack on the injunction by trying to limit the district court's jurisdiction. Yet a proper jurisdictional analysis reveals that the district court had jurisdiction over the API Request, the FG Request and the Government's revised disclosure policy.

In filing this suit, one of Plaintiffs' goals was to prevent the impending disclosure of Cooperators' personal information in response to the API and FG Requests. It is undisputed that the Government decided to disclose personal information in response to these requests, R346, 424; Gov't Br. 8, 10-11, and that its decisions satisfy the ripeness and finality prerequisites for district court jurisdiction. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149-54 (1967); *Merchants Fast Motor Lines v. ICC*, 5 F.3d 911, 919-20 (5th Cir. 1993).

Plaintiffs' second amended complaint challenged not only these disclosures, but also the Government's revised policy that prompted them. R977-78, 994. This policy, memorialized in the Cohen Memo, provided that the Government generally should disclose names and addresses of those who participate in agency programs

in a "business capacity," such as farmers and ranchers. Interpreting FOIA Exemption 6, the memo concluded that farmers and ranchers generally have no privacy interest in their names and addresses that can justify withholding that information. R1222-23. The Government's decisions to disclose personal Cooperator information in response to the API and FG Requests were based on this policy. R1231; Gov't Br. 8 & n.7, 10-11. Thus, the Government's revised policy interpreting FOIA Exemption 6 is at issue in this case and was ripe for district court review.[1] The district court did not dismiss Plaintiffs' challenge to this policy when it granted the Government's motion to dismiss claims concerning certain pending FOIA requests. R1598-99.

Nor are these challenges moot. Although a reverse-FOIA claim can become moot when the FOIA request at issue is withdrawn,[2] Forest Guardians has not

[1] *See, e.g., Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 477-79 (2001) (memorandum setting policy was final agency action ripe for review); *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (Fish and Wildlife Service's biological opinion was final agency action); *Pub. Citizen v. Dep't of State*, 276 F.3d 634, 641-43 (D.C. Cir. 2002) (challenge to agency policy ripe both generally and as applied to plaintiff); *HRI, Inc. v. E.P.A.*, 198 F.3d 1224, 1236 (10th Cir. 2000) (determination by deputy EPA administrator of disputed land status was ripe); *Arch Mineral Corp. v. Babbitt*, 104 F.3d 660 (4th Cir. 1997) (determination that mining corporation was presumed to be owner or controller of company that owned fees was ripe); *Student Loan Mktg. Ass'n v. Riley*, 104 F.3d 397, 405-06 (D.C. Cir. 1997) (interpretation of statute by Department of Education, as set forth in letter from general counsel to regulated entity, was final); *Atchison, Topeka & Santa Fe Ry. v. Pena*, 44 F.3d 437 (7th Cir. 1994) (reinterpretation of statutory provision by Federal Railroad Administration ripe for review), *aff'd*, 516 U.S. 152 (1996); *Int'l Union, United Auto. Workers v. Brock*, 783 F.2d 237, 245-51 (D.C. Cir. 1986) (agency announcement of statutory interpretation final and ripe).

[2] *Gulf Oil Corp. v. Brock*, 778 F.2d 834, 838 (D.C. Cir. 1985).

withdrawn its request. Instead, Forest Guardians and APHIS agreed to settle the New Mexico litigation. APHIS agreed to produce to Forest Guardians county summaries of the MIS database with certain cooperator and location information redacted in an effort to comply with the district court's injunction. R1184. Both parties also expressed the view that "at least some of the information which the agency was required to redact … may not be exempt from mandatory disclosure under the FOIA, and APHIS therefore may have been required to produce … [that] information to [Forest Guardians] but for the [district court] injunction." R1185. Therefore,

> to resolve this proceeding in a manner which does not require APHIS to violate the [district court] injunction …, [Forest Guardians] has agreed to dismiss all of its claims … in exchange for APHIS' promise to cooperate with [Forest Guardians] to produce within a reasonable time given the amount of review and redaction any additional non-exempt information … if and when the injunction issued by the Texas District Court is lifted or vacated.

Id.

Because the Government has not made complete disclosure in response to the FG Request, that request is not moot.[3] And far from withdrawing its request, Forest Guardians has obtained a promise from APHIS to produce additional non-

[3] *Ripskis v. H.U.D.*, 746 F.2d 1, 2 (D.C. Cir. 1984); *Ctr. for Auto Safety v. E.P.A.*, 731 F.2d 16, 19-20 (D.C. Cir. 1984); *Webb v. Dep't of Health & Human Servs.*, 696 F.2d 101, 107-08 (D.C. Cir. 1982); *see also Porter v. Schweiker*, 648 F.2d 310, 312 (5th Cir. Unit B June 1981) (settlement tender that does not provide all relief court might have ordered does not moot case).

exempt information in response to Forest Guardians' *original* request. *See Cornett v. Donovan*, 51 F.3d 894, 897 (9th Cir. 1995) (partial settlement establishing limited rights did not moot plaintiffs' claim that they were entitled to greater rights). That promise is similar to a so-called "high-low" settlement in that it is contingent on the outcome of this appeal: if the injunction stands, Forest Guardians would get no additional information; but if this Court sides with the broad view of non-exempt information offered by API, Forest Guardians can demand additional information. *Cf. Nixon v. Fitzgerald*, 457 U.S. 731, 743-44 (1982) (high-low settlement did not moot case). Thus, whether Forest Guardians is entitled to disclosure of additional cooperator information, or whether Plaintiffs are entitled to enjoin such disclosure, remains a live issue.

The Government's contention (at 28 n.13) that it is not obligated to disclose any information, but only to re-evaluate whether additional information is exempt if legal circumstances change, is disingenuous. The settlement agreement states the Government's view that some of the redacted information may not be exempt. Moreover, the question is not whether the Government will choose to allow disclosure, but whether Forest Guardians will seek mandatory disclosure of non-exempt information under the settlement agreement and a court will order it. *Cf. Oglesby v. U.S. Dep't of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996) (public disclosure of non-exempt material is mandatory). Because Forest Guardians has

reserved the right to demand additional information if the injunction is vacated, Plaintiffs' injunction against disclosure of personal information from the MIS database is not moot.

The Government may also argue that Plaintiffs' challenge to the revised disclosure policy under the Cohen Memo is moot. Yet even if the Court concludes that Forest Guardians' specific FOIA request is moot, that does not moot Plaintiffs' claim that the Government's policy or practice will result in unlawful disclosure of the type of information sought by Forest Guardians in the future. *Payne Enters., Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988).

Nor can the Government moot this policy challenge "by refraining from the conduct of which [Plaintiffs have] complained while the case is pending." *Id.*; *see Norfolk & W. Ry. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 128 n.3 (1991); 13A Charles A. Wright, et al., FEDERAL PRACTICE & PROCEDURE §3533.2 (2d ed. 1984) (compliance with injunction pending appeal does not moot case). On this record, the Government has not come close to carrying its "heavy burden" to prove mootness by demonstrating that "there is no reasonable expectation that the wrong will be repeated." *Payne Enters.*, 837 F.2d at 491-92. Although the Government's brief announces that it will now generally withhold identifying information of "individual private Cooperators" from disclosure under FOIA, it remains to be

seen whether its application of this standard to similar FOIA requests[4] will be meaningfully different from its position in the district court. For example, is a sole proprietor who signs up for a wildlife damage control program under an unincorporated ranch name an "individual private Cooperator"? *Cf.* R1137 (taking position below that he is not).

Finally, even if the Government planned to treat all members of the Plaintiff Class as "individual private Cooperators," its repeated flip-flops on the issue of protecting personal Cooperator information make it reasonable to fear that it will decide to release such information again in the future. Since 1998, the Government has held five different positions: (1) prior to March 1998, the Government withheld information identifying Cooperators unless that information itself disclosed that the Cooperator was a business organization; (2) in March 1998, the Cohen Memo concluded that the Government generally should disclose names and addresses of those who participate in agency programs in a "business capacity," such as farmers and ranchers; (3) by December 1998, the Government changed its interpretation again and determined that there was a valid basis to withhold personal Cooperator information under Exemption 6; (4) by September 1999, the Government switched back to the Cohen Memo approach and agreed to release personal Cooperator information to API and Forest Guardians; and (5) in

[4] R220-235 (chart listing similar pending requests).

December 2003, the Government announced in its brief to this Court that they will protect identifying information of "individual private Cooperators." R1221-1231, 1234-36. This schizophrenic approach hardly inspires confidence that there is no reasonable possibility of such information being released in the future. Therefore, Plaintiffs' challenge to the Government's disclosure policy is not moot.

II. The Release Of Cooperators' Personal Information Violates FIFRA And The Privacy Act.

A. The Government's concessions and their implications.

Turning to the merits, Plaintiffs agree with the Government that the district court properly held that the decision to release LPC records to API contravenes 5 U.S.C. §706(2)(A). The Government concedes that releasing the records that API seeks would violate FIFRA (Gov't Br. 19, 25, 30, 34-35) and the Privacy Act (*id.* at 37-38). It also concedes, with respect to the API Request, that the injunction "may be affirmed insofar as it enjoins specific violations of the FIFRA or the Privacy Act." Gov't Br. 25. The Government thus admits that the district court properly issued an injunction "to protect Cooperator identifying information in [the LPC application records]" subject to the API Request. *See id*. at 19-20.

The Government's concessions also compel the conclusion that the district court properly enjoined the release of personally identifying Cooperator information to Forest Guardians. The Government admits that Exemption 6 applies to personally identifying Cooperator information. Gov't Br. 42, 44.

Because the Government also concedes that personally identifying Cooperator information in the MIS is subject to the Privacy Act (Gov't Br. 39, n. 22), then *a fortiori*, the district court "properly issue[d]" an injunction to prohibit its release.

B. FIFRA and FOIA Exemption 3 protect Cooperators' information.

An analysis of the relevant provisions of FOIA and the Privacy Act reveals that the Government's concessions are correct. FOIA does not require disclosure of information if another statute requires that the matters be withheld. 5 U.S.C. §552(b)(3) (Exemption 3). The district court correctly held that Section 136i(1) of FIFRA constitutes an Exemption 3 statute, and that disclosure of the information sought by API and Forest Guardians would violate FIFRA. R1609-10; R1653.[5]

This Section requires certified applicators of restricted use pesticides to record, maintain and retain certain application records. 7 U.S.C. §136i-1(a)(1); *see also* 7 C.F.R. §110.3. While federal and state agencies may record data from applicators for certain purposes, "in no case may a government agency release data, including the location from which the data was derived, that would directly or indirectly reveal the identity of individual producers." 7 U.S.C. §136i-1(b).

[5] The Government asserts that "because the FIFRA provision applies only to information concerning the application of restricted use pesticides, it provides no basis for enjoining disclosures concerning USDA wildlife damage control programs that use other methods (such as traps, snares, shooting, and other non-chemical means)." Gov't Br. 29-30. That proposition does not undermine the injunction, which is narrowly written with respect to FIFRA to prohibit only the disclosure of "records regarding the location where restricted use pesticides have been, or will be, applied in connection with the Defendants' activities." R1654.

Neither the Government nor API disputes that: (1) the LPC program involves the use of a restricted use pesticide–Compound 1080; (2) Wildlife Services is a "government agency" that "maintains" LPC application records because it is an applicator of LPCs; and (3) API and Forest Guardians seek information that will reveal the identity of individual agricultural producers. Gov't Br. 30-31; API Br. 6, 31; R1286-90.

Defendants argued below that Section 136i-1(b) prohibits only the release of information that USDA's Agricultural Marketing Service (AMS) collects and then shares with other federal agencies for statistical or agronomic purposes. R1148-52, 1176-78, 1354-55. While API maintains that position on appeal, the Government now disagrees. It acknowledges that, in light of Section 136i-1's legislative history and the "specific language chosen in the statute as enacted," this interpretation would "defeat the dominant purpose of protecting the identities of individual agricultural producers." Gov't Br. 32-35. Plaintiffs agree with the Government, and will not repeat its arguments here.

API's interpretation would produce an absurd result. *United States v. Mathena*, 23 F.3d 87, 92-93 (5th Cir. 1994). Under its view, the statute would allow Wildlife Services to directly release application records it maintains as a certified applicator and which reveal the identity of individual agricultural producers. Yet the very same information would be protected if Wildlife Services

had forwarded the information to *another* component of the USDA (AMS), which then forwarded it to still *another* federal agency. That makes no sense.

This Court should follow the plain language of the statute: *no* agency may disclose personally identifying information from applicator records maintained pursuant to Section 136i-1(a), *regardless* of how or where the agency obtained the records. Under this interpretation, all portions of the records requested by API that concern Cooperators' identities and locations are exempt from disclosure under Exemption 3.

C. FOIA Exemption 6 applies to Cooperators' personally identifying information.

These portions are also exempt from disclosure under FOIA Exemption 6, as are comparable portions of the records requested by Forest Guardians. Exemption 6 allows the Government to withhold all information about an individual that is retained in personnel, medical and other similar files "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6).[6] It requires a balancing of an individual's right of privacy against the statute's policy of opening agency action to public scrutiny. *U.S. Dep't of State v. Ray*, 502 U.S. 164, 175 (1991).

[6] The term "similar file" has been construed broadly to include all information that applies to an individual and that is in the Government's possession. *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982). No party disputes that the records sought by API and Forest Guardians meet this standard.

The district court held that Exemption 6 applies to personally identifying Cooperator information and balanced the appropriate factors, concluding that the Government's decisions to release such information contravened the APA. R1605-08; R1652-53. Although the Government resisted this view below, it has now "determined that private individuals who participate in controversial wildlife damage control programs have significant privacy interests that will normally weigh in favor of withholding their identifies and home addresses under" Exemption 6. Gov't Br. 42. It now correctly concedes that Plaintiffs have a substantial privacy interest that outweighs any "countervailing public interest in knowing the exact location of private land where Wildlife Services applies controversial wildlife damage control methods[,]" particularly because the "vast amount" of information that they already disclose about Wildlife Services' "activities and their general locations" should be "fully adequate to allow members of the public to learn about Wildlife Services." *Id*. at 43-44.[7]

API argues that Exemption 6 does not apply to personally identifying Cooperator information because: Cooperators have a "business relationship" with

[7] The Government's only remaining Exemption 6 complaint concerns the district court's refusal to apply a revised regulation setting forth how the Government will exercise its discretion to release material that falls within Exemption 6. Gov't Br. 39-41. This argument is a red herring. Because this is a Privacy Act case, the Government has *no* discretion to disclose material that falls within Exemption 6. *See* 5 U.S.C. §552a(b)(2) (1996); Part III.D., *infra*.

Wildlife Services; Wildlife Services failed to justify withholding;[8] and the district court failed to properly balance the parties' interests. API Br. 18. These arguments all fail.

1. Plaintiffs possess a substantial privacy interest.

Cooperators' privacy interest in their homes, which are identified in many of the documents sought by API and Forest Guardians, "is accorded special consideration in our Constitution, laws and traditions." *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 501 (1994) ("*D.O.D.*"); *Wine Hobby USA, Inc. v. I.R.S.*, 502 F.2d 133, 136-37 (3d Cir. 1974); R1224. Thus, "it should come as no surprise that in none of [the Supreme Court's] cases construing the FOIA [has the Court] found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 774-75 (1989). The Supreme Court's record on this point remains unblemished, and in 1994, it reversed this Court's decision to order the Department of Defense to provide unions with home addresses of agency employees represented by unions. *D.O.D.,* 510 U.S. at 502 (home addresses represent a "nontrivial" privacy interest and are exempt from disclosure).

[8] This argument is fundamentally misplaced in a reverse-FOIA case, where the Government seeks to release the information requested.

In addition to the historic protection afforded the home, several well-settled and controlling principles of FOIA jurisprudence compel the conclusion that Cooperators possess a substantial privacy interest. For example, the Government's assurances to Cooperators that their personal information will be maintained in confidence carry special significance. *Ray*, 502 U.S. at 177; *see* R1214-15.

Furthermore, contrary to API's position (Br. 18-19), it is "incorrect to cabin the concept of 'privacy' by restricting a person's right to invoke it to only the personal or intimate details of his or her life." *Halloran v. Veterans Admin.*, 874 F.2d 315, 321 (5th Cir. 1989). Rather, what qualifies as a minimal privacy interest in one context might be substantially more private when linked with other information. Gov't Br. 42-43. The concern is "not with the identifying information *per se*, but with the connection between such information and some other detail – a statement, an event, or otherwise – which the individual would not wish to be publicly disclosed." *Halloran*, 874 F.2d at 321. A court must examine the nexus between the information sought and other details that the individual would not want publicly disclosed. *Id.*; *Ray*, 502 U.S. at 176; *Sherman v. U.S. Dep't of Army*, 244 F.3d 357, 362, 366 (5th Cir. 2001); *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1188 (8th Cir. 2000). That nexus includes the consequences that may flow from disclosure, regardless of the requestor's identity or "good intentions." *Ray*, 502 U.S. at 175-177 (potential mistreatment of Haitian

nationals who emigrated illegally and were involuntarily returned to Haiti); *D.O.D.*, 510 U.S. at 501 (influx of mailings, phone calls and other direct contacts to employees); *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 876-878 (D.C. Cir. 1989); *Family Farms*, 200 F.3d at 1184, 1189 (harassment and intimidation of pork producers signing petition).

Under these principles, Cooperators' privacy interest is especially great because disclosure reveals much more than a name or address. It identifies their participation in a controversial program opposed by animal rights extremists.

Animal rights extremists are among the most feared terrorist groups in the nation. R81-106. The Department of Justice and USDA have documented 313 individual acts of terrorism between 1977 and 1993 against enterprises or individuals using or marketing animals, including vandalism, threats, theft, arson, bomb threats, attempted and actual bombings, personal attacks, and an assassination attempt. R198. Almost one-quarter of these attacks took place at private residences or at agricultural or food production facilities. R198-99.[9]

Wildlife Services records in this case reveal that Wildlife Services personnel or property were threatened, intimidated, harassed or attacked on no fewer than 35

[9] *See also* R199, 203, 431 (Tr. Ex. 14) (ALF Website). The Animal Liberation Front teaches how to spy on animal facilities, elude security, build incendiary devices and wreck equipment, stating "arson works," and noting that "[p]laces to look for … farms … include the phone book [and] state and provincial agricultural lists (you may need a good sounding excuse) …."

occasions from 1990 to 2000. The attacks included threatening letters, phone calls, building and vehicle vandalization, tampering with equipment, break-ins, the poisoning of dogs, physical assaults, bomb-threats, death threats, multiple arson, bombings and shooting at or into a Wildlife Services building. R1218-19. These incidents prompted Wildlife Services to remove identification from some of its offices. *Id*. They cause Wildlife Services "grave concern" about Cooperator safety if their personal information is released. It believes that there is a very real and present danger that extremists will transfer their violent attacks to Cooperators based solely on their involvement with Wildlife Services. *Id*.

The record also reveals that animal extremist groups use names and addresses obtained from the Government to further their activities. One witness testified that extremists posted lists of names and addresses of fur farmers that were obtained from the Government, together with directions to the fur farmers' homes. *Id*. Many of the farmers on the lists suffered break-ins and extensive property damages following the web postings. *Id*. And while virtually every farmer whose name and address were posted had been harassed, farmers whose names were not posted had not been targeted. *Id*. at 59. In addition, an activist group referring to itself as New West Research obtained lists of names and addresses of Cooperators in New Mexico and posted them on its website captioned as the "Hall of Shame," stating "[t]he Earth is not dying – it is being killed. And

the people killing it have names and addresses." R272-91. Other Cooperators have also been harassed after the Government released their information. R1227-28.

API nevertheless claims that the threat posed to Cooperators is too speculative. API Br. 36-37. Yet a court is not required to "determine with absolute certainty" the effects of releasing particular information. *Halloran*, 874 F.2d at 320; *see also Sherman*, 244 F.3d at 365-66 ("heightened risk" of identity theft justified nondisclosure despite low probability of occurrence). In *Ray*, the Supreme Court gave "great weight" to the risk of harassment faced by illegal Haitian émigrés, even though the "danger of mistreatment" was "impossible to measure" given reports that Haiti was honoring its promise not to prosecute émigrés upon their return. 502 U.S. at 176.[10] The record here provides an ample basis to conclude that release of the information sought creates a "heightened risk" that extremists will threaten, intimidate, harass or physically harm Cooperators. *See*, *e.g.*, R1218-19, 1225-29.

API's contention (at 18-23) that Cooperators lack an Exemption 6 privacy interest because they have a business relationship with the Government is also

[10] *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 34-35, 37 (D.C. Cir. 2002) is easily distinguishable. There, the court indicated merely that there should be something more than idle speculation about untoward consequences "without *any* degree of likelihood." *Id.* (emphasis added). The court discounted the threat because, unlike here, there was a "paucity of evidence from which a reasonable fact finder *could* find that disclosure of site information will result in unlawful trespass on private property." *Id*. at 35 (emphasis added); *see id.* at 34 (evidence was single affidavit identifying one untoward incident that did not rise to level of trespass).

wrong. This Court rejected the same argument in *Halloran*. 874 F.2d at 321 ("We thus reject as overbroad the ... declaration that there [is] no privacy interests implicated ... because the participants discussed only 'business activities'."). [11] The Eighth Circuit also rejected it in *Family Farms*, where USDA argued that pork producers who signed a petition lacked a privacy interest because the "individuals were acting in their business capacities as farmers … when they signed the petitions." 200 F.3d at 1183-84. The court stated:

> [O]ur conclusion that plaintiffs have a substantial privacy interest in the petition is not diminished by the fact that many individuals may have signed it in their business or entrepreneurial capacities. … [The personal privacy exemption] excludes those kinds of files the disclosure of which might harm the individual …. 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. Whether petitioners sold pork as an individual, a sole proprietor, or as a majority shareholder in a close corporation does little to diminish the fact that disclosure of the petition will reveal the individuals who declared their position on this controversial issue.

[11] *Sims v. CIA*, 642 F.2d 562 (D.C. Cir. 1980), which predates the *Reporters Committee*, *Ray*, *Sherman* and *Halloran*, has lost relevance and is not the standard. Even in *Sims*, the court recognized that researchers may have had viable privacy interests, but because the Government declined the court's invitation to supply "information the court deemed essential to [an] accurate assessment of the privacy interests involved …[,] the Government could not prevail on the balancing test." 642 F.2d at 573.

Id. at 1188-89 (citations and quotations omitted). The same is true here. Regardless of whether Cooperators' information reached the LPC or MIS records by virtue of their individual or commercial activities, disclosure of identifying information about them will reveal their individual participation in Wildlife Service's controversial predator control program. *Cf*. Gov't Br. 42.[12]

The "business relationship" standard API advocates would eviscerate the exemption because almost any piece of paper in the Government's possession pertains to some "business activity." In *D.O.D.*, the individuals whose home addresses were the subject of FOIA requests had the most direct "business relationship" possible with the Government – they were employees. 510 U.S. at 489-90; *see Sherman*, 244 F.3d at 362 (military personnel); *Halloran*, 874 F.2d at 317-18 (government subcontractor). Yet the courts recognized the privacy rights of individuals in each of these cases. This Court should do likewise.

2. There is no public interest in disclosure.

To outweigh Plaintiffs' privacy interest, Defendants would need to demonstrate the presence of a substantial public interest in obtaining the information. *Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 390-91 nn.8, 13 (D.C. Cir. 1987).

[12] There is ample support in the record for the fact that many farmers and ranchers who are Cooperators are individuals, not corporations, and some of them live with their families on the ranches or farms listed. *See*, *e.g.*, 8 R40-42, R1166-67.

Before the district court, the law limited API to the arguments it made before the agency; API waived all other arguments. *Penn Allegheny Coal v. Mercatell*, 878 F.2d 106, 110 (3d Cir. 1989); *N. Wind, Inc. v. Daley*, 200 F.3d 13, 17-18 (1st Cir. 1999). Likewise, this Court may not consider arguments that API could have made in the district court but did not. *Hinsley v. Boudloche*, 201 F.3d 638, 645 n.12 (5th Cir. 2000) ("we consider what was before the trial court, no more and no less").

Accordingly, the Court should limit its review to the arguments that API made in its November 18, 1997 FOIA request (API000001) and June 24, 1999 administrative appeal (API000013-14). The Court should disregard API's *post-hoc* arguments regarding: Paul Wright (R1343-47, API Br. 13, 30-31) (first made before the district court); endangered species (R1347, API Br. 12, 28-29) (first made before the district court); or monitoring the Government's compliance with laws generally (first raised before the district court at R1348) and with FIFRA (first raised on appeal at API Br. 31-32) and the Endangered Species Act (first raised on appeal API Br. 28-29) specifically. However, for the reasons below, the public has little to no interest in personally identifying Cooperator information even if the Court does consider these arguments.

While the privacy interest protected by Exemption 6 is broad, the Supreme Court has "narrowly" defined the "public interest" relevant to Exemption 6

balancing as "the extent to which disclosure would … contribut[e] *significantly* to the *public* understanding of the operations or activities of the government." *Sherman,* 244 F.3d at 361-62 (emphasis added); *see Reporters Comm.*, 489 U.S. at 772-73. Information that reveals little or nothing about an agency's own conduct does not meet this standard. *Id.* The public benefit must also flow *directly* from disclosure, because "[m]ere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy." *Ray*, 502 U.S. at 179.

The "public interest" required under Exemption 6 does not include consideration of the requestor's "particular purpose" in making the request. *Reporters Comm.*, 489 U.S. at 771-72; *D.O.D.*, 510 U.S. at 496-501. Instead, the proper approach is to focus on "the nature of the requested document" and "its relationship to" the public interest in enhancing understanding of government activities. *Reporters Comm.*, 489 U.S. at 772. *See Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355, 356 (1997); *Sherman*, 244 F.3d at 366; *FLRA v. U.S. Dep't of Navy*, 941 F.2d 49, 57 (5th Cir. 1991); *Horner*, 879 F.2d at 875; *Halloran*, 874 F.2d at 323-24.

Neither API nor Forest Guardians timely identified any genuine public interest in disclosure before Defendants. Forest Guardians claimed that MIS data would help it advocate on public land management issues. R1234. But it never explained how personally identifying Cooperator information would serve that

interest. API claimed no public interest whatsoever in its FOIA request. API000001. On administrative appeal, it asserted that *it* possessed an interest in disclosure in that knowing where an LPC was placed would allow *it* to alert the public of any dangerous devices.[13] API000013-14. But API's idiosyncratic interest in publishing the information is not the same as the public's interest in the information. This is particularly true because the Government already releases extremely detailed information about Wildlife Services' activities. Gov't Br. 44 n.25; R1216. The Government has acknowledged all along that Cooperators' personal information does not further increase the public's understanding of Wildlife Services programs. R1216-17.

The Government already gave API all responsive information that would *significantly* contribute to the public's understanding of Wildlife Services' LPC program, including 94 pages of application records from California, Utah, Virginia and West Virginia (API000015-111) and 622 pages of application records from New Mexico and Texas (API000112-723). Much of *that* information sheds light on Wildlife Services' performance of its statutory duties, including whether an

[13] API continues to confuse its own interests with those of the public. *See* R1345, 1347-48, 1354; API Br. 27-28 (information requested will provide "API with a greater understanding of Wildlife Services' program" and allow "API to determine if Wildlife Services is complying" with laws); 28 (without knowing where Wildlife Services uses lethal devices, "API is unable to tell" if they are being appropriately used, "API has an interest in monitoring how Wildlife Services'" activity is impacting species not listed under the Endangered Species Act"); 32 ("API has an interest in monitoring" compliance with laws").

LPC resulted in harm to humans, domestic pets, non-target, threatened or endangered species. *Id*.; Gov't Br. 44; R 1230.

All that Cooperators' personal information potentially reveals *for purposes of the public interest* is the fact that Wildlife Services was allowed on a Cooperator's property. If that were enough, then names and addresses could never be protected. The cases hold otherwise. *See, e.g.*, *D.O.D.*, 510 U.S. at 497-98; *Ray*, 502 U.S. at 178; *Reporters Comm.*, 489 U.S. at 775; *Horner*, 879 F.2d at 873 (names and addresses of federal annuitants revealed nothing directly about workings of government); *N.Y. Times v. NASA*, 782 F. Supp. 628, 632-33 (D.D.C. 1991).[14]

API's argument that there is a "compliance monitoring" interest similarly fails to pass muster. Cases subsequent to *Reporters Committee* make clear that the public's interest in "monitoring" federal programs is "slender." *Family Farms*, 200 F.3d at 1189; *see also Ray*, 502 U.S. at 178; *Sheet Metal Workers Int'l Ass'n v. U.S. Dep't of Veterans Affairs*, 135 F.3d 891, 903 (3d Cir. 1998); *Sheet Metal Workers Int'l Ass'n v. U.S. Air Force*, 63 F.3d 994, 998 (10th Cir. 1995); *Painting*

[14] API argues that the public interest *could* be served *if* it obtains personally identifying Cooperator information *and if* it publishes the information *and* succeeds in alerting the public to the presence of LPCs on or near their property. In other words, the asserted public interest stems not from the information itself but from a use to which the documents could be put if disclosed. This claim is speculative. Moreover, the Supreme Court and this Court have declined to recognize derivative uses as legitimate for Exemption 6 purposes. *See Ray*, 502 U.S. at 178-79; *Sherman*, 244 F.3d at 366 ("[O]ur focus is solely upon what the requested information reveals, not what it might lead to").

Indus. of Haw. Mkt. Recovery Fund v. U.S. Air Force, 26 F.3d 1479, 1485-86 (9th Cir. 1994); *Hopkins v. U.S. Dep't of Housing & Urban Dev.*, 929 F.2d 81, 88 (2nd Cir. 1991). Moreover, API's mere invocation of a monitoring interest cannot justify the release, particularly given that a presumption of legitimacy attaches to official government conduct. *Ray*, 502 U.S. at 179; *Hopkins*, 929 F.2d at 88 (citing *Halloran*, 874 F.2d at 323).

Weighing the Cooperators' substantial privacy rights against the negligible public interest in personally identifying Cooperator information requires that the result in this case "can only come out one way – in favor of protecting the privacy" of the Plaintiffs. *Family Farms*, 200 F.3d at 1189.

D. The district court properly held that disclosure violates the Privacy Act.

Because Cooperators' personal information falls within Exemptions 3 and 6, the Privacy Act prohibits the Government from disclosing it. The Privacy Act protects individuals against invasions of their personal privacy by preventing the potential misuse of personally identifiable information stored in government records. *Johnson v. I.R.S.*, 700 F.2d 971, 976 (5th Cir. 1983). The statute prohibits the Government from disclosing by any means any record contained in a system of

records without the prior written consent of the individual to whom the record pertains, unless exceptions not relevant here apply. 5 U.S.C. §552a(b). [15]

A "record" is "any item [or] collection … of information about an individual that is maintained by an agency … and that contains his name, or other identifying … particular …." 5 U.S.C. §552a(a)(4). The term "maintain" includes "maintain, collect, use or disseminate." 5 U.S.C. §552a(a)(3). A "system of records" is a "group of records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol or other identifying particular assigned to the individual." 5 U.S.C. §552a(a)(5). The district court held that the Privacy Act covers LPC records sought by API and the MIS information sought by Forest Guardians. R1610-12.

The record amply supports the district court's holding as to all requested documents. Wildlife Services employee David Bergman testified that both the MIS and the paper records Wildlife Services keeps are searchable by personal identifiers.[16] R1215. Additionally, Wildlife Services memoranda state that

[15] The Act does protect records that are subject to FOIA's mandatory disclosure requirements. 5 U.S.C. §552a(b)(2). As the Government acknowledges, this exemption does not apply because the information sought by API is exempt from FOIA pursuant to Exemption 6 and Exemption 3. Gov't Br. 35 nn.19, 39, 42. The Government also acknowledges that the MIS information sought by Forest Guardians is exempt from FOIA pursuant to Exemption 6 and, in some cases, Exemption 3. Gov't Br. 30, 39, 42.

[16] Neither *Henke v. Dep't of Commerce*, 83 F.3d 1453 (D.C. Cir. 1996) nor *Bettersworth v. FDIC*, 248 F.3d 386, 392 (5th Cir. 2001) require a different result. Subsequent cases reject the "narrow *Henke* rationale" that information must be retrieved in practice to qualify, and focus on (cont'd)

"Wildlife Services records are kept by individual cooperating individual name" that can be located in computer databases by conducting searches of individual names. *Id*. Even if that were not the case, however, the Government concedes on appeal that the Privacy Act applies to documents sought by API and Forest Guardians. Gov't Br. 36-39.

The Government judicially admits that two of six types of documents identified in response to the API Request contain Cooperator agreement numbers and are retrieved by those numbers. *See id*. at 37-38; *Martinez v. Bally's La., Inc.*, 244 F.3d 474, 476 (5th Cir. 2001); *City Nat'l Bank v. United States*, 907 F.2d 536, 544 (5th Cir. 1990). A considerable portion of the responsive records consist of these very records, including all of the records sent to API on December 2, 1998. *See e.g.*, API000015-API000111.[17]

(… cont'd)

whether information is "retrievable." *Bettersworth*, 248 F.3d at 392 ("statutory language" requires "that the records be retrievable"); *Williams v. Dep't of Veterans Affairs*, 104 F.3d 670, 674-76 (4th Cir. 1997) ("Because [the information] *can be* retrieved [by identifier], and may in fact have been so, we vacate.…") (emphasis in original). The Government concedes that two of the six types of application records sufficiently "pertain" to Cooperators to be subject to the Privacy Act, and there is no basis to conclude that the remaining documents differ in the degree to which they pertain to Cooperators.

[17] The Government does not dispute that it released these documents to API without redacting Cooperator agreement numbers. This fact, coupled with the Government's admission that the records are protected by the Privacy Act, constitutes an admission that the Government violated the Privacy Act by releasing protected records to API on December 2, 1998 and May 27, 1999. The withheld information still warrants protection, however, because the records are also retrieved by other identifying information, such as farm name, ranch name, address, or county. Gov't Br. 38 n.21.

The Government also concedes that the Privacy Act applies to the MIS records sought by Forest Guardians. It judicially admits that information occasionally is retrieved from the MIS by Cooperator names, agreement numbers, or other unique personal identifiers, which subjects the information to "the disclosure restrictions of the Privacy Act." Gov't Br. 39 n.22. Accordingly, the Government cannot claim that the district court erred in holding that the release of the records sought by Forest Guardians constitutes a violation of the Privacy Act.

III. The Scope of the District Court's Injunction Is Proper.

A. The injunction is correctly categorical.

For these reasons, Plaintiffs are entitled to prevent the Government from releasing their personal information. Defendants argue, however, that the district court's injunction is overbroad. While their arguments occasionally give the impression that the district court's injunction prevents the Government from releasing any identifying information about Cooperators, that impression is incorrect. The injunction is limited to prohibiting the release of "personal information" contained in three categories of documents:

> (a) records regarding the Defendants' livestock protection collar program, including but not limited to the following: Pre-Application Inspection Reports, Application Data Reports, LPC Project Summaries, LPC Project Data Reports, Records of 1080 Toxic Collar Use, LPC Quarterly Reports; (b) records regarding the location where restricted use pesticides have been, or will be, applied in connection with the Defendants' activities; and (c) the MIS database or the records from which information in the MIS database derives,

including written agreements by which Plaintiff Cooperators authorize the Government Defendants to enter their property.

R1654.

Defendants argue that this prohibition is too broad, and that the district court lacked jurisdiction to enjoin anything other than their release of personal information in response to the API Request. As discussed in Part I above, this jurisdictional challenge is misplaced. The district court had jurisdiction to consider the API and FG Requests and the Government's disclosure policy. The district court's jurisdiction over the Government's handling of these two FOIA requests is alone sufficient to support the scope of the injunction, and its jurisdiction concerning the policy further confirms that this scope is proper.

The three categories of documents defined by the district court's injunction are based on the documents requested by Forest Guardians and API. Category (a) lists the types of documents relating to LPCs that the Government determined were responsive to the API Request for collar application data. *See* Gov't Br. 31 n.16. This category is a subset of category (b), because the LPCs contain a restricted-use pesticide. *Id.* at 30; R1592. Category (c) refers to the MIS database, which was the subject of the FG Request.

Categories (a) and (b) are included in the injunction based on the district court's Exemption 3 analysis. As the court observed, USDA personnel who apply restricted-use pesticides – such as LPCs and M-44 devices – on Cooperator

property keep records as required by FIFRA. R1609-1610. The court held, and the Government now agrees, that FIFRA categorically prohibits the Government from releasing data in such records that would reveal the identity of individual Cooperators. *Id.* In its brief, the Government recognizes that it may also be required to withhold personal information about Cooperators from some category (c) documents based on Exemption 3. Gov't Br. 30 n.15, 35 n.18.

Category (c) is included in the injunction based on the district court's Exemption 6 analysis. The court rejected the Government's revised disclosure policy as announced in the Cohen Memo, holding instead that Cooperators have a personal privacy interest in the identifying information contained in the records sought by API and Forest Guardians. Because the public interest in disclosure did not outweigh this privacy interest, the court held that Exemption 6 applied and the Privacy Act prohibited the Government from disclosing the information. R1604-08, 1610-12. This rationale applies to Cooperators' personal information in all three categories of documents, though that information is also protected by FIFRA when it appears in category (a) or (b) documents.

As explained in Part II, the district court's holdings on these issues are correct. Defendants incorrectly argue, however, that the injunction should only cover the particular documents responsive to the API and FG Requests, and that it should not bind the Government regarding future FOIA requests. "[C]ategorical

decisions may be appropriate and individual circumstances disregarded when a [FOIA] case fits into a genus in which the balance characteristically tips in one direction." *Reporters Comm.*, 489 U.S. at 776. Categorical decisions implement the congressional intent to provide workable rules that expedite FOIA disclosure determinations. *Id.* at 779. Although *Reporters Committee* involved an Exemption 7(C) claim, the decision emphasized that its conclusion "is a general one that applies to all exemptions." *Id.* at 778. When the above-quoted test is met, as it is here, a categorical decision is proper even though the language of the particular exemption at issue "seems to contemplate a case-by-case showing 'that the factors made relevant by the statute are present in each distinct situation.' " *Id.* at 776.

Courts routinely follow this approach in cases involving various exemptions, including Exemption 3 and Exemption 6.[18] In rendering a categorical decision, courts frequently find it appropriate to define a genus of similar documents that is

[18] *See, e.g., D.O.D.*, 510 U.S. at 496 n.6 (*Reporters Committee* analysis applies to Exemption 6); *F.T.C. v. Grolier Inc.*, 462 U.S. 19, 28 (1983); *Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999); *Critical Mass Energy Project v. Nuclear Reg. Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992); *Reed v. N.L.R.B.*, 927 F.2d 1249, 1252 (D.C. Cir. 1991) (Exemption 6); *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1206 (D.C. Cir. 1991); *Church of Scientology v. I.R.S.*, 792 F.2d 146, 153 (D.C. Cir. 1986) (Scalia, J.) (Exemption 3); *Campaign for Family Farms v. Veneman*, No. Civ. 99-1165, 2001 WL 1631459, at *2-3 (D. Minn. July 19, 2001) (Exemption 6).

broader than the particular documents requested, and to establish a rule for the Government to follow in future FOIA determinations.[19]

In this case, Plaintiffs sought categorical declaratory and injunctive relief,[20] and the district court did not abuse its discretion by holding that categorical treatment is appropriate. *Rolex Watch*, 158 F.3d at 823 (scope and form of injunction reviewed for abuse of discretion). As to Exemption 3, the FIFRA non-disclosure provision at issue leaves the Government no discretion regarding whether to withhold records containing restricted-use pesticide application data. 7 U.S.C. §136i-1(b); *see* Part II.B., *supra*. This type of blanket prohibition on release is uniquely suited to a categorical ruling under *Reporters Committee*, because Congress has already struck the balance and determined that no release of *any* application data is ever appropriate.

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[19] *Grolier*, 462 U.S. at 28 (attorney work-product exempt from disclosure regardless of status of litigation for which it was prepared); *Niagara Mohawk*, 169 F.3d at 19; *Critical Mass*, 975 F.2d at 879 (financial or commercial information provided to Government voluntarily is confidential if provider would not customarily release to public); *Reed*, 927 F.2d at 1252 ("Exemption 6 protects *Excelsior* lists as a category – not merely those lists sought here by Reed"); *SafeCard Servs.,* 926 F.2d at 1206 ("names and addresses of private individuals appearing in all files within the ambit of Exemption 7(C)" exempt from future disclosure absent compelling evidence of illegal activity by agency); *Family Farms*, 2001 WL 1631459, at *1-2 (permanently enjoining government defendant from releasing entire document, not merely portions requested, to requester or any other person).

[20] *See, e.g.,* R998-99, 1001, 1004-05 (complaint requested declaration that disclosing "information of the type sought" by API and Forest Guardians would be arbitrary and capricious and violate the Privacy Act, and injunction prohibiting disclosure of "any and all personal information about Cooperators," including "personal information that would directly or indirectly reveal the identity of ranchers or others using restricted use pesticides in conjunction with LPCs").

The scope of the injunction corresponds to the scope of the statutory ban, prohibiting the Government from releasing "personal information" – including specific identity and location information "that reveals, directly or in combination with other information, the identity of a Plaintiff Cooperator" – contained in the restricted-use pesticide application records specified in categories (a) and (b). R1651, 1654. Therefore, categories (a) and (b) should be upheld.

As to Exemption 6, "personal information" contained in the injunction's three categories of documents fits into a genus of information for which the balance characteristically tips against disclosure. The injunction defines "personal information" to include:

> [Cooperator] names, addresses, the county in which a Plaintiff Cooperator is located, the acreage of the Plaintiff Cooperator's property, the name of a Plaintiff Cooperator's ranch or farm, telephone numbers, agreement numbers and agreement types.

R1651. As this Court and many others have recognized, "the case law consistently supports agency redactions of identity information" like this. *Cooper Cameron Corp. v. U.S. Dep't of Labor*, 280 F.3d 539, 546 & n.28 (5th Cir. 2002); *see Sherman*, 244 F.3d at 364-66; *Schiller v. I.N.S.*, 205 F. Supp. 2d 648, 663-64 (W.D. Tex. 2002) (collecting cases). Because the privacy interest of individuals in their identifying information is significant and that information generally sheds little light on government activities, courts frequently rule categorically that such

information is exempt from disclosure.[21] *E.g., Reporters Comm.*, 489 U.S. at 773-75, 780; *Reed v. NLRB*, 927 F.2d 1249, 1252 (D.C. Cir. 1991); *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1206 (D.C. Cir. 1991).

That result is proper here. Just as the Exemption 6 balance tips against disclosure of documents requested by API and Forest Guardians, *see* Part II.C., *supra*, it also tips against disclosure for the genus of similar documents covered by the injunction. For example, there is absolutely no reason to think that the analysis of whether personal information about Cooperators may be disclosed will vary depending on whether the information is contained in the MIS database or in records from which that database derives.

In fact, the Government effectively concedes that a categorical approach is appropriate. Initially, its Cohen Memo disclosure policy stated that farmers and ranchers generally had no privacy interest in their identifying information; this conclusion applied to all "agency files" in which such information appeared. R1222. Now, the Government concedes that the opposite categorical approach is warranted. Its brief states that the Government will generally withhold identifying information of individual private Cooperators because they have significant privacy interests that normally outweigh the public interest in knowing the exact

[21] This is particularly appropriate given that a court must weight the "public's" interest in particular records rather than the requestor's, and the "public's" interest in the records will not differ if a different requestor seeks them.

location of private land where wildlife damage control activities occur. Gov't Br. 42-44, 51.

The Government does object that county and acreage information should not be treated categorically as "personal information" that must be redacted because that information will not always identify a Cooperator. Yet the Government concedes that county information can identify Cooperators in some instances, *see* Gov't Br. 51, and its original position in the Forest Guardians litigation was that both county and acreage information should be withheld because they would identify individual landowners. R406; 8 R11. Furthermore, an injunction specifying that county and acreage information should be released unless it would allow the recipient to ascertain the identity of a Cooperator would create the very type of vagueness problem that the Government is supposedly trying to avoid. *Cf.* Gov't Br. 49.

Fortunately, FOIA does not compel case-by-case consideration of counties and acreages for each Cooperator, because it only requires that any "reasonably segregable" portion of a record be provided after exempt portions are deleted. 5 U.S.C. §552(b). If exempt and non-exempt portions are "inextricably intertwined," disclosure of the intertwined non-exempt portions is not required. *E.g., Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 74 (D.D.C. 2003). Thus, even if the Court rejects the Government's original position that county and acreage will allow recipients to

identify Cooperators, identification is at least possible often enough that it would be quite burdensome and perhaps impossible for Government FOIA officers to segregate identifying from non-identifying counties and acreages. Under these circumstances, disclosure of counties and acreages is not required. *See Flightsafety Servs. Corp. v. Dep't of Labor*, 326 F.3d 607, 612 (5th Cir. 2003) (disclosure not required when "any disclosable information is so inextricably intertwined with the exempt, confidential information, that producing it would require substantial agency resources and produce a document of little informational value."). Moreover, counties and acreages must at a minimum be withheld to the extent they appear in category (a) and (b) documents because they are location data that can indirectly identify an individual producer. Therefore, it was proper for the district court to categorically enjoin release of counties and acreages, as well as of other personal information contained in the three categories of documents identified by the injunction.

The Government's argument that categorical treatment is improper relies principally on *Gulf Oil Corp. v. Brock*, 778 F.2d 834 (D.C. Cir. 1985). But *Brock* is distinguishable. It was decided before *Reporters Committee* endorsed categorical treatment of FOIA actions, and its holding was that the disclosure Gulf had sued to stop was moot because the request had been withdrawn. *Id.* at 838. Its discussion in dicta regarding the proper scope of a reverse-FOIA injunction has no

application to a case like this one, where the court has jurisdiction over pending FOIA requests and the only question is the proper scope of relief. *Cf. id.* at 842 ("Our holdings on mootness and ripeness are hardly surprising given the breadth of the original injunction"). In addition, the scope flaw found by the *Brock* court was that the injunction prohibited the disclosure of information plainly disclosable under FOIA, *id.*, which is not the case here.

Defendants' final challenge to the breadth of the injunction is that it is not limited to prohibiting the release of documents in response to FOIA requests. But this is a suit under the Privacy Act and Administrative Procedure Act, and those Acts together with FIFRA prohibit the Government from disclosing Cooperators' personal information in contexts broader than FOIA. *See* 5 U.S.C. §552a(b) ("No agency shall disclose any record … unless disclosure of the record" would fall within a listed exception); 7 U.S.C. §136i-1(b) ("in no case may a government agency release data … that would directly or indirectly reveal the identity of individual producers.").

Defendants contend that by extending the injunction outside the FOIA context, the district court has caused the Government significant hardship. For example, they argue that the injunction forbids routine releases to other Government agencies for law enforcement and administrative purposes, the compilation of complete administrative records for litigation under statutes other

than FOIA, and even routine releases to Congress. Yet Defendants have only themselves to blame for these consequences. The Privacy Act contains exceptions that may allow disclosure of information in many of these instances,[22] but Defendants never showed the district court that it had met the requirements of those exceptions or asked the court to modify its injunction to incorporate the exceptions. Nor did they explain how any exception could be reconciled with FIFRA's prohibition on disclosure. While the Government can seek such a modification in appropriate circumstances, it cannot complain about these problems for the first time on appeal.

Finally, the circumstances of this litigation confirm that the district court correctly exercised its discretion to enter a categorical injunction. All individuals and entities who have been Cooperators since January 1, 1990, are part of the Plaintiff Class, and it is an efficient use of the resources of all concerned to allow Cooperators and the Government to litigate and a court to decide, in a single proceeding, the circumstances in which the Government can disclose Cooperators' identifying information. Requiring the Plaintiffs to intervene to protect their safety and defend their rights every time a new FOIA request is made, or other disclosure of their personal information is threatened, would be a waste of the courts' and

[22] *E.g.,* 5 U.S.C. §§552a(b)(3) (disclosure for a routine use); (b)(7) (disclosure to another agency for civil or criminal law enforcement activity); (b)(9) (disclosure to Congress); (b)(11) (disclosure pursuant to court order).

Plaintiffs' resources. Plaintiffs should not be deprived of their rights by being forced to defend them on exactly the same grounds so many times that they can no longer afford to do so.

In addition, a categorical injunction is proper in light of the significant danger that the Government will disclose personal Cooperator information in the future before Cooperators have an opportunity to challenge that action in court. As discussed in Part I above, Defendants have changed their disclosure policy many times, and this flip-flopping makes it entirely reasonable to expect that the wrong will be repeated. Here, it was only due to luck and the cooperation of sympathetic USDA personnel that Plaintiffs were able to stop full disclosures of their information to Forest Guardians and API. Even then, the Government twice released Cooperator agreement numbers to API and released Cooperator names, addresses, telephone numbers, ranch names, property acreage and agreement numbers to Forest Guardians before Plaintiffs could act. R1230, 1235.

Given the significant threat that the release of this information poses to the safety of individual Cooperators, Plaintiffs should not be forced to gamble that they will be able to intercept every disclosure before it occurs. Because personal Cooperator information cannot be recalled once released, the district court correctly determined that an injunction is necessary to prevent irreparable harm to

Plaintiffs. R425. This Court can and should uphold the scope of the district court's categorical injunction.

B. The injunction is sufficiently specific.

The Government also challenges the injunction on vagueness grounds, arguing that the reach of the definition of "personal information" is unclear. The injunction defines "personal information" as (i) "information that reveals, directly or in combination with other information, the identity of a Plaintiff Cooperator," including (ii) "names, addresses, the county in which a Plaintiff Cooperator is located, the acreage of the Plaintiff Cooperator's property, the name of a Plaintiff Cooperator's ranch or farm, telephone numbers, agreement numbers and agreement types," as well as (iii) "any type of identifying information which will allow the recipient of the information to ascertain the name, address, ranch, or location of a Plaintiff Cooperator." R1651.

The Government complains that parts (i) and (iii) of this definition are vague because it has no way of determining what combination of information might allow a recipient to ascertain Cooperator identities and locations. Yet part (i) of this definition is at least as specific as the FIFRA prohibition on which it is based. FIFRA prohibits the disclosure of data "that would directly or indirectly reveal the identity of individual producers." 7 U.S.C. §136i-1(b). The Government acknowledges that these words make clear what information is protected and what

scope of protection is intended. Gov't Br. 34. The injunction's reference to information that "in combination with other information" reveals the identity of a Cooperator appropriately adheres to this clear statutory prohibition on indirect disclosure.

In addition, the purpose of parts (i) and (iii) is not to make the Government guess whether information it releases could be combined with information from another source to identify a cooperator. Rather, part (i) focuses only on the universe of information released by the Government, and the purpose of its "in combination with" reference is to prevent the Government from disclosing identifying information in a piecemeal fashion. Similarly, part (iii) focuses on information that, on its face, includes a detailed written description that specifically points to the identity or location of a particular Cooperator. This information generally will be similar to the items listed in part (ii), and could include such things as map coordinates or driving directions.

Because the question whether information falls within one of these three parts can be determined objectively by looking only at the information itself, these provisions give the Government sufficient notice of what items should be withheld.

C. If this Court concludes that the injunction is unclear, the case should be remanded.

The district court's injunction complies with FED. R. CIV. P. 65(d). However, if this Court holds that the injunction is vague or overbroad, it should

remand to give the district court the opportunity to reform the injunction. *See, e.g., Seattle-First Nat'l Bank v. Manges*, 900 F.2d 795, 799 (5th Cir. 1990); *Young v. Pierce*, 822 F.2d 1368, 1374 (5th Cir. 1987) ("It is properly the role of the district court, familiar as it is with this case, to attempt the modification of the injunction to accord with the dictates of Rule 65(d)"). If this Court concludes that any facts necessary to support the scope of the injunction are lacking, it should remand to allow the district court to further explain the basis for its decision. *Allied Mktg. Group, Inc. v. CDL Mktg., Inc.*, 878 F.2d 806, 814 (5th Cir. 1989).

IV. The District Court's Award of Reasonable Attorneys' Fees and Costs is Authorized by the Privacy Act.

The district court awarded Plaintiffs their reasonable attorneys' fees and costs under the Privacy Act because it found that Plaintiffs satisfied all four elements of a wrongful disclosure cause of action. An award of attorneys' fees and costs is mandatory once a wrongful disclosure is established, independently of whether damages are sought. 5 U.S.C. §552a(g)(4) ("[T]he United States *shall* be liable [for] … (A) actual damages … but in no case shall a person entitled to recovery receive less than the sum of $1000; *and* (B) the cost of the action together with reasonable attorney fees as determined by the court") (emphasis added). The court did not award Plaintiffs their $1000 statutory minimum monetary damage awards because Plaintiffs elected not to take them.

On appeal, the Government does not contest the district court's findings with respect to the four elements of liability. Similarly, with one minor exception discussed in Part IV.C., the Government does not challenge the district court's finding that the *amount* of the award is reasonable. Instead, the Government's narrow objection is that Plaintiffs are not entitled to their reasonable fees at all because "[t]his was not a Privacy Act suit" and because Plaintiffs lacked standing given that they "admittedly did not seek damages." Gov't Br. 53, 55. The Government is wrong on both points.

A. Plaintiffs have standing to raise claims for wrongful disclosure under the Privacy Act.

The Government attempts to use the fact that Plaintiffs did not request monetary damages to show that they lacked standing to sue under the Privacy Act. This confuses the *remedies* available to prevailing parties under §552a(g)(4) of the Privacy Act with the *injury* suffered by the Cooperators that confers standing. Certainly, "a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). But Plaintiffs never claimed, and the district court never found, that the only injury suffered by Cooperators was the expense of bringing suit. To the contrary, the district court found that the Cooperators met the "adverse effect" element of their Privacy Act claim based on the mental and emotional injury caused by the disclosure of their personal information. SR2. As a number

of courts have described it, the "adverse effect" element is in fact a standing requirement. *See Quinn v. Stone*, 978 F.2d 126, 135 (3d Cir. 1992) (citing *Parks v. I.R.S.*, 618 F.2d 677, 683 (10th Cir. 1980)). The district court found, and the Government does not dispute on appeal, that Plaintiffs satisfied the adverse effect requirement, thus establishing conclusively that they have standing to bring their Privacy Act claims.

True, Plaintiffs elected to forego the monetary damages they could have demanded, including the guaranteed statutory minimum damages award of $1000 per Cooperator. 5 U.S.C. §552a(g)(4). But their choice not to seek "actual damages" and to forego a part of their guaranteed statutory *remedy* of $1000 per Cooperator does not undermine their *standing* to sue. Indeed, this Court has previously allowed plaintiffs to recover the statutory minimum damages as well as attorneys' fees and costs *without* proving "actual damages," provided that the four prerequisites to liability are met. *See Johnson v. I.R.S.*, 700 F.2d 971 (5th Cir. 1983); *see also Orekoya v. Mooney*, 330 F.3d 1 (1st Cir. 2003) (agreeing with five other circuits that provable emotional distress constitutes an adverse effect entitling a plaintiff to the statutory award without proving actual damages); *Doe v. Chao*, 306 F.3d 170, 189 (4th Cir. 2002) ("[M]ost circuit courts have read the Privacy Act to allow recovery of statutory damages without proof of actual damages") (Michael, J., concurring in part and dissenting in part), *cert. granted*, 123 S. Ct.

2640 (2003); *but see id.* at 177 (requiring plaintiff to establish actual damages before awarding statutory minimum damages).

B. Plaintiffs' case has always been about the Privacy Act.

From the moment Plaintiffs filed suit more than 3½ years ago, they expressly prayed for their fees and costs under the Privacy Act, and they have consistently alleged that the release of personal information would be an intentional and willful violation of the Privacy Act. R22-23, 317-18, 320-21, 1003, 1004-05. Thus, the Government's contention that "this was not a Privacy Act suit," is greatly exaggerated. The Government is correct only to the extent that Plaintiffs *initially* sought to enjoin the release of private Cooperator information based in part on a theory that such releases *would be* wrongful disclosures. Obviously, Plaintiffs could not claim any *actual* wrongful disclosures until the Government released Cooperator information. After the unauthorized releases occurred or were identified, those would-be violations of the Privacy Act materialized into claims for actual wrongful disclosures. Because the Government certainly was on notice that its *threatened* disclosures *would* violate the Privacy Act, they can hardly claim that they lacked notice that their *actual* disclosures *did* violate the Act, or that they were unprepared to meet those claims. Indeed, the parties fully litigated the merits of the wrongful disclosure claims in the district court.

Even if the Court were to find that Plaintiffs did not properly plead a wrongful disclosure cause of action, the Court may still affirm the award on appeal by permitting amendment of the pleadings to conform to the evidence and issues decided below. *See Nat G. Harrison Overseas Corp. v. Am. Tug Titan,* 516 F.2d 89, 96 (5th Cir. 1975); *see also Cates v. Morgan Portable Bldg. Corp*., 780 F.2d 683, 690 (7th Cir. 1985) ("[A] complaint can be amended at any time, even in the court of appeals, to conform to the evidence."); *Smith v. CMTA-IAM Pension Trust*, 654 F.2d 650, 654 n.2 (9th Cir. 1981) (treating pleading as though amended on appeal where claims were argued in trial court); 6A Wright, Miller & Cooper, FEDERAL PRACTICE & PROCEDURE 2D §1494 (2d ed. 1990). The parties fully litigated the merits of the wrongful disclosure cause of action on uncontested facts before the district court. The Government has offered no reason why, even if the wrongful disclosure count was technically deficient in hindsight, this Court should not review and affirm the district court's determination of the issue.

Alternatively, if the Court finds that Plaintiffs improperly pled their wrongful disclosure cause of action and also refuses to deem the pleadings amended on appeal, the proper course is to remand the case for further proceedings. *See Galvan v. Bexar County*, 785 F.2d 1298 (5th Cir. 1986) (affirming the district court's discretion in allowing plaintiff to amend his complaint to add a new but related claim on remand from appeal); *see also* 6A

Charles A. Wright, et al., FEDERAL PRACTICE & PROCEDURE §1488 (2d ed. 1990) ("courts have not imposed any arbitrary timing restrictions on a party's request for leave to amend and permission has been granted under Rule 15(a) at various stages of the litigation … even on remand following an appeal.").

The statute of limitations is no bar to amendment, either on appeal or on remand, as the claim for a wrongful disclosure violation arises "out of the conduct, transaction or occurrence, set forth or attempted to be set forth in the original pleading," namely, the decisions to release personal Cooperator information to the public. FED. R. CIV. P. 15(c)(2); *F.D.I.C. v. Conner*, 20 F.3d 1376, 1387 (5th Cir. 1994). Under Rule 15 the wrongful disclosure claims would relate back to the date of the original pleading.

C. The district court properly awarded Plaintiffs their reasonable attorneys' fees and costs for all related litigation.

In a last-ditch effort to wriggle out of the full amount of the fee award, the Government argues that its wrongful disclosures represent only "a very small portion of the total volume of records involved in this case." Gov't Br. 54. Why that fact should mitigate its liability is unexplained. The information released – or threatened to be released – by the Government in this case was essentially the same for each Cooperator. And the legal arguments raised in the district court were the same regardless of the number of Cooperators involved in the proceedings. Thus, the same fees and costs were incurred whether claims were brought on behalf of

one or one thousand Cooperators. In addition, while Plaintiffs do not rely on the Government's willful violation of the district court's injunction as an independent ground for recovery of attorneys' fees, that violation confirms that the district court did not abuse its discretion in calculating the Privacy Act fee award. R488-498.

Furthermore, the Privacy Act does not shield the Government from liability for fees and costs when it releases some, but not all, of the protected information it could have released. By its terms, disclosure of "any" protected information violates the Privacy Act and subjects the United States to the mandatory award of fees and costs. 5 U.S.C. §552a(b), g(4). The case relied on by the Government, *Nichols v. Pierce*, 740 F.2d 1249 (D.C. Cir. 1984), does not even discuss, let alone support, the novel position that an agency can somehow relieve itself of liability simply by showing that it did not release as much protected information as it might have.

Nichols also offers scant support for the Government's suggestion that these wrongful disclosures will not sustain the award for all of Plaintiffs' fees, including the reverse-FOIA work and the injunction. In *Nichols*, the plaintiff successfully overturned HUD's Section 8 regulations on constitutional grounds and then requested attorneys' fees under the discretionary fee shifting provisions of FOIA because she claimed that her suit vindicated FOIA's requirement that HUD publish its regulations. *Id*. at 1232. The court rejected the request for fees because

plaintiff's complaint never even mentioned FOIA and "FOIA played little role in plaintiff's argument [that the regulations were unconstitutional] and no role in the court's decision" *Id.* at 1254 (quoting the district court's ruling). Moreover, HUD would have been required to publish its new regulations independently of FOIA's publishing requirement. *Id.* at 1253.

This case bears no resemblance to *Nichols*. First, Plaintiffs did not move for a *discretionary* award under FOIA but for a *mandatory* award under the Privacy Act. Furthermore, in stark contrast to the absence of a FOIA claim in the *Nichols* complaint, Plaintiffs sought relief under the Privacy Act from their first complaint to their last. In addition, while the plaintiff in *Nichols* attempted to collect fees for her unrelated constitutional claims, the Privacy Act and reverse-FOIA claims in this case overlapped significantly. Indeed, resolution of the dispute regarding FOIA Exemptions 3 and 6 was a *necessary prerequisite* to establishing wrongful disclosure under the Privacy Act. 5 U.S.C. §552a(b)(2). Moreover, establishing that the release of Cooperator information violated the Privacy Act was part and parcel of Plaintiffs' request for an injunction against further releases of protected information about these and other Cooperators. The Government's suggestion that the Privacy Act claims are unrelated to the rest of Plaintiffs' case is simply unfounded and disregards the well-settled rule that a party is entitled to recover fees for any work which aids in its ultimate success overall. *See Hensley v. Eckert*,

461 U.S. 424, 435 (1983); *Norris v. Hartmarx Specialty Stores, Inc*., 913 F.2d 253, 257 (5th Cir. 1990).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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One of the Attorneys for Plaintiffs-Appellees

January 29, 2004

CERTIFICATE OF SERVICE

On January 29, 2004, I served two copies of the foregoing Brief of Plaintiffs – Appellees, along with a 3½ inch diskette containing the brief in PDF format upon the following counsel by overnight courier:

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 13,972 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using MS Word in Times New Roman 14-point font.

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