

United States Court of Appeals
for the Fifth Circuit

No. 24-40756

United States Court of Appeals
Fifth Circuit

FILED

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Thomas B. Plunkett, III
Clerk

LA UNION DEL PUEBLO ENTERO,

Plaintiff—Appellant,

versus

FEDERAL EMERGENCY MANAGEMENT AGENCY; UNITED STATES
DEPARTMENT OF HOMELAND SECURITY,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:21-CV-71

Before SOUTHWICK, HIGGINSON, and DOUGLAS, *Circuit Judges*.

STEPHEN A. HIGGINSON, *Circuit Judge*:

La Unión del Pueblo Entero (LUPE) is a Texas-based organization that helps low-income Texans access federal assistance following natural disasters. For years, the organization has sought access to information about how the Federal Emergency Management Agency (FEMA) makes decisions about disaster-relief eligibility through Freedom of Information Act (FOIA) requests and separate litigation.

LUPE alleges that FEMA has a policy or practice of violating Section 552(a)(2) of FOIA, 5 U.S.C. § 552(a)—also known as the law’s

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“reading-room provision”—which requires federal agencies to make available online certain documents on which it relies, along with an index of those documents, and prohibits agencies from relying on a certain subset of these documents in enforcement and other proceedings when an agency fails to make them public. The organization claims that FEMA relies on “secret rules” when making disaster-relief determinations and seeks an injunction requiring FEMA to publish them online moving forward.

On this appeal, the central legal question we must resolve is whether FOIA’s remedial provision vests courts with the authority to redress ongoing violations of the statute’s reading-room provision by ordering prospective relief requiring an agency to post materials online.

We conclude that, on the record before us, LUPE has plausibly alleged that FEMA has a practice of failing to comply with FOIA’s reading-room provision. We thus REVERSE the district court’s grant, in part, of FEMA’s motion, as well as the district court’s dismissal of the case with prejudice. However, these findings do not necessitate the legal relief LUPE requests, since additional record development is needed and equitable relief is in the sound discretion of the district court. We REMAND for further consideration consistent with this opinion.

I.

We begin with an overview of the statutory and regulatory background and continue with a discussion of the factual and procedural history of this case.

A.

Congress enacted FOIA to “pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Batton v. Evers*, 598 F.3d 169, 175 (5th Cir. 2010) (quoting *Dep’t of the Air Force v. Rose*, 425 U.S.

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352, 361 (1976)). FOIA obligates federal agencies to make certain information available to the public, both affirmatively and in response to requests. *See* 5 U.S.C. § 552(a)(1)–(3). Specifically, the statute requires agencies to (1) publish certain documents in the Federal Register, (2) proactively make available certain documents for public inspection in an electronic format, and (3) provide records in response to requests, barring certain exceptions. *Id.*

The second of FOIA’s affirmative-disclosure provisions requires that agencies “make available for public inspection in an electronic format” certain documents. 5 U.S.C. § 552(a)(2). This provision is commonly known as FOIA’s reading-room provision. *See Animal Legal Def. Fund v. U.S. Dep’t of Agric. (ALDF)*, 935 F.3d 858, 862 (9th Cir. 2019) (explaining the historical origins of the “reading room” label). As relevant here, the documents the statute obligates agencies to place in their reading rooms include “statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register,” “administrative staff manuals and instructions to staff that affect a member of the public,” and “copies of all records” that have been released in response to a specific FOIA request and that either the agency determines have or are likely to become the subject of subsequent requests because of the “nature of their subject matter” or have been requested three or more times. 5 U.S.C. § 552(a)(2)(B)–(D). FOIA also compels agencies to “make available for public inspection in an electronic format current indexes providing identifying information for the public” for any document “required . . . to be made available or published” under Section 552(a)(2). *Id.* § 552(a)(2). And it prohibits agencies from relying on, using, or citing as precedent any “final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public” unless it has been indexed and made available or published in

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accordance with the section or the “party has actual and timely notice of the terms thereof.” *Id.* § 552(a)(2)(E).

FOIA outlines the timeline by which an agency must respond to requests regarding its affirmative and responsive obligations and provides a limited administrative exhaustion requirement after which a party may seek relief in court. *See id.* § 552(a)(6)(A)–(C). Administrative remedies are deemed exhausted when an agency “fails to comply with the applicable time limit” and provides that “[u]pon any determination . . . to comply with a request for records, the records shall be made promptly available to such person making such request.” *Id.* § 552(a)(6)(C)(i).

The statute also provides a private cause of action if agencies fail to comply with their disclosure obligations. Section 552(a)(4)(B) confers onto district courts “jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B). That provision provides that “the court shall determine the matter de novo” and places “the burden . . . on the agency to sustain its action.” *Id.*

FOIA separately requires the Office of the Special Counsel to investigate in cases where a court “orders the production of any agency records improperly withheld from the complainant” and issues a written finding raising questions about agency personnel’s actions with respect to the withholding. *Id.* § 552(a)(4)(F)(i).

B.

The Robert T. Stafford Disaster Relief Act of 1988 (Stafford Act), permits the President to provide federal aid, assistance, and emergency services after declaring a “major disaster.” Pub. L. No. 100–707, 102 Stat. 4689 (1988) (codified as amended at 42 U.S.C. §§ 5121–207) (amending the Disaster Relief Act of 1974). The law defines a major disaster as “any natural

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catastrophe” (such as a hurricane, tornado, storm, or drought), fire, flood, or explosion that the President determines “causes damage of sufficient severity and magnitude to warrant major disaster assistance.” 42 U.S.C. § 5122(2). The President has delegated most Stafford Act authority to FEMA. Delegation of Disaster Relief and Emergency Assistance Functions, 54 Fed. Reg. 12,571 (Mar. 28, 1989).

In 2000, Congress amended the Stafford Act to establish the Federal Assistance to Individuals and Households Program (IHP). *See* Disaster Mitigation Act of 2000, Pub. L. No. 106-390, § 206, 114 Stat. 1552, 1566–71 (2000) (codified at 42 U.S.C. § 5174). IHP permits the President—and, as delegated, FEMA—to “provide financial assistance, and, if necessary, direct services, to individuals and households” who are in a state with a declared natural disaster and who “have necessary expenses and serious needs” that cannot be otherwise met. 42 U.S.C. § 5174(a)(1); *see also id.* § 5174(b)–(c) (outlining options to provide housing assistance).

Congress also directed the President—and, in turn, FEMA—to promulgate additional rules and regulations for “determining eligibility for assistance.” *Id.* § 5174(j). FEMA has since enacted regulations on the registration period for aid, the amount and type of assistance available, and the eligibility requirements for disaster victims. Yet the regulations leave uncertain significant details about who is eligible for what amount of disaster assistance.

As described in the briefing and in the record, the process for attaining disaster relief is as follows: A survivor whose home was damaged by a declared disaster applies for IHP assistance. FEMA sends an inspector to evaluate the damage. The inspector inputs findings into a FEMA system, which applies the agency’s eligibility rules and issues a decision letter. An “eligible” letter informs an applicant that they are eligible for assistance of a

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specific amount between \$50 and \$43,600 but does not explain “how FEMA calculated the amount of assistance” or “what criteria or standards FEMA relied on to decide on that precise amount.” An “ineligible” letter informs an applicant that they were “not approved” for home assistance because the “disaster ha[d] not caused [their] home to be unsafe to live in.” An individual may appeal an ineligibility determination within sixty days of receipt. 44 C.F.R. § 206.115(a). An appeal “must include a written explanation or verifiable documentation for the appeal,” *id.* § 206.115(b), that explains the reasons for the appeal.

C.

LUPE is a non-profit organization that provides services for low-income Texans, largely in South Texas. Disaster recovery efforts comprise part of the organization’s work, including by informing its members and the public about how to access disaster assistance. As a part of this disaster-recovery work, LUPE has sued FEMA on multiple occasions under FOIA, alleging, as it does here, that the agency has used “unpublished” or “secret” rules in deciding how to dole out disaster relief. *See, e.g., LUPE v. FEMA*, No. 1:08-cv-487, 2017 WL 2539451 (S.D. Tex. Feb. 15, 2017); *Barbosa v. U.S. Dep’t of Homeland Sec.*, 263 F. Supp. 3d 207 (D.D.C. 2017).

LUPE has also submitted multiple FOIA requests seeking documents related to the standards FEMA uses for disaster-recovery relief. In 2008, the organization sued the agency for an alleged violation of Section 552(a)(1); after ten years of litigation, the district court agreed that FEMA violated FOIA and vacated the pertinent rule. *See LUPE v. FEMA*, 2017 WL 2539451, at *2–5. Between August 2020 and March 2021, LUPE submitted sixteen FOIA requests under Section 552(a)(3) seeking documents related to its IHP standards for sixteen different disasters but received no documents. In October 2020, LUPE also sent a letter to FEMA

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“describing the agency’s responsibility to proactively post its IHP guidance and standards to an electronic reading room under Section 552(a)(2),” which elicited no response.

In May 2021, LUPE submitted a request under Section 552(a)(2), asking FEMA to “make publicly available in its online electronic reading room” records that: (a) “communicate” to any FEMA employee or contractor: “any substantive or procedural standard that is or will be used . . . to help decide any application for [IHP] assistance” following a disaster declared after January 1, 2019; and (b) “state any future change to any existing substantive or procedural IHP standard” described in (a). FEMA acknowledged receipt of the request but did not produce the documents.

LUPE subsequently filed suit in July 2021 against FEMA and the Department of Homeland Security (of which FEMA is a part), asserting claims under both FOIA and the Administrative Procedure Act (APA). It sought declaratory and injunctive relief, including an order requiring FEMA to produce the “complete administrative record,” including all documents relied on to defend the actions challenged in this litigation, and to publish IHP eligibility standards used after January 1, 2019 (including future standards) in an electronic reading room.

FEMA conducted a search and began producing documents to LUPE on a rolling basis. FEMA did not concede that the materials qualified for proactive disclosure under Section 552(a)(2). The agency redacted a large portion of the 4,350 pages produced.

In October 2022, FEMA then moved to dismiss or, in the alternative, for summary judgment, which the district court granted in part in August 2023. The district court concluded that it lacked jurisdiction over the APA claims, and that there was a genuine dispute of material facts as to the adequacy of FEMA’s search thus far. The district court provided that

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Section 552(a)(4)(B) “authorizes prospective injunctive relief as a remedy,” but declined to address whether the provision “authorizes courts to order agencies to post documents online” and “whether a prospective injunction can enforce the electronic reading room requirement.”

The district court also ordered FEMA to conduct a secondary search for documents created between January 1, 2019, and January 19, 2022, and to enter mediation as to documents post-dating that period. FEMA subsequently produced 6,000 pages of additional documents, unredacted copies of documents from the original productions, and an index, all of which it posted to its reading room. The previously unreleased documents included policies and guidelines used to determine IHP eligibility. The parties agreed that FEMA’s subsequent production of records between January 1, 2019, and January 19, 2022, was adequate, and agreed to defer mediation on the post-January 2022 documents until the district court ruled on the scope of Section 552(a)(4)(B).

In January 2024, the parties traded cross-motions for summary judgment. FEMA again moved to dismiss, or, in the alternative, for summary judgment, arguing that the case was moot, that LUPE’s claim “fails as a matter of law,” and that the district court should not enter a “prospective injunction concerning future documents.” FEMA’s short, combined motion made two summary judgment arguments: first, that LUPE did not meet the standard for prospective relief—should it even be permitted under FOIA—because the organization could not show that the agency had a policy or practice of violating Section 552(a)(2); and second, that the court lacked authority to order the agency to post records online. It offered in support of its first contention the declaration of a FEMA employee (the Bridges Declaration) providing that the agency would “evaluate[]” documents moving forward “based on the applicable law.”

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LUPE cross-moved for summary judgment, asserting that Section 552(a)(4)(B) permitted the district court to “order FEMA’s compliance with [Section] 552(a)(2),” that FEMA has a “policy or practice of using unpublished IHP rules in violation of FOIA,” and that the circumstances warranted injunctive relief. The organization sought an injunction prohibiting FEMA officials from “us[ing] any rule to decide any part of any application for assistance” under the IHP program, unless it was published on “FEMA’s website with an index that makes the rule reasonably accessible to the public” or “in the Federal Register.”

In September 2024, the district court granted in part and denied in part the government’s motion to dismiss or, in the alternative, for summary judgment and denied LUPE’s motion for summary judgment. The district court concluded that LUPE’s request was not frivolous (that is, the organization’s claim did not fail as a matter of law) and that, although FEMA had fully responded to LUPE’s FOIA request, the organization’s “policy-or-practice claim” was not moot. It further found that LUPE had failed to establish that FEMA has a policy or practice of violating FOIA. It declined to reach the question of whether Section 552(a)(4)(B) authorizes courts to order agencies to post documents online. The district court issued its final judgment on the same day, dismissing the case with prejudice.

LUPE timely appealed.

II.

We review motions to dismiss for lack of jurisdiction and cross-motions for summary judgment de novo. *See TIG Ins. Co. v. Woodsboro Farmers Coop.*, 117 F.4th 715, 721 (5th Cir. 2024) (motion to dismiss); *Evanston Ins. Co. v. Mid-Continent Cas. Co.*, 909 F.3d 143, 146 (5th Cir. 2018)

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(cross-motions for summary judgment).¹ In so doing, we examine “each party’s motion independently” and view “the evidence and inferences in the light most favorable to the nonmoving party.” *Springboards to Educ., Inc. v. Hou. Indep. Sch. Dist.*, 912 F.3d 805, 811 (5th Cir. 2019) (citation omitted).

We generally grant summary judgment if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Canadian Standards Ass’n v. P.S. Knight Co.*, 112 F.4th 298, 303 (5th Cir. 2024), *cert. denied*, 145 S. Ct. 1135 (2025) (quoting FED. R. CIV. P. 56(A)).

III.

Section 552(a)(4)(B) provides courts with “jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B). At issue in this case is whether this provision permits district courts to address agencies’ practices, remedy ongoing reading-room violations by issuing prospective relief, and require the violating agency to post qualifying materials online.

We first conclude that Section 552(a)(4)(B) includes two clauses: the enjoin-from-withholding clause and the order-production clause. We then explain why the enjoin-from-withholding clause empowers courts to issue prospective relief. Next, we resolve why ordering agencies to post materials online presents a permissible form of relief in reading-room cases. We finally

¹ We note that FEMA urged the district court to dismiss for lack of jurisdiction under Rule 12(h)(3), which mandates district court dismissal of an action if the district court determines that it lacks subject matter jurisdiction. FED. R. CIV. P. 12(h)(3). We have historically reviewed dismissal under Rule 12(h)(3) for lack of subject-matter jurisdiction de novo, *see Jones v. Heuer*, No. 24-50348, 2024 WL 4481852, at *2 (5th Cir. Oct. 14, 2024) (per curiam) (collecting cases), and so do the same here.

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conclude with interpretive guidance to assist district courts when presented with requests for equitable relief.

A.

i.

In interpreting statutes, we start with the plain meaning of the text. *United States v. Moore*, 71 F.4th 392, 395 (5th Cir. 2023) (citing *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010)). Three grammatical features of Section 552(a)(4)(B) make obvious that two distinct clauses, each conferring a distinct remedial power, make up the provision: the use of “and”; the provision’s two infinitives and distinct postpositive modifying clauses; and the rule against superfluity.

Begin with the provision’s use of the conjunction “and.” “And” is a “coordinating junction” that is employed to “link[] independent ideas.” *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236 (2011). The Revised Fourth Edition of Black’s Law Dictionary defines “and” as: “A conjunction connecting words or phrases expressing the idea that the latter is to be added to or taken along with the first.” *And*, Black’s Law Dictionary (4th ed. rev. 1968).² Here, “and” is most naturally understood to connect two “independent ideas.” *Bruesewitz*, 562 U.S. at 236. A court therefore has jurisdiction “to enjoin” or “to order production.”

FEMA argues that if Congress intended for each clause of Section 552(a)(B)(4) to confer a distinct power, it would have used the disjunctive

² We “often look to dictionary definitions for help in defining a word’s ordinary meaning.” *Cascabel Cattle Co., L.L.C. v. United States*, 955 F.3d 445, 451 (5th Cir. 2020) (collecting cases). Congress enacted the current iteration of FOIA’s remedial provision in 1974. In turn, we use definitions from the era of that amendment. See *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (using dictionaries from the “era” of a statute’s enactment); accord *Van Loon v. Dep’t of the Treasury*, 122 F.4th 549, 563 (5th Cir. 2024).

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“or.” *See also* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012) (Scalia & Garner) (distinguishing “and” and “or”). But “the mere possibility of clearer phrasing cannot defeat the most natural reading of the statute.” *Caraco Pharm. Lab’ys, Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 416 (2012). Moreover, “and” can be interpreted as disjunctive when the context so requires. *See, e.g., Bruce v. First Fed. Sav. & Loan Ass’n of Conroe, Inc.*, 837 F.2d 712, 717 (5th Cir. 1988) (“But to read the word ‘and’ in the disjunctive is to give the word its clearly intended effect.”).

Next, statutory syntax. Section 552(a)(4)(B) separates two infinitives, each with distinct postpositive modifiers using a distinct form of the verb “withhold” following the two infinitives. The familiar *noscitur a sociis* canon instructs that, in interpreting statutes, words are “known by the company [they] keep.” *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995); *see also* Scalia & Garner at 195 (“Associated words bear on one another’s meaning (*noscitur a sociis*).”). This canon helps “avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words.” *Gustafson*, 513 U.S. at 575; *see also ALDF*, 935 F.3d at 870 n.12 (applying this principle to Section 552(a)(4)(B)).

Courts “frequently look[] to Congress’ choice of verb tense to ascertain a statute’s temporal reach.” *Carr v. United States*, 560 U.S. 438, 448 (2010). The present participle “withholding” follows the first infinitive. *See* 5 U.S.C. § 552(a)(4)(B). This verb form usually denotes ongoing action. *See D.L. Markham DDS, MSD, Inc. 401(K) Plan v. Variable Annuity Life Ins. Co.*, 88 F.4th 602, 610 (5th Cir. 2023) (defining present participle “providing” to mean “a person who is currently providing services”) (emphasis omitted); *see also* 1 U.S.C. § 1 (directing that present-tense verbs be read to “include the future as well as the present”). The enjoin-from-withholding clause permits courts to issue injunctive relief related to present and ongoing actions. By contrast, “withheld” is backward-

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looking, referring only to documents that the agency has but has not yet released. The relief afforded by the order-production clause is narrowly tailored to deal with those such documents.

Were these three textual features not enough, the canon against superfluity also guides us. It would render the first clause entirely unnecessary if we adopted FEMA’s one-clause reading of the statute, permitting courts to enter relief only by ordering the production of documents that an agency has withheld. Although FEMA counters that reading the statute as providing for two forms of relief would render the second clause redundant because “the first phrase swallows the second” — that is, the power “to enjoin” would necessarily include the power to order production—the canon against surplusage encourages courts to read capacious words narrowly to avoid superfluity. *See ALDF*, 935 F.3d at 869. To do so, we can read the first clause as providing for broad equitable authority distinct from the narrow equitable power provided for in the second clause. *See id.* at 870; *accord N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals*, 987 F.3d 207, 218 (2d Cir. 2021) (*NYLAG*) (“Here, [the rule against surplusage] suggests that the first clause is best read as providing a remedy distinct from that authorized by the second clause.”). Depending on the alleged violation, a court may find it necessary to issue equitable relief relying on both provisions of the statute. This reading “requires less grammatical torture of the statute.” *Netsphere, Inc. v. Baron*, 799 F.3d 327, 332 (5th Cir. 2015) (citation omitted).³

³ Our colleagues and other circuits have debated the value of the canon against surplusage here. *Compare NYLAG*, 987 F.3d at 218 n.19 (“The mutual arguments from superfluity here illustrate the point that the Supreme Court has made concerning the limited force of arguments from superfluity.”), *with id.* at 226 (Park, J., dissenting) (arguing that reading “requiring production to the complainant” to “specif[y] and compliment[]” the first clause “contains some redundancy, [but] gives effect to all parts of the provision”).

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ii.

Further, this two-clause reading of Section 552(a)(4)(B) comports with related reading-room decisions from our sister circuits. In *ALDF*, the Ninth Circuit addressed animal rights organizations’ request that a sub-agency of the Department of Agriculture post reports, settlement agreements, administrative complaints, and other documents collected under the Animal Welfare Act online in accordance with Section 552(a)(2). *See* 935 F.3d at 863–65. The Ninth Circuit concluded that the organizations could seek injunctive relief in the form of publication after determining that Section 552(a)(4)(B) consisted of two distinct provisions: the first “to enjoin” clause (providing jurisdiction “to enjoin the agency from withholding agency records”); and the second “to order” clause (providing jurisdiction “to order the production of any agency records improperly withheld from the complainant”). *See id.* at 869–71 (quoting 5 U.S.C. § 552(a)(4)(B)). If ordering the production of agency records were the sole available relief, then Section 552(a)(4)(B) would not need the enjoin-from-withholding clause because “the latter phrase would do all of the necessary work.” *Id.* at 870. The Ninth Circuit rejected the contention that reading “to enjoin” so expansively would “render[] superfluous” the “to order production clause.” *Id.*

In *NYLAG*, the Second Circuit joined the Ninth Circuit in determining that Section 552(a)(4)(B) affords two types of relief. *See* 987 F.3d at 215–24. There, a legal services organization challenged the failure of the Board of Immigration Appeals to make available online its non-precedential opinions. *Id.* at 208–09. The district court had “read the provision as authorizing only a single form of relief (in effect, ‘to enjoin and to order’)—with the second verb simply defining and limiting the first.” *Id.* at 216. Examining the provision’s text, context, and amendments, as well as FOIA’s broader purpose, the Second Circuit concluded that

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Section 552(a)(4)(B) “grants district courts the authority to order injunctive relief to enforce § 552(a)(2), including an order requiring the agency to make records available for public inspection in an electronic reading room.” *Id.* at 224. The court recognized that the parties both had plausible readings of the statute. *See id.* at 217 (noting that “neither parties’ [sic] reading is ‘wholly without force’” (citation omitted)). But the Second Circuit was persuaded by the provision’s dual-pronged nature for a couple of reasons. First, it noted that “and” is “typically used for linking independent ideas, suggesting that Congress meant to authorize courts to exercise two independent powers.” *Id.* (citation modified). Second, it observed the statute’s use of two infinitives. *See id.*

iii.

Finally, the Supreme Court precedent FEMA cites is inapposite. The agency cites two cases in support of its position that the “withholding of documents” is a prerequisite for jurisdiction: *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), and *United States Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989). These cases do not stretch so far.

In *Kissinger*, the Supreme Court addressed Section 552(a)(4)(B) in the context of a FOIA request for transcriptions of Secretary of State Henry Kissinger’s phone conversations. 445 U.S. at 139, 143–44. Addressing Section 552(a)(4)(B), the Court provided that “federal jurisdiction is dependent upon a showing that an agency has (1) ‘improperly’; (2) ‘withheld’; (3) ‘agency records.’” *Id.* at 150. It specified, however, that it was not deciding “the full contours of a prohibited ‘withholding.’” *Id.* Rather, it determined that an agency had no obligation to retrieve a record sent to another government entity. *See id.* at 150–51 (“Congress did not mean that an agency improperly withholds a document which has been removed from the possession of the agency prior to the filing of the FOIA request.”).

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The Court did not examine agency obligations as to future documents, nor did it address whether the statute permitted plaintiffs to seek prospective relief. The Court’s statement that an agency’s withholding of agency records is an “indispensable prerequisite to liability in a [FOIA suit],” 445 U.S. at 155—relied on by FEMA—should be read in context. *See Tax Analysts*, 492 U.S. at 148–50 (emphasizing *Kissinger*’s narrow holding).

In *Tax Analysts*, the Supreme Court built on *Kissinger*, quoting the same language about the three jurisdictional prerequisites. 492 U.S. at 142. The Court examined whether FOIA required the Department of Justice to make copies of district court decisions it receives in the course of litigating tax cases available to FOIA requesters. *Id.* at 138. The Court answered in the affirmative. *Id.* at 155. Here too, context matters. Although the *Tax Analysts* Court restated the *Kissinger* rule, its conclusions were quite narrow. It concluded that the district court decisions at issue constituted agency records. *See id.* at 146. It denied the government’s argument “that an agency has not ‘withheld’ a document under its control when, in denying an otherwise valid request, it directs the requester to a place outside of the agency where the document may be publicly available.” *See id.* at 150. And it analyzed what “improperly” meant within FOIA. *See id.* at 150–55. As LUPE argues, *Tax Analysts* “did not announce a strict past-tense-only ‘withheld’ rule.”

These two cases “can be read to support the government’s position,” but they focus on “which among existing documents constitute ‘records’ for FOIA purposes,” not on “the propriety of injunctive relief.” *Ctr. for the Study of Servs. v. U.S. Dep’t of Health & Hum. Servs.*, 874 F.3d 287, 291 (D.C. Cir. 2017). Neither *Kissinger* nor *Tax Analysts* dictate that FOIA limits federal court jurisdiction as FEMA argues they do. For that reason, our sister circuits have read Section 552(a)(4)(B) to consist of two distinct clauses.

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B.

Having determined that two distinct clauses constitute Section 552(a)(4)(B), we next assess whether the enjoin-from-withholding clause permits FOIA plaintiffs to obtain prospective relief. Once again, we agree with our sister circuits that it does.

The verb enjoin is quite capacious, generally including both present and forward-facing relief. *See Enjoin, Black's Law Dictionary* (4th ed. rev. 1968) (defining “enjoin” as “[t]o require; command; positively direct” or “[t]o require a person . . . to perform, or to abstain or desist from, some act”). As noted above, the verb is modified by the present participle “withholding,” 5 U.S.C. § 552(a)(4)(B), a verb form that implies a present and continuing action. *See D.L. Markham DDS*, 88 F.4th at 610.

In *Citizens for Responsibility and Ethics in Washington v. United States Department of Justice (CREW)*, the D.C. Circuit examined a plaintiff organization’s challenge to the Office of Legal Counsel’s alleged failure to post its opinions online, in which both retroactive and prospective relief were sought. 846 F.3d 1235, 1239 (D.C. Cir. 2017). Emphasizing FOIA’s broad language, the court had “little trouble concluding that a district court possesses authority” to issue an injunction under the statute that “would have prospective effect” and “impose an affirmative obligation to disclose.” *CREW*, 846 F.3d at 1241–2.⁴

Further, the Supreme Court has stated that “there is little to suggest” that Congress intended Section 552(a)(4)(B) “to limit the inherent powers of an equity court” in FOIA cases. *Renegotiation Bd. v. Bannerkraft Clothing*

⁴ Only the Fourth Circuit—in a narrow, unpublished decision—has concluded FOIA confers no prospective-relief authority. *See Humane Soc’y of the U.S. v. U.S. Fish & Wildlife Serv.*, 838 F. App’x 721, 731–32 (4th Cir. 2020) (per curiam).

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Co., 415 U.S. 1, 20 (1974); *see also Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988) (“FOIA imposes no limits on courts’ equitable powers in enforcing its terms.”); *Lewis v. Reagan*, 660 F.2d 124, 128 (5th Cir. Oct. 1981) (agreeing with most courts that have discussed the question of whether FOIA precludes courts from “exercising their traditional equitable powers”).

The scope of a court’s equitable authority, once established, “is broad, for breadth and flexibility are inherent in equitable remedies.” *Brown v. Plata*, 563 U.S. 493, 538 (2011) (citation omitted). That is especially so where, as in FOIA, the public interest is involved. In such circumstances, a court’s “equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.” *Kansas v. Nebraska*, 574 U.S. 445, 456 (2015) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)); *see also Virginian Ry. Co. v. Railway Employees*, 300 U.S. 515, 552 (1937) (“Courts of equity may, and frequently do, go much farther. . . to give . . . relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.”).

None of FEMA’s counter arguments convince us that we should read the enjoin-from-withholding clause differently. First, FEMA, relying again on *Tax Analysts*, asserts that the term “agency records” has a specific meaning that applies only to documents in agency control at the time of a FOIA request. As discussed above, however, *Tax Analysts* addressed the narrow question of whether the Department of Justice was required to produce district court decisions it obtained through its tax litigation. 492 U.S. at 138. It pronounced two requirements for requested materials to qualify as “agency records”: (1) “an agency must ‘either create or obtain’ the requested materials ‘as a prerequisite’”; and (2) “the agency must be in control of the requested material at the time the FOIA request is made.” *Id.* at 144–45. Read in context, *Tax Analysts* provides that Section 552(a)(4)(B)

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prohibits courts from ordering agencies to draft materials or seek materials from outside the agency. *See CREW*, 846 F.3d at 1241–42 (noting that the court “ha[d] little trouble concluding” that it could order an injunction that “would apply to opinions not yet written”). The same context limitation colors our *Nolen v. Rumsfeld* case, which FEMA also cites, in which we stated that FOIA “compels disclosure only of existing records.” 535 F.2d 890, 891 (5th Cir. 1976). Neither case precludes us from determining the statute affords prospective relief where it is so warranted.

Second, FEMA argues that FOIA proscribes prospective injunctions because they inherently defy the statute’s administrative exhaustion requirements, which we have understood to be jurisdictional. *See* 5 U.S.C. § 552(a)(6)(c); *Hedley v. United States*, 594 F.2d 1043, 1044 (5th Cir. 1979) (per curiam) (“FOIA should be read to require that a party must present proof of exhaustion of administrative remedies prior to seeking judicial review.”). FEMA reasons that prospective injunctions necessarily seek relief as to documents for which a complainant has not “ma[de] a request.” 5 U.S.C. § 552(a)(6)(c).

Yet despite our case law determining that FOIA exhaustion is jurisdictional, we have never limited “request[s]” to apply only to existing records. *Id.* Indeed, as LUPE points out, a “request” may encompass a request for existing *and* future documents. Indeed, other courts appear to have determined that a demand letter to an agency is sufficient in the context of certain FOIA claims. *See, e.g., Campaign for Accountability v. U.S. Dep’t of Just.*, 280 F. Supp. 3d 112, 115–16 (D.D.C. 2017) (distinguishing exhaustion in the Section 552(a)(2) and (a)(3) contexts, but noting that “a FOIA plaintiff does have to make an initial demand of the agency before pursuing either type of lawsuit” (citing *Prisology, Inc. v. Fed. Bureau of Prisons*, 852 F.3d 1114, 1117 (D.C. Cir. 2017))).

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Further, exhaustion requires an understanding of the “purpose[] and of the particular administrative scheme involved.” *McKart v. United States*, 395 U.S. 185, 193 (1969). It would defeat the clearest reading of the enjoin-from-withholding clause, as well as FOIA’s broader purpose, to read “request” as requiring specific documents already in existence. *Cf. Brook v. Holzerland*, No. 24-40640, 2025 WL 2254514, at *2 (5th Cir. Aug. 7, 2025) (describing and adopting the D.C. Circuit’s “constructive exhaustion” doctrine that arises where an agency fails to respond within the statutory timeframe).

Finally, FEMA argues that Section 552(a)(4)(B) does not permit prospective relief because it does not provide a cause of action for cases challenging ongoing policies or practices. Specifically, it asserts that when Congress wants to provide a cause of action for “policy-or-practice” claims, it does so explicitly. Although certain statutes make pattern-or-practice claims explicit, the majority of those that FEMA cites create a cause of action for the government. *See, e.g.*, 42 U.S.C. § 2000e-6(a) (stating that the “Attorney General may bring a civil action” for “pattern or practice” claim under Title VII); 42 U.S.C. § 3614(a) (same under Fair Housing Act); 34 U.S.C. § 12601 (same against local law enforcement agencies for patterns or practices that cause a deprivation of rights, privileges, or immunities); 52 U.S.C. § 10101(e) (same for racial discrimination in voting rights). It makes sense that identifying a pattern-or-practice (as opposed to a single incident) would be a prerequisite for government litigation efforts. These limitations give the government direction and discourage ineffective use of government resources. It makes less sense applied to private causes of action, which are not bound by the same constraints.

We have little trouble concluding that FOIA plaintiffs may challenge ongoing practices. That is so even though the D.C. and Ninth Circuits have largely applied the “policy or practice” label to cases in which agencies

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continuously fail to comply with requests for documents under Section 552(a)(3). *See, e.g., Payne*, 837 F.2d at 491; *Jud. Watch, Inc. v. U.S. Dep’t of Homeland Sec. (Judicial Watch)*, 895 F.3d 770, 777–78 (D.C. Cir. 2018); *Hajro v. U.S. Citizenship and Immigr. Servs.*, 811 F.3d 1086, 1103 (9th Cir. 2016). Other courts have permitted challenges to ongoing agency practices without using the specific label where such practices impair a plaintiff’s “lawful access to information in the future.” *CREW*, 846 F.3d at 1242 (citation modified); *see also ALDF*, 935 F.3d at 874; *NYLAG*, 987 F.3d at 208.

C.

i.

Holding that FOIA permits prospective relief for ongoing agency actions, we next examine the scope of relief that the statute affords. Section 552(a)(4)(B) concludes with the modifying phrase “from the complainant.” 5 U.S.C. § 552(a)(4)(B). The parties debate whether “from the complainant” limits a court’s authority both “to enjoin the agency from withholding agency records” and to “order the production” of records, or solely the latter. If “from the complainant” modifies both clauses, FEMA argues, a court may order the publication of documents only to parties. In support, it cites the D.C. Circuit’s *CREW* case, which, bound by precedent, reached the same conclusion. *See CREW*, 846 F.3d at 1243. By contrast, LUPE asserts that “from the complainant” is better understood to qualify only the second clause, and, as such, that courts may require the publication of documents to non-parties. It relies on the Second and Ninth Circuits, which have diverged from the D.C. Circuit. *See NYLAG*, 987 F.3d at 214; *ALDF*, 935 F.3d at 874.

Once again, we start with the text. “Under conventional rules of grammar, when there is a straightforward, parallel construction that involves

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all nouns or verbs in a series, a modifier at the end of the list normally applies to the entire series.” *Facebook, Inc. v. Duguid*, 592 U.S. 395, 402 (2021) (quoting Scalia & Garner at 147) (citation modified). In *Facebook, Inc. v. Duguid*, the Supreme Court found this grammatical rule—also known as the series-qualifier canon—applicable to the Telephone Consumer Protection Act. *See id.* at 398, 403. The statute defined “automatic telephone dialing system” as equipment with the capacity “to store or produce telephone numbers to be called, using a random or sequential number generator.” 47 U.S.C. § 227(a)(1)(A). Applying the series-qualifier canon, the Court determined that the modifying phrase “using a random or sequential number generator” qualified both “store” and “produce.” *Duguid*, 592 U.S. at 403. The Court rested this conclusion on a few aspects of the provision. First, the modifier “follow[ed] a concise, integrated clause” that “hangs together as a unified whole, using the word ‘or’ to connect two verbs that share a common direct object, ‘telephone numbers to be called.’” *Id.* (citation modified). Second, the modifier followed a comma. *See id.* That comma served as “evidence that the qualifier . . . appl[ied] to all the antecedents.” *Id.* at 403–04 (first quoting William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 67–68 (2016); and then citing 2A N. Singer & S. Singer, *Sutherland Statutes and Statutory Construction* § 47:33, at 499–500 (7th ed. rev. 2014); and Scalia & Garner 161–62)).

Here, these syntactic canons lead us to conclude that the modifier “from the complainant” qualifies only the second of Section 552(a)(4)(B)’s two clauses. To start, rather than constituting a “concise, integrated clause” comprised of a parallel list of nouns or verbs, *Duguid*, 592 U.S. at 403, as explained above, the two grants of jurisdiction in Section 552(a)(4)(B) stand distinctly. They are separated by an “and” and share no “common direct object.” *Id.* Rather, a direct object—“the agency” and “the production”—follows each verb “to enjoin” and “to order,” respectively. 5 U.S.C.

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§ 552(a)(4)(B). Further, an infinitive “to” repeats before the second verb. As one leading treatise explains of the series-qualifier canon, the repetition of a determiner or some other word (such as “to”) “suggest[s] no carryover modification.” Scalia & Garner at 148; *see also id.* at 149 (applying this rule to the phrase, “[t]o clap and to cheer lustily,” noting “the clapping need not be lusty”) (citation modified).

Moreover, the phrase “from the complainant” is not preceded by the crucial comma that often leads courts to apply a qualifying phrase to all antecedents instead of the one that immediately precedes it. *See Duguid*, 592 U.S. at 403–04. If that phrase “were intended to modify ‘withholding’ in the phrase governed by [the infinitive] ‘to enjoin’ . . . that intention would have to be expressed by adding commas after ‘records’ in the first infinitive phrase and ‘withheld’ in the second.” *NYLAG*, 987 F.3d at 217.

As the Second Circuit explained in concluding the modifier “from the complainant” qualifies only the order-production clause, if Congress intended that modifier to qualify both clauses, it could have drafted Section 552(a)(4)(B) as follows: “[A court] has jurisdiction to enjoin the agency from withholding agency records, and to order the production of any agency records, improperly withheld from the complainant.” *See NYLAG*, 987 F.3d at 217 (noting that Congress would need to “take the words ‘from the complainant’ out of the second infinitive phrase”). It did not. Of course, that Congress could have drafted a statute more neatly does not overcome the most natural reading of the text. *See Torres v. Lynch*, 578 U.S. 452, 472 (2016). Here, the Second Circuit’s analysis provides helpful indication that we should read the sentence as the usual rules of grammatical construction command.

We acknowledge that FEMA’s construction of Section 552(a)(4)(B) is not “entirely implausible,” *NYLAG*, 987 F.3d at 219, but reading “from

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the complainant” to qualify only the order-production clause likewise comports with the affirmative obligations that FOIA sets out in Section 552(a)(2), requiring agencies to make records available to the public, not just to individual complainants. Limiting relief to individual plaintiffs would “collapse[] an agency’s affirmative responsibility to post certain records (identified in the statute by Congress) into an agency’s responsibility to respond to requests for copies of documents under § 552(a)(3).” *ALDF*, 935 F.3d at 872. As the Ninth Circuit noted, this limitation would be particularly problematic for “frequently requested documents” required to be posted under Section 552(a)(2)(D), which Congress intentionally brought out of the “backlogs” of traditional FOIA requests. *See id.* We decline to read the statute in a way that would limit the statute’s carefully constructed pro-disclosure goals.

Indeed, as the Ninth Circuit noted, the notion that Section 552(a)(4)(B) limits relief to the complainant, “not the general public[,] is a red herring.” *ALDF*, 935 F.3d at 875 (citation modified). In a reading-room case, the violation at issue is inherently one about public access. Requiring an agency to post materials online “enjoin[s] the agency from withholding agency records,” 5 U.S.C. § 552(a)(4)(B), from a FOIA complainant by ensuring they do what the statute requires. Whereas in a standard FOIA request case, relief in the form of document turnover is only appropriate to the party that had specifically requested documents, relief in a reading-room case requires something broader, since the violation is inherently about the agency’s failure to make requisite materials available online.

ii.

Nor do we think that FOIA’s other provisions countermand this reading of the statute. First, the special counsel provision.

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Section 552(a)(4)(F) permits district courts to refer cases to the Office of Special Counsel, but only if they “order[] the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(F). FEMA argues that Congress “thus evidently believed this would be the type of order a court would issue.” We agree with the Second Circuit that, although “there is no obvious reason why Congress would limit that remedy to some violations of FOIA but not to others, the express limitation of the Special Counsel investigation to one particular context does not foreclose the possibility of other remedies” and sheds “little light” on Section 552(a)(4)(B). *NYLAG*, 987 F.3d at 219; *accord ALDF*, 935 F.3d at 872 (dismissing an agency’s argument about the special counsel provision).

Next, Section 552(a)(2)’s internal enforcement mechanism. Section 552(a)(2) prohibits agencies from “rel[ying] on, us[ing], or cit[ing]” final orders, opinions, policy statements, interpretations, or staff manuals or instructions that “affect[] a member of the public” unless they have been made public as required by the provision or the relevant party has “actual and timely notice.” 5 U.S.C. § 552(a)(2). We again agree with the Second Circuit that this defense was not “meant to be an exclusive one.” *NYLAG*, 987 F.3d at 220 (quoting *Am. Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 701 (D.C. Cir. 1969)). The affirmative defense that Section 552(a)(2) grants parties “does not ensure . . . that the agency [will] make available *all* final decisions,” as would an injunction. *See id.* Nothing in Section 552(a)(2) gives us hesitation in understanding Section 552(a)(4)(B)’s first clause naturally.

We recognize that, in adopting this interpretation of Section 552(a)(4)(B), we part ways with the D.C. Circuit, which has found that relief in reading-room cases does not extend beyond the individual complainant. *See CREW*, 846 F.3d at 1243. But we are buoyed that our understanding of the statute squares with the more recent decisions of the Second and Ninth Circuits. *See NYLAG*, 987 F.3d at 214; *ALDF*, 935 F.3d at

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874. Specifically, we note that the D.C. Circuit’s decision in *CREW* that Section 552(a)(4)(B) limits the scope of relief rested in large part on that court’s precedent. *See* 846 F.3d at 1242–44 (citing *Kennecott Utah Copper Corp. v. U.S. Dep’t of Interior*, 88 F.3d 1191, 1203 (D.C. Cir. 1996)); *see also* Margaret B. Kwoka, *An Information Commission*, 112 Geo. L.J. 841, 872 (2024) (characterizing the split). The *Kennecott* court addressed Section 552(a)(4)(B) in the context of a Section 552(a)(1) request to publish a final regulation in the Federal Register. *See* 88 F.3d at 1202–03. The court parsed Section 552(a)(4)(B)’s second clause, concluding that “[p]roviding documents to the individual fully relieves whatever information injury may have been suffered by that particular complainant” and that “ordering publication goes well beyond that need.” *Id.* at 1203 (citation modified). It did not examine Section 552(a)(4)(B)’s first clause with the same level of detail. *See generally id.* at 1202–03; *see also ALDF*, 935 F.3d at 874–85 (describing *Kennecott*). Although the D.C. Circuit in *CREW* understood its *Kennecott* precedent to stand for a broader proposition, *see* 846 F.3d at 1244, we are not so constrained.

D.

We conclude with a few cautions about FOIA’s remedial provision.

Although Section 552(a)(4)(B) “vests courts with broad equitable authority,” *CREW*, 846 F.3d at 1241, courts should use caution when determining whether to issue such relief. Courts should consider whether there is a “cognizable danger of recurrent violations,” based on: (1) the agency’s statement that it will comply with FOIA, including the “*bona fides* of the expressed intent to comply”; (2) “the effectiveness of the discontinuance of the violation and, in some cases, the character of the past violations”; and, critically, (3) the “effect on the public of disclosure or non-disclosure,” in furtherance of FOIA’s seminal purpose. *See Judicial Watch*,

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895 F.3d at 783 (citation modified).⁵ And, of course, before issuing prospective relief, a court must “find[] a probability that alleged illegal conduct will recur in the future.” *Long v. I.R.S.*, 693 F.2d 907, 909 (9th Cir. 1982); cf. *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 381 (2024) (“[W]hen a plaintiff seeks prospective relief such as an injunction, the plaintiff must establish a sufficient likelihood of future injury.”).

Further, requiring an agency to post materials online may not always be warranted. Courts examining requests for injunctive relief should be conscientious about the appropriateness of a remedy for each case before them, including to avoid issuing a perpetual follow-the-law injunction. As the Second Circuit advised, “the general rule is that injunctive relief under § 522(a)(2) should be ‘no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.’” *NYLAG*, 987 F.3d at 225 (quoting *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994)). “A district court granting relief under § 552(a)(4)(B) should therefore craft remedies that take into account the potentially significant burden on the agency of complying with any such order, and work with the parties to establish realistic timelines for compliance.” *Id.*

IV.

At last, we return to the dispute here. We conclude that, on the record before us, LUPE has made a plausible case that FEMA has an ongoing practice of violating the reading-room provision. But because the district court did not weigh whether the allegedly unreleased IHP documents are the type that an agency would be required to post in its reading room—nor did it weigh the traditional equitable or FOIA-specific considerations that factor

⁵ Although *Judicial Watch* is a case addressing a policy FOIA request under Section 552(a)(3), see 895 F.3d at 773, we find its test instructive.

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into an award of injunctive relief under the statute—we remand for further assessment.

A.

The district court granted in part FEMA’s motion for summary judgment, concluding that, even if we recognized that Section 552(a)(4)(B) granted district courts the authority to prospectively enjoin ongoing agency practices, LUPE had only demonstrated “[d]iscrete violations,” not a pattern or policy meriting the injunction it requested. It declined to reach the question of whether Section 552(a)(4)(B) authorizes courts to order agencies to post documents online and denied LUPE’s motion in full.

In addressing these cross-motions, the district court found that LUPE had failed to offer evidence that there was a cognizable danger of recurrent violation. It credited the agency’s “commit[ment] to reviewing future documents as they are created,” citing the Bridges Declaration. And it noted that, although LUPE pointed to “many instances of misbehavior, it [] failed to connect them.”

It reached no determination about whether any of the documents to which LUPE referred are the type that an agency would be required to make publicly available under the reading room provision. Nor did the district court assess the equitable considerations inherent in issuing injunctions.

B.

In assessing claims for injunctive relief based on ongoing agency practices, the D.C. Circuit has required plaintiffs demonstrate a “cognizable danger of recurrent violation[s].” *Judicial Watch*, 895 F.3d at 783. As discussed above, the primary factor for consideration is “the effect on the public of disclosure or nondisclosure.” *Id.* Other factors include “the *bona fides* of the expressed intent to comply,” “the effectiveness of the

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discontinuance of the violation,” and “in some cases, the “character of the past violations.” *Id.* (citation modified).

Applying these factors to the case at hand, each favors LUPE. First, the effect of public disclosure. As LUPE explains, FEMA provides an extraordinary amount of money to people impacted by natural disasters. Between October 2020 and January 2024, the agency provided \$32 billion in IHP assistance. This money is essential for those who face significant losses after hurricanes, floods, and other disaster events—such as Texas’s devastating 2021 Winter Storm Uri. IHP provides for uninsured losses up to \$43,600 adjusted for inflation, regardless of family income. 42 U.S.C. § 5174(c)(2)(B), (h)(1). The process for obtaining IHP assistance has long been “Kafkaesque,” *Ass’n of Cmty. Orgs. for Reform Now v. FEMA (ACORN)*, 463 F. Supp. 2d 26, 35 (D.D.C. 2006), making it difficult for disaster survivors to understand how to access government support during harrowing times for them and their families.

When an IHP decision is denied, FEMA requires written appeals explaining the reason for a challenge and “sufficient justification” for FEMA to reconsider. 44 C.F.R. § 206.115(a)–(b); 89 Fed. Reg. 3,990, 3,999 (Jan. 22, 2024). As LUPE asserts, FOIA should provide some relief for those in the precarious position of applying for IHP assistance. Its reading-room provision requires that the agency make available online “statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register” and “administrative staff manuals and instructions to staff that affect a member of the public.” 5 U.S.C. § 552(a)(2)(B)–(C). These are the types of documents on which an agency like FEMA might rely in making IHP determinations. And if they are relied on, as LUPE suggests, the impact of their disclosure is unquestionable.

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Next, the agency's expressed intent to comply. In granting in part FEMA's motion for summary judgment, the district court relied on FEMA's "commitment to reviewing future documents as they are created," which it expressed in a declaration providing in full:

In making the materials at issue in this case publicly available, FEMA is not conceding that these materials qualify for proactive disclosure under § 522 (a)(2), *nor is FEMA making a determination on the release of documents that will be created in the future. All such documents will be evaluated based on the applicable law.* Plaintiff's request that FEMA predetermine which documents will be made available in the future is denied.

This does not carry the weight the district court afforded to it. To be sure, this court has affirmed that, "in analyzing the affidavits and declarations submitted by the government, the agency is entitled to a 'presumption of legitimacy' unless there is evidence of bad faith in handling the FOIA request." *Batton*, 598 F.3d at 176 (quoting *U.S. Dep't of State v. Ray*, 502 U.S. 164, 179 (1991)). But it has also provided that this presumption of legitimacy "does not relieve" an agency of its burden to demonstrate compliance. *See id.* (citation omitted).

Payne provides a helpful analog. There, the D.C. Circuit determined that a FOIA case was not moot despite the government's "promise to desist from following the challenged practice." *Payne*, 837 F.2d at 491-92. Although the government proffered a declaration, its assurance was insufficient. *Id.* at 492 (describing the declaration as "modest" and "weak"). The court concluded that the agency's declaration, "coupled with the history" of FOIA violations, prohibited the court from concluding the violation would not happen again. *See id.*

That brings us to our following consideration: the character of FEMA's past violations. As LUPE offered in the district court, FEMA is a

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frequent offender when it comes to FOIA. In 2008, LUPE sued FEMA, arguing that the agency violated Section 552(a)(1) by using an unpublished rule to decide hurricane-home-damage claims. *See LUPE*, 2017 WL 2539451 at *3.⁶ The district court agreed, vacating FEMA’s rule. More than a decade later, and following sixteen disasters between 2020 and 2021, LUPE sought IHP documents under Section 552(a)(3). It received not a single substantive response. When LUPE then sent the agency a letter, invoking the reading-room provision to seek online publication, it failed to turn over any documents or make any publicly available online until court intervention. And disclosure of unredacted records took even longer. Further, and as mentioned above, some of the documents turned over in this litigation—for example inspection guidelines—are the type of documents that seem of a kind that would be required to be posted online. One such inspection guidelines document outlined limitations on what claims can be paid out for storm-damaged basement rooms. That information governs claims’ success, and yet a potential claimant cannot access it. Such examples may be disparate, perhaps even arising under different provisions of FOIA. But they are deeply interconnected. *Cf. Judicial Watch*, 895 F.3d at 774, 782 (reversing the district court’s Rule 12(c) dismissal, determining that the plaintiff stated a plausible practice claim where the requests “relat[ed] to the same subject matter”). And FEMA’s delays have consequences. Disaster victims, facing down their own filing deadlines, do not have access to potentially crucial information. Such delay also threatens to weaken FOIA’s protections for future requestors. *Cf. Tucker v. Gladdis*, 40 F.4th 289, 295 (5th Cir. 2022) (Ho, J., concurring).

⁶ Around the same time, we recognized the difficulties that result from FEMA’s lack of transparency. *See Ridgely v. Fed. Emergency Mgmt. Agency*, 512 F.3d 727, 741 (5th Cir. 2008) (urging FEMA to improve its processes following Hurricanes Katrina and Rita).

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Of course, without comprehensive examination of the records below, we cannot definitively say that FEMA has a policy or practice of withholding IHP documents that should be made public. Nor can we declare that LUPE is entitled to the injunctive relief it seeks. But construing the facts in the light most favorable to LUPE as we must, *Springboards*, 912 F.3d at 811—and recognizing that where a FOIA violation is alleged, the agency has a burden to “sustain” its action, *see Citizens for Resp. & Ethics in Wash. v. U.S. Dep’t of Just.*, 922 F.3d 480, 488 (D.C. Cir. 2019)—we can determine that FEMA was not entitled to summary judgment on its motion that it lacks a policy or practice of violating FOIA. More development is needed. On remand, the district court should consider whether the specific IHP documents at issue are of the kind that an agency would be obligated to post under Section 552(a)(2) and, if so, the appropriate scope of relief.

V.

For the foregoing reasons, we reverse the district court’s grant in part of summary judgment in favor of FEMA and its dismissal of the case with prejudice. We REMAND for reconsideration. With the benefit of clearer case law, we hope the district court will be empowered to sort out the facts of this long-running dispute.