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24 UNITED STATES DISTRICT COURT
25 NORTHERN DISTRICT OF CALIFORNIA
26 SAN FRANCISCO DIVISION

27 ANIMAL LEGAL DEFENSE FUND,
28 STOP ANIMAL EXPLOITATION NOW,
29 COMPANION ANIMAL PROTECTION
30 SOCIETY, and ANIMAL FOLKS,

31 Plaintiffs,

32 v.

33 UNITED STATES DEPARTMENT OF
34 AGRICULTURE and ANIMAL AND
35 PLANT HEALTH INSPECTION
36 SERVICES,

37 Defendants.

Case No. 3:17-cv-00949

**PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Dept: Courtroom 2, 17th Floor
Judge: Hon. William H. Orrick
Hearing Date: May 10, 2017
Hearing Time: 2:00 p.m.

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25
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27
28

TABLE OF CONTENTS

I. NOTICE OF MOTION AND RELIEF SOUGHT..... 1

II. STATEMENT OF FACTS 1

III. STATEMENT OF ISSUES 3

IV. ARGUMENT 3

 A. Plaintiffs Will Likely Succeed on the Merits of Their Claims..... 4

 1. Defendants have failed to make records affirmatively available as required by the Freedom of Information Act 4

 a. All records in the APHIS databases constitute frequently requested records required to be made affirmatively available under FOIA..... 5

 b. In the alternative, the vast majority of records in the APHIS databases constitute agency orders required to be made affirmatively available under FOIA 7

 2. Defendants acted arbitrarily and capriciously in violation of the Administrative Procedures Act by suddenly removing databases from the APHIS website that have been continually published for years in the name of “transparency.” 9

 a. Removal of the databases constitutes a final agency action 9

 b. The agency’s decision to remove the APHIS databases is arbitrary, capricious, and an abuse of discretion..... 11

 B. Plaintiffs Will Suffer Irreparable Harm from Defendant’s FOIA and APA Violations Absent a Preliminary Injunction..... 13

 1. Plaintiffs’ diversion of resources and frustration of mission from Defendant’s FOIA and APA violations is irreparable harm because neither statute provides compensatory damages 13

 2. Plaintiffs’ will be irreparably harmed by the loss of member and donor goodwill 17

 C. The Balance of Hardships and Public Interest Favor an Injunction..... 18

V. CONCLUSION AND RELIEF REQUESTED 19

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CASES

Abramowitz v. EPA,
832 F.2d 1071 (9th Cir. 1987), *superseded by statute on other grounds as
recognized by Hall v. EPA*, 263 F.3d 926 (9th Cir. 2001)10

Alliance for the Wild Rockies v. Cottrell,
632 F.3d 1127 (9th Cir. 2011).....3, 4

Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife,
273 F.3d 1229 (9th Cir. 2001).....11

Bennett v. Spear,
520 U.S. 157 (1997).....10

Cal. Pharmacists Ass’n v. Maxwell-Jolly,
563 F.3d 847 (9th Cir. 2009), *modified on other grounds*13

Cohen v. United States,
650 F.3d 717 (DC Cir. 2011)13

Elec. Frontier Found. v. Office of the Dir. of Nat’l Intelligence,
542 F. Supp. 2d 1181 (N.D. Cal. 2008)4

Fair Hous. of Marin v. Combs,
285 F.3d 899 (9th Cir. 2002).....13

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009).....11

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982).....13

Idaho v. Coeur d’Alene Tribe,
794 F.3d 1039 (9th Cir. 2015).....13

Judulang v. Holder,
565 U.S. 42 (2011).....11

League of Wilderness Defs. v. Connaughton,
752 F.3d 755 (9th Cir. 2014).....17

Martins v. U.S. Citizenship & Immigration Servs.,
962 F. Supp. 2d 1106 (N.D. Cal. 2013)4

Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.,
463 U.S. 29 (1983).....11

1	<i>N.D. ex rel. Parents v. Haw. Dep’t of Ed.</i> , 600 F.3d 1104 (9th Cir. 2010).....	4
2	<i>Navajo Nation v. U.S. Dep’t of Interior</i> ,	
3	819 F.3d 1084 (9th Cir. 2016).....	10
4	<i>NLRB v. Brown</i> ,	
5	380 U.S. 278 (1965).....	11
6	<i>NLRB v. Robbins Tire & Rubber Co.</i> ,	
7	437 U.S. 214 (1978).....	4
8	<i>NLRB v. Sears, Roebuck, & Co.</i>	
9	421 U.S. 132 (1975).....	8
10	<i>Pacific Radiation Oncology, LLC v. Queen’s Medical Center</i> ,	
11	555 Fed. Appx. 730 (9th Cir. 2015).....	17
12	<i>Regents of Univ. of Cal. v. American Broadcasting Cos.</i> ,	
13	747 F.2d 511 (9th Cir. 1984).....	17
14	<i>Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.</i> ,	
15	944 F.2d 597 (9th Cir. 1991).....	17
16	<i>Roman v. Nat’l Reconnaissance Office</i> ,	
17	952 F. Supp. 2d 159 (D. D.C. 2013).....	13
18	<i>Sackett v. EPA</i> ,	
19	566 U.S. 120 (2012).....	10
20	<i>SEC v. Chenery Corp.</i> ,	
21	332 U.S. 194 (1947).....	11
22	<i>Textile Unlimited, Inc. v. A. BMH & Co.</i> ,	
23	240 F.3d 781 (9th Cir. 2001).....	4
24	<i>U.S. Army Corps of Eng’rs v. Hawkes Co.</i> ,	
25	136 S. Ct. 1807 (2016).....	10
26	<i>Willamette Indus., Inc. v. United States</i>	
27	530 F. Supp. 904 (D. Or. 1981), <i>aff’d</i> 689 F.2d 865 (9th Cir. 1982).....	8
28	<i>Winter v. Natural Res. Def. Council, Inc.</i> ,	
	555 U.S. 7 (2008).....	3, 18
	STATUTES	
	5 U.S.C. § 551(6).....	8
	5 U.S.C. § 552(a)(2).....	5

1 5 U.S.C. § 552(a)(2)(A)7

2 5 U.S.C. § 552(a)(2)(D)5, 7, 9

3 5 U.S.C. § 552(a)(4)(B).....5

4 5 U.S.C. § 552(a)(6)(A)3

5 5 U.S.C. § 552(b)(6).....12

6 5 U.S.C. § 552(b)(7)(C)12

7 5 U.S.C. § 702.....5

8 5 U.S.C. § 704.....5, 9

9 5 U.S.C. § 706.....5

10 5 U.S.C. § 706(2)(A).....11

11 7 U.S.C. § 21311

12 7 U.S.C. § 21321

13 **RULES**

14 Fed. R. Civ. Proc. 651

15 **REGULATIONS**

16 7 C.F.R. § 1.4(a)(4)5

17 7 C.F.R. § 1.4(f)7

18 9 C.F.R. § 1.11

19 9 C.F.R. § 2.1 *et seq.*1

20 9 C.F.R. § 3.1 *et seq.*1

21 **OTHER AUTHORITIES**

22 H.R. Rep. No. 104-795 (1996).....5

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1 **I. NOTICE OF MOTION AND RELIEF SOUGHT**

2 PLEASE TAKE NOTICE THAT at 2:00 p.m. on May 10, 2017, or as soon thereafter as
3 counsel may be heard, in the courtroom of the Honorable William H. Orrick, courtroom 2 located
4 on the 17th Floor of the Federal Courthouse at 450 Golden Gate Avenue, San Francisco,
5 California, Plaintiffs will, and hereby do, move for a preliminary injunction pursuant to Fed. R.
6 Civ. Proc. 65.

7 On February 3, 2017, the United States Department of Agriculture (“USDA”) removed
8 from the public domain all of the records documenting the Animal and Plant Health Inspection
9 Service’s (“APHIS”) enforcement of the Animal Welfare Act (“AWA”). To remove the
10 documents, USDA took “the entire agency search tool database . . . off line.” USDA, *AWA*
11 *Inspection and Annual Reports*, [https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa/AWA-Inspection-and-Annual-Reports)
12 [sa_awa/AWA-Inspection-and-Annual-Reports](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa/AWA-Inspection-and-Annual-Reports) (last modified Mar. 10, 2017). Plaintiffs seek a
13 preliminary injunction to the *status quo ante*, requiring USDA to continue its years-long practice
14 of allowing public access to the continually updated records in the APHIS databases pending the
15 outcome of the litigation.

16 **II. STATEMENT OF FACTS**

17 The AWA sets minimum standards for the humane treatment of animals by certain
18 commercial enterprises including animal breeders, animal exhibitors, and animal research
19 facilities. *See* 7 U.S.C. § 2132; 9 C.F.R. § 1.1. USDA, through APHIS, is responsible for
20 enforcing the AWA. *See* 7 U.S.C. §§ 2131 *et seq.*; 9 C.F.R. §§ 1.1 *et seq.* Regulated entities must
21 either maintain a license or registration with the agency and are required to provide adequate care
22 to their animals as specified by AWA regulations. *See* 9 C.F.R. §§ 2.1 *et seq.*, 3.1 *et seq.*

23 APHIS’s enforcement of the AWA generates important records that it routinely published
24 in searchable databases over the course of many years. First, the Animal Care Information Search
25 (“ACIS”) database included annual reports required to be submitted by animal research facilities
26 and inspection reports for all regulated entities. The ACIS database allowed users to search for
27 documents by date, type of facility, type of animal, geographic location, name of facility,
28 customer name, or license or registration number and generated a list of hyperlinks to individual

1 PDF documents according to the search. Ex. 1, Liebman Decl. ¶¶ 3, 4. Second, APHIS
2 maintained a database of Enforcement Actions (“EA”), where it uploaded five types of
3 enforcement documents that APHIS generates in response to AWA violations: official warning
4 letters; voluntary settlement agreements between APHIS and regulated entities; administrative
5 complaints filed against a regulated entity to initiate a formal administrative enforcement
6 proceeding before the USDA’s Office of the Administrative Law Judge (“OALJ”); consent
7 decisions before the OALJ; and final OALJ decisions. The final two categories—consent
8 decisions and final decisions of the OALJ—are also published on the OALJ’s website. The EA
9 database page had a tree structure, where users would click on a year, then a month, and then
10 finally the type of document of interest, which were presented in individual hyperlinks to PDFs.
11 Ex. 1, Liebman Decl. ¶¶ 5, 6.

12 On February 3, 2017, in violation of its public disclosure obligations under FOIA and
13 without any rational justification, USDA blocked public access to the ACIS and EA databases
14 (collectively, the “APHIS databases”). In so doing, USDA ironically announced that, based on its
15 “commitment to being transparent,” it was “implementing actions to remove documents.” USDA,
16 *Animal Welfare Enforcement Actions*, [https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/
17 enforcementactions](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/enforcementactions) (last modified on Mar. 3, 2017). Despite the APHIS records having been
18 freely and publicly available to be viewed and downloaded for many years, USDA also cited
19 privacy concerns in removing them.

20 Public access to the APHIS databases is still blocked, and, by its own admission, USDA
21 has not posted all of the AWA records once publicly available in the APHIS databases. *See*,
22 USDA, *AWA Inspection and Annual Reports*, [https://www.aphis.usda.gov/aphis/ourfocus/
23 animalwelfare/sa_awa/awa-inspection-and-annual-reports](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa/awa-inspection-and-annual-reports) (last modified Mar. 10, 2017) (the
24 March 10 update states “APHIS expects it may be several weeks before it will be prepared to
25 issue its next update”); *see also* Ex. 1, Liebman Decl. ¶ 13 (providing an example of missing
26 inspection reports). In the meantime, USDA directs the public to submit FOIA requests for the
27 records that were once published in the APHIS databases. USDA, *Animal Welfare Enforcement
28 Actions*, <https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/enforcementactions> (last

1 modified Mar. 3, 2017). Yet, in 2016—when the APHIS databases were online and available to
2 the public—the agency was unable to process FOIA requests within the twenty business-day
3 timeframe required by statute. 5 U.S.C. § 552(a)(6)(A). For simple requests, it took 93 days, on
4 average, for APHIS to respond; for complex requests, the average rose to 233 days. In one case it
5 took APHIS over three years to respond. USDA, *Department of Agriculture Freedom of*
6 *Information Act Annual Report for Fiscal Year 2016*, at 22, [https://www.dm.usda.gov/foia/](https://www.dm.usda.gov/foia/reading.htm#reports)
7 [reading.htm#reports](https://www.dm.usda.gov/foia/reading.htm#reports) (follow “DOCX” hyperlink for USDA Annual FOIA Reports 2016).

8 The Plaintiffs are all non-profit organizations dedicated to animal welfare. As discussed
9 further in Section B.1, each Plaintiff used the APHIS databases in their day-to-day operations and
10 in their advocacy efforts. Without access to the APHIS databases the Plaintiffs have been forced
11 to divert their resources to submitting and managing FOIA requests and several of the Plaintiffs’
12 past and ongoing efforts to protect animals are now in jeopardy—settlement agreements rendered
13 unenforceable, legislation made moot, and advocacy projects scuttled. Without a preliminary
14 injunction, the Plaintiffs will continue to suffer irreparable and exponentially detrimental
15 consequences for every day that they do not have access to the APHIS databases.

16 **III. STATEMENT OF ISSUES**

17 Whether an injunction should be entered precluding Defendants from blocking public
18 access to the APHIS databases where there is a strong likelihood that the Defendants are violating
19 their public disclosure obligations under FOIA and where the Plaintiffs will suffer irreparable
20 harm if an injunction does not issue.

21 **IV. ARGUMENT**

22 To obtain a preliminary injunction, the moving party must establish (1) a likelihood of
23 success on the merits, (2) a likelihood of suffering irreparable harm absent a preliminary
24 injunction, (3) that the balance of equities tips in the movant’s favor, and (4) that an injunction
25 would serve the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131
26 (9th Cir. 2011) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). These
27 four factors tip decidedly in Plaintiffs’ favor, and an injunction is particularly warranted in light
28 of the Ninth Circuit’s “sliding scale” approach to this standard. *Id.* at 1134–35. Under this

1 approach, “the elements of the preliminary injunction test are balanced, so that a stronger
2 showing of one element may offset a weaker showing of another.” *Alliance for the Wild Rockies*,
3 632 F.3d at 1131. Where the likelihood of success is such that “serious questions going to the
4 merits [a]re raised,” and the “balance of hardships tips sharply in the plaintiff’s favor,” a
5 preliminary injunction is appropriate. *Id.*

6 A preliminary injunction is not a preliminary adjudication on the merits, but a device for
7 preserving the status quo and preventing the irreparable loss of rights before judgment. *Textile*
8 *Unlimited, Inc. v. A..BMH & Co.*, 240 F.3d 781, 786 (9th Cir. 2001). Here, Plaintiffs seek a
9 preliminary injunction to preserve “the last, uncontested status which preceded the pending
10 controversy,” namely, to preserve the public’s longstanding and uncontested access to the
11 continually updated AWA enforcement records contained in the APHIS databases. *N.D. ex rel.*
12 *Parents v. Haw. Dep’t of Ed.*, 600 F.3d 1104, 1112 n.6 (9th Cir. 2010) (concluding that an
13 injunction to prevent the continuing implementation of a contested policy announced prior to the
14 litigation was a prohibitory injunction to maintain the *status quo ante*). Preliminary injunctions
15 have been used on many occasions to enforce the public’s rights under FOIA. *See, e.g., Martins v.*
16 *U.S. Citizenship & Immigration Servs.*, 962 F. Supp. 2d 1106, 1130 (N.D. Cal. 2013) (issuing a
17 preliminary injunction for the government to produce an expedited *Vaughn* index); *Elec. Frontier*
18 *Found. v. Office of the Dir. of Nat’l Intelligence*, 542 F. Supp. 2d 1181, 1187 (N.D. Cal. 2008)
19 (issuing a preliminary injunction requiring expedited processing of plaintiff’s FOIA requests).

20 **A. Plaintiffs Will Likely Succeed on the Merits of Their Claims.**

21 **1. Defendants have failed to make records affirmatively available as required by**
22 **the Freedom of Information Act.**

23 “The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of
24 a democratic society, needed to check against corruption and to hold the governors accountable to
25 the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). While FOIA is
26 most well-known for its provision allowing anyone to file a request for agency records, equally
27 important to its goal of promoting agency oversight is its so-called “reading room” provision.
28 This provision requires each agency to make affirmative disclosures of enumerated categories of

1 records “available for public inspection in an electronic format,” without waiting for a FOIA
2 request from the public. 5 U.S.C. § 552(a)(2). Legislative history demonstrates that an
3 “underlying goal” of the 1996 Electronic FOIA Amendments was to “encourage on-line access to
4 Government information,” which would give the public direct access to popular records and
5 result in better use of the federal government’s scarce FOIA resources. H.R. Rep. No. 104-795, at
6 11 (1996). FOIA creates a right of action for broad injunctive relief, giving this court “jurisdiction
7 to enjoin the agency from withholding agency records and to order the production of any agency
8 records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B). The use of the
9 disjunctive “and” between the two clauses demonstrates that this court’s power goes beyond
10 merely ordering production of records to plaintiffs or to individual FOIA requesters but allows
11 this court to remedy violations of FOIA’s affirmative disclosure obligations as well.¹

12 **a. All records in the APHIS databases constitute frequently requested**
13 **records required to be made affirmatively available under FOIA.**

14 One category of records required to be affirmatively disclosed in a reading room are
15 frequently requested records. A record falls in this category if it has “been previously released to
16 any person” in response to a FOIA request and if the agency determines that “because of the
17 nature of their subject matter, [the records] have become or are likely to become the subject of
18 subsequent requests for substantially the same records” or if the record has been requested “three
19 or more times.” 5 U.S.C. § 552(a)(2)(D); *see also* Michael Herz, *Law Lags Behind: FOIA and*
20 *Affirmative Disclosure of Information*, CARDOZO PUB. L. POL’Y & ETHICS J. 577 (2009). USDA’s
21 own FOIA regulations specify that in deciding whether records are likely to become the subject of
22 subsequent requests, the agency should consider “[p]revious experience with similar records” as
23 well as the “number of requesters and whether there is widespread . . . interest in the records.” 7
24 C.F.R. § 1.4(a)(4). The records that USDA previously published on a continuing basis in the
25 APHIS databases are frequently requested records that must be made affirmatively available in
26 electronic format.

27 ¹ Were this Court to conclude that FOIA does not provide authority to order the agency to
28 publish records to satisfy its reading room obligations, there would be no other adequate remedy
and the APA would provide a cause of action for the same. *See* 5 U.S.C. §§ 702, 704, 706.

1 There is abundant evidence that all of the records have been the subject of repeated
2 requests in the past, including by APHIS’s own admission. In 2009, APHIS publicly stated that
3 the AWA inspection reports “were the most frequently requested APHIS records under the FOIA
4 and making them available on our Web site will go a long way toward informing the public of our
5 commitment to animal welfare, while also supporting our FOIA backlog reduction efforts.”
6 USDA APHIS, *Letter from APHIS Acting Administrator and Associate Administrator to APHIS*
7 *Management Team and Program Leaders Group* (June 19, 2009), available at
8 <https://www.aphis.usda.gov/foia/downloads/APHIS%20Commitment%20to%20Transparency.pdf>
9 [f](#). Also, in 2014, APHIS responded to a FOIA request for “all USDA enforcement actions” under
10 the AWA for a particular region by stating: “[t]he requested records are *frequently requested* and
11 as a result, APHIS, in compliance with the Electronic Freedom of Information Act Amendments
12 of 1996, made the determination to provide the requested records on its agency website.” Ex. 1,
13 Liebman Decl., ¶ 18, Ex. J (emphasis added).

14 APHIS’s FOIA logs confirm frequent requests across all of these categories of records,
15 even when the APHIS databases were available for public access. As an example, in January
16 2016, out of 172 FOIA requests, at least 54 requested AWA inspection reports for a specific
17 facility (sometimes along with other records). USDA, *FOIA Logs*, [https://www.aphis.usda.gov/](https://www.aphis.usda.gov/aphis/resources/foia/ct_foia_logs)
18 [aphis/resources/foia/ct_foia_logs](#) (follow 2016 “January” hyperlink). As to enforcement records,
19 5 requests that month asked for all enforcement records regarding specific facilities, sometimes
20 including multiple facilities in one request. *Id.* Moreover, whole categories of records previously
21 published on the databases were also routinely requested. *Id.* (showing two requests for categories
22 of inspection records); *id.* (follow 2016 “February” hyperlink) (showing two requests for
23 categories of enforcement actions). To be clear, these are just samples of the types of requests that
24 can be found throughout the seven years of FOIA logs posted on the APHIS website.

25 Notably, it would be reasonable to assume that once plaintiffs are able to engage in
26 discovery, agency records would show that many more such requests are being made now that the
27 public does not have access to the databases. Plaintiffs themselves have collectively filed sixteen
28 such FOIA requests since the February 3, 2017 removal of the databases, and will continue to file

1 requests for categories of records previously in the databases so long as they remain unavailable.
2 Ex. 1, Liebman Decl. ¶¶ 15, 17; Ex. 2, Budkie Decl. ¶¶ 8, 11; Ex. 3, Howard Decl. ¶ 10; Ex. 4,
3 Olson Decl. ¶¶ 12, 14.

4 Plaintiffs can also show strong evidence that the government has “previously released” all
5 such database records in response to FOIA requests. *See* 5 U.S.C. § 552(a)(2)(D). When the
6 databases were public, the agency routinely responded to FOIA requests for records within those
7 databases not by releasing the records to the requester, but by directing the requester to the online
8 APHIS databases. Ex. 1, Liebman Decl. ¶ 18, Ex. J (providing copies of four such response letters
9 from USDA). These response letters demonstrate that the records published in the databases are
10 done so not only to satisfy the reading room requirements under FOIA, but as a response to any
11 relevant FOIA request for the same records.

12 USDA regulations provide only one condition under which the agency may remove
13 frequently requested records that have already been made available for public inspection:
14 “Agencies may remove a record from this access medium when the appropriate official
15 determines that it is unlikely there will be substantial further requests for that document.” 7
16 C.F.R. § 1.4(f). In the agency’s public statements about the removal of the databases from the
17 public domain, no finding, statement, or rationale of this nature was articulated. *See* USDA,
18 *Animal Welfare Enforcement Actions*, [https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/
19 enforcementactions](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/enforcementactions) (last modified Mar. 3, 2017). In fact, given the substantial evidence in the
20 public domain about the frequent nature of these requests, such a finding, had it been made,
21 would be plainly unworkable.

22 **b. In the alternative, the vast majority of records in the APHIS databases**
23 **constitute agency orders required to be made affirmatively available**
24 **under FOIA.**

25 Plaintiffs are likely, in the alternative, to show that the Defendants violated FOIA by not
26 affirmatively disclosing previously published records which are “orders.” FOIA requires agencies
27 to make affirmatively available, in an electronic format, “final opinions, including concurring and
28 dissenting opinions, as well as orders, made in the adjudication of cases.” 5 U.S.C.
§ 552(a)(2)(A). The statute defines “orders” as “the whole or part of a final disposition, whether

1 affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule
2 making.” 5 U.S.C. § 551(6). This provision “represents a strong congressional aversion to ‘secret
3 (agency) law,’” and covers “final dispositions of matters by an agency.” *NLRB v. Sears, Roebuck,*
4 *& Co.* 421 U.S. 132, 153–54 (1975).

5 In *NLRB v. Sears, Roebuck, & Co.*, the Supreme Court considered so-called “advice” and
6 “appeals” memoranda, which the office of the general counsel at the NLRB produced to advise an
7 NLRB regional director about whether to issue a complaint in response to an employer’s or
8 union’s charge of an unfair labor practice. 421 U.S. at 138–42. The Court concluded that those
9 advice and appeals memorandum that directed the regional director not to issue a complaint
10 ended an inquiry into an alleged labor violation and thus constituted an “order” that had to be
11 affirmatively disclosed under FOIA. *Id.* at 158–59. Similarly, the Ninth Circuit has affirmed a
12 district court decision that “engineering and valuation reports” prepared by foresters during a
13 disputed audit of an individual taxpayer constituted “orders” of the agency because such a report
14 “is the agency’s final opinion on the valuation of timber.” *Willamette Indus., Inc. v. United States*
15 *530 F. Supp. 904, 906 (D. Or. 1981), aff’d 689 F.2d 865 (9th Cir. 1982).*

16 Several categories of records previously published in the APHIS databases likewise
17 constitute the final disposition of the agency in the investigation of a possible AWA violation.
18 Specifically, according to APHIS, when it issues official warning letters or enters into a voluntary
19 settlement agreement with an alleged violator, it “closes the investigative file.” USDA,
20 *Investigative and Enforcement Process*, [https://www.aphis.usda.gov/aphis/ourfocus/business-](https://www.aphis.usda.gov/aphis/ourfocus/business-services/ies/ies_processes)
21 [services/ies/ies_processes](https://www.aphis.usda.gov/aphis/ourfocus/business-services/ies/ies_processes) (last modified Oct. 28, 2016). Unlike a report that an investigator
22 prepares for the agency’s enforcement staff, these enforcement actions are the final actions by the
23 agency, not merely tentative or interlocutory documents.

24 Inspection reports are similarly final orders. These reports document whether the agency
25 found any AWA violations and instruct licensees or registrants on any corrective actions that
26 must be taken. In fact, APHIS has created a process for a regulated entity to appeal its inspection
27 report, thereby demonstrating that these reports state the agency’s definitive position on the
28 violations found. *See* USDA, *Appeals Process* (July 2014), <https://www.aphis.usda.gov/>

1 [publications/animal_welfare/2014/appeals_process.pdf](#). Moreover, a prior AWA violation (in an
2 inspection report or warning letter) warrants more stringent enforcement consequence for
3 subsequent violations. *See* USDA, *Checklist for Animal Care Inspection Report*, at 11, available
4 at [https://www.aphis.usda.gov/animal_welfare/downloads/Inspection_Requirements](https://www.aphis.usda.gov/animal_welfare/downloads/Inspection_Requirements_Attachments.PDF)
5 [Attachments.PDF](#).

6 The agency's final decisions on whether a violation of the AWA has occurred and what
7 enforcement action is taken fall squarely into the category of records that must be released under
8 FOIA. Precisely as Congress intended, the publication of these records allows the public to
9 ascertain the government's interpretations and enforcement of the AWA and to hold the agency
10 accountable in vigorously enforcing the act to prevent animal cruelty. Plaintiffs themselves use
11 the records for this very purpose. *See, e.g.*, Ex. 3, Howard Decl. ¶ 8 (describing how CAPS
12 compares APHIS database records with CAPS's own investigations and refers discrepancies to
13 USDA's Office of the Inspector General, and how this work has resulted in a scathing OIG report
14 about APHIS's administration and enforcement of the AWA).

15 **2. Defendants acted arbitrarily and capriciously in violation of the**
16 **Administrative Procedures Act by suddenly removing databases from the**
17 **APHIS website that have been continually published for years in the name of**
“transparency.”

18 Plaintiffs alternatively have a likelihood of success in demonstrating that APHIS, by
19 removing public access to the APHIS databases, violated the Administrative Procedures Act
20 (“APA”). FOIA's reading room provision is a legal requirement for agencies to take affirmative
21 actions. If agencies fail to make electronically available to the public the required categories of
22 records, they have violated the law. 5 U.S.C. § 552(a)(2)(D). However, irrespective of whether
23 the agency is failing to act in accordance with the reading room requirements, the wholesale
24 removal of previously published databases from the public domain constitutes an independent
25 final agency action that cannot be undertaken arbitrarily.

26 **a. Removal of the databases constitutes a final agency action.**

27 The APA makes reviewable any “final agency action for which there is no adequate
28 remedy in a court.” 5 U.S.C. § 704. Because FOIA does not provide a remedy for an agency's

1 discretionary removal of databases from the public domain, there is no other adequate remedy for
2 such an action taken arbitrarily. In addition, an agency action is final where the action “mark[s]
3 the consummation of the agency’s decisionmaking process” and is “one by which rights or
4 obligations have been determined, or from which legal consequences will flow.” *U.S. Army Corps*
5 *of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016) (quoting *Bennett v. Spear*, 520 U.S. 157,
6 177–78 (1997)). The agency’s actions here are final and thus reviewable under the APA.

7 First, USDA’s decision to remove the APHIS databases from public domain marks the
8 “consummation” of the agency’s decision making process because the agency actually acted on
9 its decision and removed access to the databases. Indeed, the agency issued a statement
10 accompanying its removal of the databases from the website, in which it explained it “is
11 implementing actions to remove documents it posts on APHIS’ website.” See USDA, *Animal*
12 *Welfare Enforcement Actions*, [https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/
13 enforcementactions](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/enforcementactions) (last modified Mar. 3, 2017). There is nothing “tentative” or “interlocutory”
14 about the agency’s action, despite the agency’s assertion that its decisions to block access to the
15 APHIS databases “are not final.” *Id.* To determine if the agency’s decision is final, a court must
16 consider “the effect of the action and not its label.” *Abramowitz v. EPA*, 832 F.2d 1071, 1075 (9th
17 Cir. 1987), *superseded by statute on other grounds as recognized by Hall v. EPA*, 263 F.3d 926,
18 937 (9th Cir. 2001); *see also Sackett v. EPA*, 566 U.S. 120, 127 (2012) (“The mere possibility that
19 an agency might reconsider in light of ‘informal discussion’ and invited contentions of inaccuracy
20 does not suffice to make an otherwise final agency action nonfinal.”). USDA has taken actions
21 based on its decision and has blocked the APHIS databases from public access, illustrating the
22 consummation of its decision.

23 Second, USDA’s decision to block public access to the APHIS databases has immediate
24 legal consequences. The Supreme Court takes a “pragmatic” approach to finality. *U.S. Army*
25 *Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016). In *Navajo Nation v. U.S. Dep’t of*
26 *Interior*, the Ninth Circuit concluded that an agency’s decision that a certain statutory scheme
27 applied to particular Native American remains and objects had immediate legal consequences
28 because it delayed the Navajo Nation’s access to those items by a period of months. 819 F.3d

1 1084, 1091 (9th Cir. 2016). Here, USDA has blocked the public’s ability to immediately access
2 important AWA inspection and enforcement records and instead directed those seeking the
3 previously available documents to “submit Freedom of Information Act requests for that
4 information.” USDA, *Animal Welfare Enforcement Actions*, [https://www.aphis.usda.gov/aphis/
5 ourfocus/animalwelfare/enforcementactions](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/enforcementactions) (last modified Mar. 3, 2017). USDA’s action here
6 has the effect of delaying—by months and sometimes by years—the public’s ability to access
7 critical records about the government’s enforcement of animal welfare laws, which sometimes
8 reveal serious instances of animal neglect or abuse.

9 **b. The agency’s decision to remove the APHIS databases is arbitrary,
10 capricious, and an abuse of discretion.**

11 Even when an agency retains discretion over a decision, it may not make a choice that is
12 “arbitrary, capricious, [or] an abuse of discretion.” 5 U.S.C. § 706(2)(A). Although the court’s
13 scope of review under the APA’s arbitrary and capricious standard is “narrow,” the court is
14 tasked with “ensuring that agencies have engaged in reasoned decisionmaking.” *Judulang v.*
15 *Holder*, 565 U.S. 42, 53–54 (2011). Reasoned decision making exists where there is a “rational
16 connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc.*
17 *v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). This inquiry requires the court to
18 examine the reasons for agency decisions—or, as the case may be, the absence of such reasons.
19 *Judulang*, 565 U.S. at 53 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)
20 for “the requirement that an agency provide reasoned explanation for its action”). The court must
21 rely on the reasons given by the agency and cannot “supply a reasoned basis for the agency’s
22 action that the agency itself has not given.” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43 (quoting
23 *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Importantly, a court must not “rubber-stamp
24 . . . administrative decisions . . . that frustrate the congressional policy underlying a statute.” *Ariz.*
25 *Cattle Growers’ Ass’n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001) (quoting
26 *NLRB v. Brown*, 380 U.S. 278, 291–92 (1965)) (first omission in original).

27 USDA stated that it removed the APHIS databases from the public domain “based on [its]
28 commitment to being transparent, remaining responsive to [its] stakeholders’ informational needs,

1 and maintaining the privacy rights of individuals.” USDA, *Animal Welfare Enforcement Actions*,
2 <https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/enforcementactions> (last modified
3 Mar. 3, 2017). It further stated that it was removing “documents . . . that contain personal
4 information” and redacting lists of licensees and registrants under the AWA “to ensure personal
5 information is not released to the general public.” *Id.* In short, USDA provided three reasons for
6 its decision to remove the APHIS databases: transparency, meeting stakeholders’ informational
7 needs, and privacy concerns.

8 The first two reasons are patently inconsistent with the agency’s actions of removing
9 public access to the APHIS databases. Transparency is not increased by removing public access
10 to information. The very opposite is true. As evidenced by FOIA’s legislative history,
11 transparency is achieved by greater public access to government records. Similarly, it is not
12 logical that an agency is “meeting stakeholder’s informational needs” by removing the
13 stakeholders’ access to information.

14 The third stated reason, privacy concerns, also cannot justify removal of the databases
15 given the agency’s prior inconsistent actions with respect to the records contained therein. First
16 and foremost, APHIS had already routinely redacted the records to remove personally identifying
17 information pursuant to 5 U.S.C. § 552(b)(6), (7)(C), thereby obviating any privacy concern. *See*,
18 *e.g.*, Ex. 1, Liebman Decl. ¶ 3, Ex. A. Second, the records that were already published in the
19 databases had been available for the general public to view, publicize, or copy on an ongoing
20 basis for many years. The agency is effectively trying to “unring a bell” by removing documents
21 that have previously been released to the public, some significant subset of which is undoubtedly
22 already in the hands of any number of private parties. Finally, to the extent that any specific
23 records implicated privacy concerns that were identified by the agency, the decision to remove
24 the entire universe of records in the APHIS databases is an incredibly overbroad response. Given
25 that the same privacy laws that apply today were in effect at the time these records were
26 published, there is no new privacy interest that could have arisen recently so as to form a
27 reasonable basis for the agency’s action.

1 The agency has not provided a reasonable explanation for its actions, and thus its decision
2 to block public access to the APHIS databases is a final agency action that is arbitrary, capricious,
3 and an abuse of discretion.

4 **B. Plaintiffs Will Suffer Irreparable Harm from Defendant’s FOIA and APA Violations
5 Absent a Preliminary Injunction.**

6 **1. Plaintiffs’ diversion of resources and frustration of mission from Defendant’s
7 FOIA and APA violations is irreparable harm because neither statute
8 provides compensatory damages.**

9 Access to the records stored in the APHIS databases is critical to the Plaintiffs’ missions.
10 *See* Ex. 1, Liebman Decl. ¶¶ 2, 24; Ex. 2, Budkie Decl. ¶¶ 2, 18; Ex. 3, Howard Decl. ¶¶ 2, 20;
11 Ex. 4, Olson Decl. ¶¶ 2, 20. The diversion of an organization’s resources “constitutes far more
12 than simply a setback to the organization’s abstract social interests.” *Havens Realty Corp. v.*
13 *Coleman*, 455 U.S. 363, 379 (1982). Indeed, diversion of resources and frustration of mission are
14 compensable injuries. *See Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905, 906 (9th Cir. 2002)
15 (affirming such an award of compensatory damages). Although economic harms are generally not
16 considered irreparable harm, economic harms are irreparable where, as here, compensatory
17 damages are not available because the wrongdoer is protected by sovereign immunity. *Idaho v.*
18 *Coeur d’Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015); *Cal. Pharmacists Ass’n v. Maxwell-*
19 *Jolly*, 563 F.3d 847, 851–52 (9th Cir. 2009), *modified on other grounds*. Here, neither FOIA nor
20 the APA waives sovereign immunity as to compensatory damages. *Roman v. Nat’l*
21 *Reconnaissance Office*, 952 F. Supp. 2d 159, 163 (D. D.C. 2013) (“FOIA does not provide for
22 monetary damages.”); *Cohen v. United States*, 650 F.3d 717, 735 (DC Cir. 2011) (“The APA does
23 not offer any monetary award.”). Because Plaintiffs can never be made whole for the diversion of
24 their resources and frustration of their mission, any such harm that continues to result from
25 USDA’s blocking public access to the APHIS databases pending a final adjudication on the
26 merits is irreparable harm, warranting a preliminary injunction.

27 Plaintiffs have already had to divert resources and will continue to have to do so for as
28 long as APHIS continues to block public access to the databases. Each plaintiff organization has
already filed FOIA requests—to date, collectively totaling sixteen requests—for records that were

1 previously published as part of the databases, and will have to file regular requests for as long as
2 the databases are withheld from the public. Ex. 1, Liebman Decl. ¶¶ 15, 17; Ex. 2, Budkie Decl.
3 ¶¶ 8, 11; Ex. 3, Howard Decl. ¶ 10; Ex. 4, Olson Decl. ¶¶ 12, 14. At ALDF, filing a FOIA request
4 necessitates approximately one hour of staff time to simply submit a request. In addition staff
5 spend time communicating with the agency and tracking the request. ALDF will have to file
6 approximately one request per week for records that were previously made affirmatively
7 available. Ex. 1, Liebman Decl. ¶ 17. SAEN has recently hired an additional staff member, a
8 “document procurement specialist,” whose very position was “made necessary in significant part”
9 by APHIS’s removal of the databases from the public view. Ex. 2, Budkie Decl. ¶ 11. These
10 diversions represent significant investments that the Plaintiffs could have used for other critical
11 organizational functions.

12 In addition to the diversion of resources that the FOIA requests entail, obtaining untimely
13 information through FOIA requests—or not obtaining any information at all, as is the current
14 situation, Ex. 1, Liebman Decl. ¶ 15—frustrates the mission of the Plaintiff organizations. To
15 begin, certain ongoing efforts are thwarted. For example, CAPS has a long-running advocacy
16 effort in Southern California to investigate the sources of retail pet stores’ animals, in part
17 through the APHIS databases, exposing stores that source from large dog breeders, known as
18 puppy mills, and helping to enact ordinances banning the practice. Ex. 3, Howard Decl. ¶ 3.
19 When USDA took the APHIS databases offline, CAPS was in the middle of working with the city
20 of Riverside on a new ordinance but now cannot access the inspection reports pertaining to the
21 largest pet store in the city, Barkworks, thereby frustrating its ongoing investigative and advocacy
22 efforts. *Id.* at ¶ 9. ALDF is currently suing that same Barkworks pet store chain for
23 misrepresenting puppy mills as “reputable” breeders. Ex. 1, Liebman Decl. ¶ 9. ALDF’s inability
24 to access timely reports from the APHIS databases will impair its ongoing monitoring of the
25 sources of Barkworks’ puppies and ALDF’s case. *Id.*

26 Similarly, a core aspect of Animal Folks’ work is filing law enforcement complaints under
27 state cruelty laws and filing complaints to state licensing authorities or APHIS. Ex. 4, Olson Decl.
28 ¶ 4–5. To accomplish this, Animal Folks spent between two and four hours each week checking

1 the APHIS databases for records to support the complaints. *Id.* at ¶ 3. Because law enforcement
2 typically only considers timely complaints, a delay in receiving records will hinder Animal Folks
3 in its ongoing efforts to file complaints. *Id.* at ¶ 6. In another example, the Executive Director of
4 Animal Folks recently testified before a city council about a pet store ordinance and was unable
5 to access the most recent inspection reports for certain breeders, rendering the data presented out-
6 of-date. *Id.* at ¶ 11. For its part, SAEN typically checked the APHIS databases up to ten times per
7 day. Ex. 2, Budkie Decl. ¶ 3. SAEN estimates that it has been unable to review dozens of
8 inspection reports it would otherwise have monitored. As a result, it is also unable to publicize
9 instances of serious animal abuse to pressure animal research facilities to improve their treatment
10 of animals. *Id.* at ¶¶ 17–18.

11 Furthermore, two of the Plaintiffs have achieved previous victories for animals that are
12 now in jeopardy because they depend on public access to the APHIS databases. Plaintiffs are now
13 forced to choose between frustration of their mission to protect animals or dedicating additional
14 resources to revisiting previous campaigns. For example, CAPS has worked to enact certain local
15 ordinances that rely on access to the APHIS databases. One such ordinance in New York City
16 requires that retail pet stores keep the two “most recent” inspection reports for the breeder of each
17 animal so that prospective purchasers can review the reports and to provide copies of the reports
18 to purchasers. Ex. 3, Howard Decl. ¶ 6. The New York City ordinance also requires that retail pet
19 stores not buy any puppies or kittens from a facility that has a certain number of AWA violations
20 over a period of time. *Id.* Without access to the APHIS databases, the retail pet stores will not be
21 able to fully comply with the ordinance. *Id.* Another ordinance that CAPS helped to enact
22 requires pet stores in Orland Park, Illinois, to post the website link to the APHIS database so that
23 consumers can conduct their due diligence on the breeder. This link now sends the consumer to
24 an error message, rather than the databases. *Id.*

25 ALDF, for its part, facilitated a settlement that it cannot completely enforce without
26 access to the APHIS databases. ALDF used the APHIS databases to demonstrate that a Chicago-
27 area pet store, Furry Babies, misrepresented puppies it obtained from puppy mills as coming from
28 reputable breeders. Ex. 1, Liebman Decl. ¶ 8. After ALDF filed suit for violations of consumer

1 protection laws, Furry Babies agreed to use the APHIS databases on a monthly basis to ensure
2 that its breeders' last inspection reports contain no critical or direct AWA violations. *Id.* at ¶ 8 &
3 Ex. D. Without access to the APHIS databases, that element of the agreement is frustrated.
4 ALDF's past efforts to protect animals in this instance will have been frustrated and it will be
5 forced to spend additional resources assuring that Furry Babies does not return to its previous
6 practices sourcing animals from unscrupulous dog breeders who mistreat their animals.

7 In addition, each of the Plaintiffs engages in substantial public and media outreach as part
8 of their core mission to protect the lives and welfare of animals, and this core work is also
9 frustrated by the removal of the databases. *See* Ex. 1, Liebman Decl. ¶¶ 2, 24; Ex. 2, Budkie Decl.
10 ¶¶ 2, 18; Ex. 3, Howard Decl. ¶¶ 2, 20; Ex. 4, Olson Decl. ¶¶ 2, 20. Without access to the
11 databases, the Plaintiffs are unable to use the records to generate media interest to pressure
12 regulated entities to correct violations of the law or to pressure consumers and lawmakers to take
13 action to hold those entities accountable. For example, CAPS has worked with reporters from
14 20/20, Dateline, CNN, People, Life, and the Rolling Stone on stories concerning the pet shop and
15 puppy mill industries. CAPS has been working on a story about Internet sellers with a national
16 news program, but without access to the APHIS databases, CAPS cannot provide inspection
17 reports for the story. Ex. 3, Howard Decl. ¶ 18. Similarly, in 2016 alone, SAEN was directly
18 responsible for 125 news stories on conditions and treatment of animals in research facilities. Ex.
19 2, Budkie Decl. ¶ 19. Plaintiffs therefore use the APHIS database records as a key piece in their
20 robust media work, which will be frustrated absent public access to those records.

21 Finally, Plaintiffs often seek to give their members and supporters actionable items that
22 can affect consumer decisions. For example, CAPS provides its website visitors with instructions
23 on how to find "a USDA-licensed breeding or brokering facility." The link that CAPS has on its
24 website goes to the now-offline database, resulting in an error message for the user. CAPS, *Find a*
25 *USDA-Licensed Breeding or Brokering Facility*, [https://www.caps-web.org/find-a-breeding-](https://www.caps-web.org/find-a-breeding-facility)
26 [facility](https://www.caps-web.org/find-a-breeding-facility); *see also* Ex. 3, Howard Decl. ¶ 13. Similarly, ALDF has issued "consumer alerts" about
27 puppy mills, urging consumers not to support unscrupulous dog breeders and to "do your
28 research" about where pet stores puppies come from. *E.g.*, ALDF, *CONSUMER ALERT: Pet*

1 *Stores are No Place for Holiday Shopping* (Dec. 14, 2016), [http://aldf.org/press-room/press-](http://aldf.org/press-room/press-releases/consumer-alert-pet-stores-are-no-place-for-holiday-shopping)
2 [releases/consumer-alert-pet-stores-are-no-place-for-holiday-shopping](http://aldf.org/press-room/press-releases/consumer-alert-pet-stores-are-no-place-for-holiday-shopping). Plaintiffs' efforts to help
3 consumers protect the lives and welfare of animals through their purchasing decisions will be
4 thwarted until such time as the databases are returned to the public domain.

5 For so long as the APHIS databases are not publicly available, the Plaintiffs will be forced
6 to divert staff resources to FOIA requests, put advocacy and media efforts on hold, and spend
7 time reconfiguring, where possible, projects, ordinances, and settlement agreements that rely on
8 public access to the APHIS databases. Indeed, harm to the lives and welfare of the animals
9 Plaintiffs work to protect cannot be adequately remedied by money damages and is permanent.
10 *Cf. League of Wilderness Defs. v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014) (finding
11 irreparable harm where thousands of mature trees were going to be felled because “[n]either the
12 planting of new seedlings nor the paying of money damages can normally remedy such damage”).
13 Plaintiffs can therefore demonstrate a likelihood of irreparable harm in their diversion of
14 resources and frustration of mission.

15 **2. Plaintiffs' will be irreparably harmed by the loss of member and donor**
16 **goodwill.**

17 Intangible injuries, such as the loss of goodwill, may constitute irreparable harm. *Rent-A-*
18 *Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991).
19 For example, irreparable harm has been found where a plaintiff shows that it seeks to protect
20 advertising efforts and goodwill, *id.*, or recruitment efforts and goodwill, *Regents of Univ. of Cal.*
21 *v. American Broadcasting Cos.*, 747 F.2d 511, 519–20 (9th Cir. 1984), or other harm that is
22 difficult to value, *Rent-A-Center*, 944 F.2d at 597. *See also Pacific Radiation Oncology, LLC v.*
23 *Queen's Medical Center*, 555 Fed. Appx. 730, 732 (9th Cir. 2015) (mem) (finding irreparable
24 harm where a doctor would suffer “harm to relationships with patients” and competitive harm).

25 Here, the Plaintiffs risk harming their relationship and goodwill with their members,
26 supporters, and donors by being unable to provide up-to-date information regarding animal
27 cruelty. ALDF provides daily website updates to its news stories and recommendations to its
28 members and the general public of animal-friendly businesses. Ex. 1, Liebman Decl. ¶ 21.

1 Moreover, prior to USDA's decision to remove the APHIS databases, ALDF specifically
2 committed to its donors and members that it was focusing its efforts this year on advocacy against
3 unscrupulous dog breeders and facilities with captive exotic animals. Ex. 5, Wells Decl. ¶ 14. Past
4 fundraising efforts involving such facilities have generated substantial charitable donations to
5 ALDF. *Id.* at ¶¶ 10, 11, 13. Both industries are largely regulated by APHIS under the AWA, and
6 the lack of information about facilities in those industries will significantly stunt ALDF's efforts
7 to satisfy that commitment to its members. *Id.* at ¶ 14.

8 For its part, SAEN's core work is to publicize instances of animal abuse to create public
9 pressure on bad actors. A substantial amount of the information SAEN acts on has been drawn
10 from the documents previously available in the APHIS databases. Ex. 2, Budkie Decl. ¶¶ 4–6,
11 12–16. Moreover, SAEN's Executive Director has traced certain significant donations and
12 successful fundraising campaigns directly to the work SAEN has done exposing to the media and
13 the public serious AWA violations, thereby demonstrating the importance of SAEN's visibility
14 and timeliness to its supporters and donors. *Id.* at ¶¶ 19–21.

15 If the Plaintiffs are unable to provide timely information to its members and consumers in
16 the general public, they will lose their relevance as up-to-date information sources for the people
17 who once relied on them. Moreover, it is likely to lead to diminished charitable donations. This
18 loss of goodwill constitutes irreparable harm, as those individuals no longer will no longer trust
19 the Plaintiff organizations to provide the most relevant information and advocacy.

20 **C. The Balance of Hardships and Public Interest Favor an Injunction.**

21 In weighing the balance of hardships, the court must consider the impact of a preliminary
22 injunction “on each party of the granting or withholding of the requested relief . . . pay[ing]
23 particular regard for the public consequences.” *Winter v. Natural Res. Def. Council, Inc.*, 555
24 U.S. 7, 24 (2008) (internal quotations and citations omitted). Here, the equities weigh decidedly
25 in Plaintiffs' favor. All indications suggest that the agency has merely removed the databases
26 from public view, and nothing suggests the agency has destroyed the databases underlying
27 functionality. Accordingly, restoring public access to the databases, i.e. the *status quo ante*, is
28 unlikely to be a burdensome process for the agency. Moreover, retaining the status quo of

1 allowing public access to the databases will not harm the agency, as demonstrated by the many
2 years in which the agency published those records without consequence. By contrast, the
3 Plaintiffs will continue to suffer without access to the databases.

4 Further, the public interest in maintaining uninterrupted access to these records is
5 substantial. To begin, for every day that passes without access to records that document AWA
6 violations, animal advocacy groups, like Plaintiffs here, and others concerned about animal
7 welfare, cannot take steps to protect animals and prevent cruelty. USDA's own Inspector General
8 has decried APHIS's lackadaisical enforcement of the AWA. *See, e.g., USDA OIG, Animal and*
9 *Plant Health Inspection Service Oversight of Research Facilities 2* (Dec. 2014), *available at*
10 <https://www.usda.gov/oig/webdocs/33601-0001-41.pdf>. Thus, without public oversight, animals
11 kept for commercial enterprises—whose rights to basic necessities such as adequate shelter, food,
12 water, and veterinary care, are guaranteed by statute—will be more likely to suffer. Public outcry
13 has come from every side of the issue, including organizations that support animal research,
14 members of Congress, and local jurisdictions with puppy mill ordinances that cannot be fully
15 enforced. *See Speaking of Research, The USDA's Removal of Information About Animal*
16 *Research is a Step Backwards for Transparency* (Feb. 7, 2017), [https://speakingofresearch.com/](https://speakingofresearch.com/2017/02/07/the-usdas-removal-of-information-about-animal-research-is-a-step-backwards-for-transparency)
17 [2017/02/07/the-usdas-removal-of-information-about-animal-research-is-a-step-backwards-for-](https://speakingofresearch.com/2017/02/07/the-usdas-removal-of-information-about-animal-research-is-a-step-backwards-for-transparency)
18 [transparency](https://speakingofresearch.com/2017/02/07/the-usdas-removal-of-information-about-animal-research-is-a-step-backwards-for-transparency); *Senators Urge USDA to Restore Animal Cruelty Data to Website*, U.S. NEWS (Feb.
19 13, 2017), [https://www.usnews.com/news/new-jersey/articles/2017-02-13/senators-urge-usda-to-](https://www.usnews.com/news/new-jersey/articles/2017-02-13/senators-urge-usda-to-restore-animal-cruelty-data-to-website)
20 [restore-animal-cruelty-data-to-website](https://www.usnews.com/news/new-jersey/articles/2017-02-13/senators-urge-usda-to-restore-animal-cruelty-data-to-website); Skyler Swisher & Ryan Van Velzer, *County Says Loss of*
21 *Federal Animal-Welfare Data Hinders Puppy Mill Crackdown* (Feb. 6, 2017), [http://www.sun-](http://www.sun-sentinel.com/local/palm-beach/fl-pn-puppy-mill-info-blackout-20170206-story.html)
22 [sentinel.com/local/palm-beach/fl-pn-puppy-mill-info-blackout-20170206-story.html](http://www.sun-sentinel.com/local/palm-beach/fl-pn-puppy-mill-info-blackout-20170206-story.html). This flurry
23 of public activity underscores what is common sense: deleting scores of AWA enforcement
24 records used to document animal cruelty in the name of “transparency” is not in the public
25 interest.

26 V. CONCLUSION AND RELIEF REQUESTED

27 APHIS acted unlawfully in violation of FOIA and the APA when it blocked public access
28 to its ACIS and EA databases, and stopped affirmatively disclosing all recent inspection reports,

1 annual research reports, and enforcement action documents. Accordingly, Plaintiffs seek a
2 preliminary injunction to the *status quo ante*, requiring USDA to continue its years-long practice
3 of allowing public access to the continually updated records in the APHIS databases pending the
4 outcome of the litigation.

5
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