No. 18-15907

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION OF ARIZONA, ET AL.,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Arizona

OPENING BRIEF FOR APPELLANTS

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INTRODUCTION

In this Freedom of Information Act (FOIA) case, the U.S. Department of Homeland Security (DHS) and its component agencies produced over 30,000 pages of documents and 35 audio files, including three interim reports from the DHS Office of Inspector General (OIG), concerning investigations into allegations of abuse of unaccompanied minors in immigration detention between 2009 and 2014. In accordance with its usual practice, DHS redacted the names and personal identifying information of third parties and government employees at the GS-14 level or lower who were named in the responsive documents as investigators, witnesses, third parties, or investigation subjects pursuant to FOIA Exemptions 6 and 7(C), 5 U.S.C. § 552(b)(6) and (7)(C), which allow the government to withhold information the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy," *id.* § 552(b)(7)(C).

The district court nevertheless required the government to disclose the names and other personally identifying information of government agents who had been accused of misconduct, even though those allegations had not been substantiated. The court concluded that the names of individual agents might reveal whether particular agents were subject to repeated allegations (even if unsubstantiated), which in turn might shed light on whether DHS was sufficiently investigating complaints. Despite the fact that the inference that DHS is not sufficiently investigating complaints, given that plaintiffs cannot substantiate the allegations, rests almost entirely on speculation,

the district court concluded that this public interest was sufficient to outweigh the privacy interests of the individual agents, which it acknowledged are substantial. *See National Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). This conclusion is contrary to both Supreme Court and Ninth Circuit precedent, which "requires [the court] to protect . . . the personal privacy of citizens against the uncontrolled release of [personal] information," unless the FOIA requester can "show that the public interest sought to be advanced [by the disclosure] is a significant one" and that the "information is likely to advance the interest." *Id.*; *see also Forest Serv. Emps. for Envt'l Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1027 (9th Cir. 2008) (Plaintiff must demonstrate that the "marginal additional usefulness" of disclosing the names of individual agents subject to investigations "is sufficient to overcome the privacy interests at stake."). Moreover, the record in this case demonstrates that, contrary to plaintiffs' assertion, DHS and its component agencies did, in fact, investigate the allegations of abuse, and plaintiffs have not explained why the names of the individual agents would add to the information in the over 30,000 pages of documents and 35 audio files DHS has already provided.

STATEMENT OF JURISDICTION

This suit arises out of a request made by the American Civil Liberties Union of Arizona (ACLU) under FOIA, 5 U.S.C. § 552, for records held by the U.S. Department of Homeland Security and a number of its component agencies. ACLU invoked the district court's jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B). The district court entered an order on August 14, 2017, granting in part and denying in part

each party's cross-motion for summary judgment, and requiring disclosure of certain information redacted under FOIA Exemptions 6 and 7(C). On August 28, 2017, defendants filed a motion for reconsideration under Fed. R. Civ. P. 54(b). On March 22, 2018, the district court entered an order granting in part and denying in part the motion for reconsideration, but still requiring disclosure of certain redacted information. The government defendants filed a timely notice of appeal on May 17, 2018. On May 21, 2018, this Court stayed the district court's production order pending appeal. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291, 1292(a)(1). *See In re Steele*, 799 F.2d 461, 464-65 (9th Cir. 1986).

STATEMENT OF THE ISSUE

The question presented is whether the district court erred when it concluded that Exemptions 6 and 7(C) of the Freedom of Information Act do not protect from disclosure the names of government agents subject to unsubstantiated accusations of misconduct.

PERTINENT STATUTES

Pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Factual Background

The case arises from a request made by the American Civil Liberties Union of Arizona for records held by the U.S. Department of Homeland Security and several of its component agencies: Customs and Border Protection (CBP), Immigration and

Customs Enforcement (ICE), Office for Civil Rights and Civil Liberties (CRCL), and Office of the Inspector General. The records requested relate to an administrative complaint filed in June 2014 by ACLU and its partner organizations, alleging that 116 unaccompanied minor immigrants were subject to mistreatment while in Border Patrol custody. ER15 (August 14, 2017 Order). In response to ACLU's complaint, DHS "initiated investigations" into the 116 allegations ACLU raised. ER95 (2d Goal Decl.). OIG, ICE's Office of Professional Responsibility, CBP's Office of Internal Affairs, and DHS's Office for Civil Rights and Civil Liberties each investigated a portion of the allegations. *See id.* n.1; *see also* ER161-67 (July 2014 OIG meeting notes on ongoing investigation by OIG and other components into 116 allegations and others); ER89-92 (CBP Response to CRCL Preliminary Findings and Recommendations).

OIG's investigation went well beyond the allegations raised by ACLU. Inspectors conducted extensive fieldwork consisting of over 90 unannounced detention facility site visits in which investigators "evaluated the treatment of unaccompanied alien children in DHS custody," including "the availability of potable drinking water and adequate food;" "access to operable and sanitary toilets and sinks;" "access to emergency medical care;" "the adequacy of detention facility temperatures and ventilation;" "the adequacy of supervision and access to telephones;" "the following of protocols for notifying [U.S. Department of Health and Human Services (HHS)] and [U.S. Citizenship and Immigration Services (USCIS)] for placement or when [unaccompanied alien children (UAC)] raise protection concerns;" and "whether UAC

were held in DHS custody for less than 72 hours before transfer to HHS except in exceptional circumstances." ER95 (2d Goal Decl.); *see also* ER163 (detailing ongoing OIG field visits). As part of its investigation, OIG issued three interim reports in July, August, and October 2014 regarding the oversight of unaccompanied minors.[1] ER95; *see also* OIG Press Release, *Improvements Continue at Detention Centers*, (October 6, 2014), https://www.oig.dhs.gov/assets/pr/2014/oigpr_100214.pdf. OIG did not find any of the complaints it investigated to be substantiated. *See* ER95.

Less than six months after the administrative complaint was filed, ACLU filed a FOIA request with the DHS Privacy Office in December 2014, seeking disclosure of records pertaining to the allegations in their complaint and other similar allegations. Specifically, ACLU sought records related to any "alleged or actual mistreatment of children in DHS custody from January 1, 2009, to the present, as well as any such Records held by United States Border Patrol, [Customs and Border Protection], or any other DHS component agencies." ER15 (quoting Dkt. No. 1, Ex. A, at 5-6).

B. Prior Proceedings

On February 11, 2015, ACLU filed this lawsuit in the U.S. District Court for the District of Arizona, seeking judicial review of DHS's response to the FOIA request.

[1] The three interim reports are publicly available on OIG's website. *See* July 30, 2014 Interim Report, https://www.oig.dhs.gov/assets/Mgmt/2014/Over_Un_Ali_Chil.pdf; August 28, 2014 Interim Report, https://www.oig.dhs.gov/assets/pr/2014/Sig_Mem_Over_Unac_Alien_Child090214.pdf; October 2, 2014 Interim Report, https://www.oig.dhs.gov/sites/default/files/assets/Mga/2016/Over_Un_Ali_Child_100214.pdf.

ER15. The Freedom of Information Act requires government agencies to produce records and information in response to requests from the public, subject to a number of statutory exceptions. *See* 5 U.S.C. § 552. Under the supervision of the district court, the defendant agencies produced documents responsive to ACLU's request. The agencies also produced several *Vaughn* indices, a tool named after *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), in which the agency "identif[ies] each document withheld [or redacted], the statutory exemption claimed, and a particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption," *Weiner v. FBI*, 943 F.2d 972 (9th Cir. 1991); *see also* Dkt. Nos. 56-3 (CBP *Vaughn* Index); 56-5 (ICE *Vaughn* Index); 56-7 (CRCL *Vaughn* Index); 56-9 (OIG *Vaughn* Index).

By October 2016, the defendant agencies completed "production of the responsive non-exempted records within [the defendants'] control," which totaled over "30,000 pages and 35 audio files." ER16. Relevant to this appeal, the defendant agencies redacted the names of all DHS employees at the GS-14 level or lower who were named in the responsive documents as investigators, witnesses, or investigation subjects pursuant to 5 U.S.C. § 552(b)(6) and (b)(7)(C). Exemptions 6 and 7(C) allow the government to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," and "records or information compiled for law enforcement purposes . . . to the extent that

the production of such [records] . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy," respectively. 5 U.S.C. § 552(b)(6), (7)(C).

The defendant agencies filed a motion for summary judgment, arguing that the agencies' search for responsive records was reasonable, that the defendants properly withheld and redacted records under FOIA's Exemptions 5, 6, and 7(C) and (E), and that they released reasonably segregable portions of responsive records. *See* Dkt. No. 56. ACLU filed its response and cross-motion for summary judgment, arguing that defendants failed to demonstrate an adequate search, improperly withheld documents and information, and failed to segregate non-exempt materials from the withheld records. *See* Dkt. No. 61. With regard to those redactions made by the agencies under Exemptions 6 and 7(C), ACLU only challenged the withholdings with regard to the names of public employees allegedly responsible for misconduct. Despite having thousands of pages of documents detailing investigations by various DHS components, ACLU argued that the names of the individual agents were necessary to verify "the integrity and reliability of government investigation procedures," including more specifically to "determine whether the same agents [were] repeatedly the subject of abuse allegations or if any disciplinary proceedings have been instituted in response." Dkt. No. 61, at 27. This interest, they argued, is part of a broader assertion that the agencies failed to adequately investigate the allegations of misconduct and failed to discipline employees for abuse of unaccompanied minors in immigration detention facilities.

The district court granted in part and denied in part the government's motion for summary judgment. *See* ER17 ("Summary judgment is the procedural vehicle by which nearly all FOIA cases are resolved.") (quoting *Natural Res. Def. Council v. DoD*, 388 F. Supp. 2d 1086, 1094 (C.D. Cal. 2005)). Although the district court addressed a variety of issues in its decision, this appeal concerns only the parties' dispute concerning the personal privacy interests of government agents.[2]

With regard to those documents withheld or redacted under FOIA's Exemption 6 and 7(C), the district court compelled disclosure of the names and personally identifying information of government agents accused of misconduct, even where those allegations had not been substantiated. The court acknowledged (implicitly recognizing the significant privacy interests of the individuals involved) that it was "sympathetic to Defendants' argument that allegations against its officers and agents may be unwarranted and disclosure of such identifying information may subject them to undeserved scorn" and "could conceivably . . . put [such employees] in danger due to disclosure of their personal information." ER39. And the court recognized that the only cognizable public interest in disclosure was "relating to the investigations of mistreatment allegations made by children in Border Patrol custody," holding that

[2] Although the district court's opinion is unclear on this point, ACLU only sought to challenge the redaction of the names of those DHS agents "allegedly responsible for the abuse of minors," Dkt. No. 61, at 24, and the parties agree that the names of witnesses, investigators, and third parties are not to be disclosed, *see also* Dkt. No. 83, at 3 ("Plaintiffs only request the un-redacted names of 'public employees allegedly responsible for the abuse of minors,' not the names of 'DHS employees' generally.").

"disclosure of such investigations" warranted disclosure. ER38-39. But the court did not engage in any balancing of those interests, instead assuming that the privacy concerns could be mitigated by "a protective order that would prevent public disclosure of those names while allowing Plaintiffs unfettered access to the information." ER39.

The government moved for reconsideration of the district court's decision on Exemptions 6 and 7(C), pointing out that FOIA does not permit selective disclosure of information subject to a protective order. *See* Dkt. No. 77; *see also National Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004) (explaining that there is "no mechanism under FOIA for a protective order allowing only the requester to see whether the information bears out his theory, or for proscribing its general dissemination"); *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1082, 1088 (9th Cir. 1997) ("FOIA does not permit selective disclosure of information only to certain parties, and [] once the information is disclosed to Audubon, it must also be made available to all members of the public who request it."). The government also reiterated its arguments for why DHS agents' personal information is exempt from disclosure under FOIA Exemptions 6 and 7(C). *See* Dkt. No. 77.

On reconsideration, the district court recognized that it erred by suggesting that a protective order would be appropriate, and the court also provided a more fulsome explanation of its balancing of the privacy interests articulated by the agencies against the public interest asserted by ACLU, acknowledging that "[p]rior cases have identified the potential for harassment and stigma that could be attached to a sensitive

investigation," which "creates a cognizable, nontrivial privacy interest for the officers involved." ER5.

The court explained, however, that it had "concluded that Plaintiffs' requests implicated a significant public interest—an agency's performance of its statutory duty," ER6—in this case, the agency's duty to investigate allegations of misconduct. The court concluded that "Plaintiffs demonstrated that their requests were likely to advance that interest." ER7. With regard to the redacted names, the court explained that "Plaintiffs' evidence also indicates that disclosure of the names of the employees accused of misconduct would be more than marginally useful to Plaintiffs" "because without those names, it is impossible to synthesize the numerous allegations of abuse to find patterns of behavior by certain individuals and determine, among other things, whether the agencies turned a blind eye to those patterns of behavior." ER10. In reaching this conclusion, the district court relied heavily on its assumption that "virtually no investigations into the complaints took place, or at least were completed," despite the fact that defendants produced thousands of pages of documents related to such investigations in response to plaintiffs' FOIA request. ER9. Ultimately, the court concluded that although "[w]eighing the privacy interest against the public interest is a difficult task here," "the balance tips in favor of the public interest." ER11. The court ordered production of unredacted versions of the thousands of pages of documents, including names and personal identifying information for government agents accused of misconduct, but stayed that production order for sixty days.

The government filed a notice of appeal on May 17, 2018, and this Court granted a stay pending appeal.

SUMMARY OF ARGUMENT

The district court erred when it concluded that the public interest in disclosure of the names of DHS agents subject to unsubstantiated allegations of misconduct outweighed the significant privacy interests of the employees implicated by the disclosure. This Court and the Supreme Court have recognized that under FOIA's Exemption 7(C), the court must "protect . . . the personal privacy of citizens against the uncontrolled release of information compiled through the power of the State" unless the requester "establish[es] a sufficient reason for the disclosure." *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). A reviewing court undertakes a three-step process requiring (1) the identification of a nontrivial personal privacy interest, (2) a showing that the public interest sought to be advanced is significant and that the information is likely to advance that interest, and (3) a balancing of the two. *See, e.g.*, *Tuffly v. U.S. Dep't of Homeland Sec.*, 870 F.3d 1086, 1092-93 (9th Cir. 2017).

The district court correctly recognized that the privacy interest at stake here is a significant one: release of the names of DHS agents subject to unsubstantiated allegations of misconduct would lead to "the obvious stigma that would be attached to being associated with allegations of the abuse of minors," ER5 (quotation marks omitted), and this Court has previously been quite protective of similar "strong interest[s] [for government employees] in 'not being associated unwarrantedly with

alleged criminal activity.'" *Schiffer v. FBI*, 78 F.3d 1405, 1410 (9th Cir. 1996) (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990)) (citation omitted); *see also Lahr v. National Transp. Safety Bd.*, 569 F.3d 964, 977 (9th Cir. 2009); *Forest Serv. Emps. for Envt'l Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1027 (9th Cir. 2008); *Hunt v. FBI*, 972 F.2d 286, 288 (9th Cir. 1992).

At step two, however, ACLU has failed to show a "significant" public interest in the disclosure of the redacted information or "the necessary nexus between the requested information and the asserted public interest that would be advanced by disclosure." *Favish*, 541 U.S. at 172-73. The district court's conclusion that it had is contrary to both this Court's case law and the documentary evidence in this case.

Plaintiffs argue that disclosing the individual officers' names might reveal whether particular agents were subject to repeated allegations, which in turn might lend support to their theory that DHS was not sufficiently investigating complaints. This interest rests almost entirely on speculation, especially in light of the fact that the government has already produced extensive documentation showing that the relevant agencies investigated ACLU's allegations and in most cases found them unsubstantiated. For example, OIG's *Vaughn* Index demonstrates that the agency produced in redacted form thousands of pages of interview notes, facility observation checklists, situation reports, reports of investigation, case narrative forms, investigative plans, draft memoranda, and communications with other agencies such as CBP, ICE, and FBI. *See generally* Dkt. No. 56-9 (OIG *Vaughn* Index); ER275-318 (Excerpts from

OIG *Vaughn* Index; *see also* ER95 (OIG was "unable to substantiate any of the allegations" that it investigated from ACLU's June 2014 complaint).

"Allegations of misconduct are 'easy to allege and hard to disprove,' so courts must insist on a meaningful evidentiary showing" that would "warrant a belief by a reasonable person that the alleged [g]overnment impropriety might have occurred." *Favish*, 541 U.S. at 173 (quoting *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998) (citations omitted)). Here, ACLU has failed to put forth a "meaningful evidentiary showing" that DHS failed to investigate claims of abuse. *Id.* In drawing a contrary conclusion, the district court relied primarily on a spreadsheet—compiled by OIG in response to ACLU's FOIA request and provided to the court by plaintiffs—that summarizes complaints against Border Patrol agents and about conditions in detention. ER9.

The court—relying on plaintiffs' mischaracterizations about the chart—put significant emphasis on the fact that all but one of the complaints was marked "Referred-No Reply" to CBP or ICE and "Closed Not Converted." ER9; *see also* ER47-48 (Reddy Decl.) ("Records produced by Defendants have revealed multiple instances where . . . Defendants have either failed to open investigations . . . or inexplicably closed investigations."); ER51-88 (OIG spreadsheet). From this document, the court concluded that "virtually no investigations into the complaints took place, or at least were completed." ER9. This conclusion is based on a misunderstanding of the notations used by OIG. In the majority of cases, OIG has discretion to investigate or to refer the matter externally and where it refers matters to a component for

investigation, OIG does not require follow up from the component unless the component uncovers potential criminal misconduct during the course of its investigation. *See* ER161-62 (explanation of OIG referral process); *see also* OIG, *Definitions of Column Labels*, (Nov. 15, 2013), https://www.oig.dhs.gov/sites/default/files/assets/PDFs/OIG_13_FOIA_Definitions.pdf. The notations therefore provide no information about the subsequent investigation by the relevant component. Moreover, the district court's conclusion is contrary to the over 30,000 pages of documents, 35 audio files, and multiple OIG reports that demonstrate that DHS components in fact investigated complaints received about allegations of abuse.

Where "there is no credible evidence of wrongdoing on the part of a government employee, the public interest in disclosure of investigation records is minimized." *Dobronski v. FCC*, 17 F.3d 275, 278 (9th Cir. 1994). As a result, the district court erred when it concluded that ACLU had identified a "significant" public interest because there is "no credible evidence of wrongdoing" to support their allegation that DHS and its component agencies were not sufficiently investigating complaints of misconduct. *Id.* at 278.

Furthermore, ACLU has failed to demonstrate how disclosing the names of the agents investigated would advance the public interest in measuring "the integrity and reliability of" the agencies' investigations, especially given that plaintiffs and the district court acknowledge that they have no independent way to measure the truth or falsity of the underlying allegations. *See* ER9 (acknowledging that "it is true that one cannot

determine the truth of any of the allegations from the documents provided"); *see also* ER7, ER11. ACLU already has thousands of pages of documents that defendants have produced, including reports of investigation, significant incident reports, case summary reports, and three DHS OIG interim reports, which allow them to evaluate whether DHS was properly investigating complaints of alleged abuse of unaccompanied minors. *See generally* Dkt. Nos. 56-3 (CBP *Vaughn* Index); 56-5 (ICE *Vaughn* Index); 56-7 (CRCL *Vaughn* Index); 56-9 (OIG *Vaughn* Index).

The district court thought that disclosing the names of the DHS agents subject to investigation would help plaintiffs "accomplish their goal of finding alleged repeat offenders," ER7-8, but failed to explain how having the names of individual agents—even of those repeatedly accused of misconduct—would allow ACLU to "examine whether agencies initiated disciplinary actions," ER8. That is simply a non sequitur. Whether DHS initiated disciplinary actions generally is a distinct question, unrelated to and uninformed by the identities of individuals who were accused more than once.

Moreover, as in this Court's previous cases, the DHS Office of the Inspector General has "investigated the incident[s] and produced three publicly-available reports." *Forest Serv. Emps.*, 524 F.3d at 1027; *see also Lahr*, 569 F.3d at 979. ACLU—unsatisfied with the government's internal investigations—seeks disclosure of personal identifying information about government agents in order to conduct its own investigations, and to publicize the names of those officers accused of wrongdoing. As this Court has recognized, FOIA litigation is not an appropriate vehicle for identifying

and punishing employees accused of misconduct. *See Forest Serv. Emps.*, 524 F.3d at 1027.

This Court should follow the example of its previous precedent and conclude that the marginal usefulness of the agents' names would not serve ACLU's interest in determining the sufficiency of DHS's investigations into allegations of abuse. When properly considered, the "marginal additional usefulness" of disclosing the names of individual agents subject to investigations is not "sufficient to overcome the privacy interests at stake." *Forest Serv. Emps.*, 524 F.3d at 1027. The district court's conclusion that the "balance tip[ped] in favor of the public interest," cannot stand and should be reversed. ER11.

STANDARD OF REVIEW

This Court reviews de novo the district court's summary judgment order and its conclusion that FOIA Exemptions 6 and 7(C) do not exempt personal identifying information about government employees from disclosure. *Animal Legal Def. Fund v. FDA*, 836 F.3d 987, 990 (9th Cir. 2016) (en banc) (per curiam).

ARGUMENT

THE SIGNIFICANT PRIVACY INTERESTS OF DHS AGENTS SUBJECT TO UNSUBSTANTIATED ALLEGATIONS OF MISCONDUCT SHOULD NOT BE DISREGARDED WHERE PUBLICIZING INDIVIDUALS' NAMES WILL NOT ADVANCE A SIGNIFICANT PUBLIC INTEREST.

This Court and the Supreme Court have repeatedly recognized that FOIA's Exemptions 6 and 7(C) protect the personal privacy interests of individuals except in

the rare case when disclosure of personally identifiable information is necessary to advance a significant public interest. *See, e.g.*, *Department of State v. Ray*, 502 U.S. 164, 174 (1991) ("Congress thus recognized that the policy of informing the public about the operation of its Government can be adequately served [where Exemption 7(C) applies] without unnecessarily compromising individual interests in privacy."); *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) (Exemption 7(C) is a "statutory direction that the information not be released if the invasion of personal privacy could reasonably be expected to be unwarranted."). "A broad range of personal privacy interests are cognizable under FOIA." *Prudential Locations LLC v. HUD*, 739 F.3d 424, 430 (9th Cir. 2013). "Where there are relevant privacy interests at stake, a requester must demonstrate that the interest served by disclosure is a significant one, an interest more specific than having the information for its own sake, and that disclosure is likely to advance that interest." *Lahr v. National Transp. Safety Bd.*, 569 F.3d 964, 974 (9th Cir. 2009) (quotation marks omitted).

FOIA provides that the government may withhold from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6), and "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy," *id.* § 552(b)(7)(C). This Court, like other courts, has recognized that while these two exemptions are often

invoked under similar circumstances, Exemption 7(C) is more protective of privacy interests, and as a result, where both are invoked, the court need only consider whether withholding is appropriate under 7(C). *See, e.g.*, *Dobronski v. FCC*, 17 F.3d 275, 279 (9th Cir. 1994); *see also Tuffly v. U.S. Dep't of Homeland Sec.*, 870 F.3d 1086, 1092 n.5 (9th Cir. 2017) (explaining that where both Exemptions 6 and 7(C) are invoked, the 7(C) balancing test applies).

Exemption 7(C) applies here because the agencies' investigations of allegations that agents mistreated children in the government's custody implicates serious law enforcement concerns, and plaintiffs' request for documents, by its very terms, thus seeks information compiled for law enforcement purposes.[3] *See, e.g.*, Dkt. No. 1, at ¶¶ 20, 21 (Compl.) ("By failing to meaningfully investigate or otherwise respond to consistent reports of systemic abuse, DHS and CBP officials have demonstrated a continuing disregard for the civil and human rights of children in their custody, and may have violated state and federal child abuse reporting laws."); Dkt. No. 1, Ex. A, at 10 (FOIA Request) (requested documents are "likely to contribute" to an understanding of government operations, "specifically by helping the public determine whether minors encountered, apprehended, and/or detained by CBP or the U.S. Border Patrol are treated in a manner that comports with the U.S. Constitution and other federal laws, and whether CBP personnel are properly investigated and held accountable when they

[3] The district court assumed that Exemption 7(C) applies in deciding that disclosure was required even under the more stringent standard. *See* ER10-11 n.1.

fail to respect those laws."). Furthermore, the record confirms that the information at issue was compiled for law enforcement purposes. *See, e.g.*, ER215-16 (1st Goal Decl.) (explaining that OIG records investigating allegations of abuse are law enforcement records); ER188-194 (sample redacted ICE reports of investigation of allegations of abuse by Border Patrol agents).

Under Exemption 7(C), the court must "protect . . . the personal privacy of citizens against the uncontrolled release of information compiled through the power of the State" unless the requester "establish[es] a sufficient reason for the disclosure." *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). In order for disclosure of the information to be proper, the requester (1) "must show that the public interest sought to be advanced is a significant one" that is cognizable under FOIA, *id.*, and consistent with the statute's aim "to open agency action to the light of public scrutiny," *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976); and, (2) that "the information is likely to advance that interest," *Favish*, 541 U.S. at 172. Otherwise, "the invasion of privacy is unwarranted." *Id.* A reviewing court undertakes a three-step process requiring (1) the identification of a nontrivial personal privacy interest, (2) a showing that the public interest sought to be advanced is significant and that the information is likely to advance that interest, and (3) a balancing of the two. *See, e.g.*, *Tuffly*, 870 F.3d at 1092-93; *see also Favish*, 541 U.S. at 172 ("The statutory direction that the information not be released if the invasion of personal privacy could reasonably be

expected to be unwarranted requires the courts to balance the competing interests in privacy and disclosure.").

The district court here correctly recognized that government agents have a significant privacy interest that would be invaded by having their names associated with unsubstantiated allegations of misconduct involving minors. *See* ER5-6. But plaintiffs here failed to offer both a "meaningful evidentiary showing" of government impropriety, *Favish*, 541 U.S. at 175, and "the 'additional usefulness' of the specific information withheld," *Tuffly*, 870 F.3d at 1094, in advancing the particular public interest at issue. The district court misunderstood the record in this case and failed to assess plaintiffs' claims about asserted misconduct under the rigorous standard required by precedents of the Supreme Court and this Court.

A. Disclosing the names of individuals subject to unsubstantiated allegations of misconduct would implicate significant privacy interests.

As the district court correctly recognized, disclosing the names of DHS agents subject to unsubstantiated allegations of misconduct would implicate significant and well-recognized individual privacy interests because disclosure would lead to "the obvious stigma that would be attached to being associated with allegations of the abuse of minors" and the "possibility of harassment and undue public attention that could interfere with the performance of their duties." ER5 (quotation marks omitted). In addition, the court acknowledged that producing the unredacted documents "could

conceivably . . . put [such agents] in danger due to disclosure of their personal information." ER39.

This Court has previously recognized similar "strong interest[s] [for government agents] in 'not being associated unwarrantedly with alleged criminal activity.'" *Schiffer v. FBI*, 78 F.3d 1405, 1410 (9th Cir. 1996) (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990)); *see also Lahr* 569 F.3d at 977; *Forest Serv. Emps. for Envt'l Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1027 (9th Cir. 2008); *Hunt v. FBI*, 972 F.2d 286, 288 (9th Cir. 1992). In addition, "lower level officials, like . . . FBI officials [or the DHS agents here] . . ., 'generally have a stronger interest in personal privacy than do senior officials.'" *Lahr*, 569 F.3d at 977 (quoting *Dobronski*, 17 F.3d at 280 n.4). And here, the DHS officers' "privacy interest is heightened [because] the allegations involve 'sexual and professional misconduct [which] could cause the agent[s] great personal and professional embarrassment.'" *Dobronski*, 17 F.3d at 279-80 (second alteration in original) (quoting *Dunkelberger v. Department of Justice*, 906 F.2d 779, 781-82 (D.C. Cir. 1990)).

Disclosure of the names of DHS agents would subject them to the public scrutiny and harassment that comes with being labeled a child abuser based on nothing more than unsubstantiated allegations. The district court acknowledged that ACLU had not attempted to substantiate any of the underlying allegations and that the Court itself could "not determine the truth of any of the allegations." ER9. The record also demonstrates that internal investigations were unable to substantiate the complaints.

See, e.g., ER148-60 (CRCL chart, produced in redacted form, detailing ongoing investigations and complaints closed for lack of substantiating evidence); ER95 (2d Goal Decl.) (OIG was "unable to substantiate any of the allegations" that it investigated from ACLU's June 2014 complaint). In light of this significant privacy interest, plaintiffs would have to demonstrate a "significant" public interest to outweigh the DHS employees' privacy concerns, but they have failed to do so.

B. Plaintiffs have not shown a "significant" public interest or the "necessary nexus" between the requested information and the asserted interest advanced by disclosure.

In order to overcome the recognized privacy interests at stake here, plaintiffs must identify a "significant" public interest that would be furthered by the disclosure of the redacted information and must also explain "the necessary nexus between the requested information and the asserted public interest that would be advanced by disclosure." *Favish*, 541 U.S. at 172-73. They have failed to do so.

1. The district court concluded that disclosure of the names of accused agents would shed light on "the integrity and reliability of Defendants' internal investigations," particularly "whether the same government agents were repeatedly the subject of abuse allegations and whether disciplinary proceedings were initiated in response." ER7. This asserted interest was based on plaintiffs' unsubstantiated assertion that the agencies failed to adequately investigate the allegations of misconduct and failed to discipline officers for abuse of unaccompanied minors in immigration detention facilities. But the record refutes those claims. The government has already produced extensive

documentation showing that the relevant agencies investigated ACLU's allegations and largely found them unsubstantiated. *See generally, e.g.*, Dkt. No. 56-9 (OIG *Vaughn* Index); *see also* ER95 (OIG was "unable to substantiate any of the allegations" that it investigated from ACLU's June 2014 complaint.

For example, OIG's *Vaughn* Index demonstrates that the agency produced in redacted form thousands of pages of interview notes, facility observation checklists, situation reports, reports of investigation, case narrative forms, investigative plans, draft memoranda, and communications with other agencies such as CBP, ICE, and FBI. *See generally* 56-9 (OIG *Vaughn* Index); ER275-318 (Excerpts from OIG *Vaughn* Index). Specific documents that plaintiffs themselves submitted as exhibits to their district court filings also undermine their contention that the components were not investigating claims of abuse. S*ee, e.g.*, ER161-67 (July 2014 OIG meeting notes on ongoing investigation by OIG and other components into 116 allegations and others); ER168-94 (sample Reports of Investigation); ER197-98 (CRCL investigation update); ER89-92 (CBP Response to CRCL Preliminary Findings and Recommendations).

Moreover, the information that the defendants have redacted is the names and personal information of the government agents subject to unsubstantiated accusations of abuse, and disclosing the names of every individual would not advance the asserted purpose of identifying whether the government has sufficiently investigated allegations of repeated abuse. The claim that disclosure might reveal that DHS was negligent in investigating particular agents who were subject to repeated allegations rests almost

entirely on speculation. And what plaintiffs are asking for here bears no relevance to this speculation because even if some individuals were accused more than once, that in itself would not demonstrate whether DHS was sufficiently investigating complaints.

This Court and the Supreme Court have made clear that in considering whether a requester has put forth a public interest that outweighs a government employee's privacy interest under Exemption 7(C), it is not enough for the requester to merely to assert the *possibility* of agency misconduct, such as inadequate investigations or disciplinary procedures. "Allegations of misconduct are 'easy to allege and hard to disprove,' so courts must insist on a meaningful evidentiary showing" that would "warrant a belief by a reasonable person that the alleged [g]overnment impropriety might have occurred." *Favish*, 541 U.S. at 175 (quoting *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998) (citation omitted)); *see also Tuffly*, 870 F.3d at 1095 ("[T]here is an additional evidentiary showing required when the asserted public interest is demonstrating that responsible officials acted negligently or otherwise improperly in the performance of their duties." (quotation marks omitted)).

Where, as here, "the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure." *Favish*, 541 U.S. at 174. This is especially true here because, as noted above, the "privacy interest is heightened [because] the allegations involve 'sexual and professional misconduct [which] could cause the agent[s] great personal and professional

embarrassment.'" *Dobronski*, 17 F.3d at 279-80 (quoting *Dunkelberger*, 906 F.2d at 781-82).

The district court acknowledged that the allegations of abuse are largely unsubstantiated, and plaintiffs make no claim to the contrary. *See* ER11 ("Plaintiffs have not attempted to demonstrate that the underlying abuse by Defendants' employees actually occurred."). Thus, this case would not advance any public interest in knowing about any wrongdoing by the individuals whose privacy would be invaded by disclosure. Where "there is no credible evidence of wrongdoing on the part of a government employee, the public interest in disclosure of investigation records is minimized." *Dobronski*, 17 F.3d at 278. Instead, plaintiffs would sacrifice the privacy interests of the individual agents in an effort to identify supposed misconduct by others—those who are charged with investigating the accusations of misconduct.

Under these circumstances, a court should take particular care to ensure that the public interest is significant and would be served by disclosure of the agents' names. The Supreme Court has repeatedly considered and rejected similar efforts, emphasizing most recently the "presumption of legitimacy accorded to the Government's official conduct," and the need for a "meaningful evidentiary showing" to support claims of government impropriety where the requested disclosure would invade recognized privacy interests. *Favish*, 541 U.S. at 174-75. The district court erred when it concluded that ACLU had identified a "significant" public interest because there is "no credible evidence of wrongdoing" to support the allegation that DHS and its component

agencies were not sufficiently investigating complaints of misconduct. *Dobronski*, 17 F.3d at 278.

In considering whether ACLU "provided sufficient actual evidence to allow a reasonable person to believe government impropriety occurred," the court relied primarily on a spreadsheet plaintiffs provided, listing complaints against Border Patrol agents and about conditions in detention that was compiled by OIG in response to ACLU's FOIA request.[4] ER9; *see also* ER51-88 (Reddy Decl., Ex. E) (OIG spreadsheet); ER207-08 (1st Goal Decl.) (explaining that OIG "provide[d] an Excel chart containing detailed information extracted from [certain databases] concerning potentially responsive complaints and investigations" in the form of "a narrative list of 214 complaints and investigations, which OIG produced to Plaintiffs on May 27, 2015."); Dkt. No. 56-9, at 195 (listing Case Narrative Matrix among produced documents in OIG *Vaughn* Index). Relying on plaintiffs' mischaracterizations about the chart, *see* ER47 (Reddy Decl.) ("Records produced by Defendants have revealed

[4] The 214 complaints in the Excel spreadsheet referenced by the district court were compiled specifically in response to this FOIA request in an effort "to facilitate an agreement with Plaintiffs to narrow their request" in order to reduce the burden to the agency of complying with it. ER207. The document included allegations beyond ACLU's 2014 complaint, which specifically raised 116 allegations. *Compare* ER207-08 (1st Goal Decl.) (explaining that OIG "provide[d] an Excel chart containing detailed information extracted from [certain databases] concerning potentially responsive complaints and investigations" in the form of "a narrative list of 214 complaints and investigations, which OIG produced to Plaintiffs on May 27, 2015."), *with* ER95 (2d Goal Decl.) (explaining that DHS investigated the 116 complaints raised by ACLU in its June 2014 complaint).

multiple instances where . . . Defendants have either failed to open investigations . . . or inexplicably closed investigations."), the court put significant emphasis on the fact that all but one of the complaints was marked "Referred-No Reply" and "Closed Not Converted," concluding that "virtually no investigations into the complaints took place, or at least were completed," ER9. That conclusion was incorrect, and is not borne out by the record in this case.

The district court's mistaken assumption that the agency had not completed any investigations appears to be based principally on plaintiffs' misunderstanding of OIG notations and how OIG handles complaints before it. *See* Dkt. No. 83, at 9. In the majority of cases, OIG has discretion to investigate or to refer the matter externally. For example, in the OIG update detailing the ongoing investigation into ACLU's 116 allegations, which plaintiffs provided to the district court, OIG explained:

> DHS OIG Investigations (INV) coordinates with CRCL, Immigration and Customs Enforcement (ICE) Office of Professional Responsibility (OPR), and Customs and Border Protection (CBP) Internal Affairs (IA) . . . All information goes to [OIG's Office of Investigations], who enters it into its data system. The cases then are pushed to the Special Agents in Char[ge] (SACs), who decide whether to investigate. In this case, [OIG] has kept 16 of the 116 allegations and notified CRCL and OPR accordingly. Generally, the order of priority is [OIG], then OPR, then IA, then CRCL. In this case, CRCL said it would like to review 38 cases. . . . If [OIG] does not accept, the component will do its own investigation but must keep [OIG] informed and [OIG] will compile component investigation details for reporting.

ER161-62.

Where OIG refers matters to a component for investigation, it does not require follow up from the component unless the component uncovers potential criminal misconduct during the course of its investigation. On the FOIA page of its website, OIG provides an explanation for terms that may be found in its documents. *See* OIG, *Definition of Column Labels*, (Nov. 15, 2013), https://www.oig.dhs.gov/sites/default/files/assets/PDFs/OIG_13_FOIA_Definitions.pdf.[5] That document demonstrates that the notations on which the district court relied indicate only that the complaints were referred to the various components for investigation and that they had not been converted into OIG investigations. The lack of reply to a referral is routine and does not support the district court's assumption that the complaint was not investigated; instead, it indicates only that the investigation did not turn up conduct that the component was required to refer back to OIG.

[5] The document explains that a complaint received by OIG may be subject to four "final" actions: (1) if the complaint was "closed without any significant action taken by DHS-OIG," it is marked "Administrative Closure"; (2) if the complaint is "referred to the affected agency and no reply is requested from the agency," it is marked "Referred-No Reply Requested"; (3) if the complaint is "referred to the affected agency and a reply is requested to be sent to DHS-OIG," it is marked "Referred-Reply Requested"; and (4) if a complaint "has been converted to an [OIG] investigation," it is marked "Convert to Investigation." OIG, *Definition of Column Labels*, https://www.oig.dhs.gov/sites/default/files/assets/PDFs/OIG_13_FOIA_Definitions.pdf. A complaint is marked closed on the date that OIG "determines the 'final' disposition of the complaint." *Id.* Similarly, an investigation in which "[no] significant action is taken by DHS-OIG" is marked "Administrative Closure"; and an investigation may be referred to an agency component with or without a reply requested. *Id.*

The district court's conclusion that DHS was negligent in failing to investigate allegations of abuse is also irreconcilable with the other evidence before it, which demonstrates multiple ongoing and completed investigations conducted by OIG and the component agencies. The agencies produced over 30,000 pages of documents, 35 audio files, three OIG reports, and documents related to those reports that demonstrate that DHS components in fact investigated complaints received about allegations of abuse. *See, e.g.*, Dkt. Nos. 56-3 (CBP *Vaughn* Index); 56-5 (ICE *Vaughn* Index); 56-7 (CRCL *Vaughn* Index); 56-9 (OIG *Vaughn* Index). Moreover, DHS specifically "initiated investigations" into the 116 allegations ACLU raised. *See* ER95 (2d Goal Decl.) (explaining that OIG investigated sixteen and the other 100 were investigated by ICE, CBP, and CRCL, respectively); *see also, e.g.*, ER197-98 (June 2014 email explaining that CRCL would "open [investigations into] 38 of the cases . . . which are representative of all of the issues in each Sector and Station. The selected complaints that will serve as lead complaints for investigation cover[ing] a range of issues.").

DHS OIG issued three interim reports regarding ACLU's 116 specific allegations of abuse of unaccompanied minor children; of the sixteen complaints "OIG investigated, [it] was unable to substantiate any of the allegations." ER95; *see supra* p. 5 n.1. In addition, the Assistant Counsel to the Inspector General explained that the remaining "100 allegations were investigated by [ICE's] Office of Professional Responsibility; [CBP's] Office of Internal Affairs, and [DHS's CRCL office]." ER95. The district court's conclusion is also controverted by documents produced by the

agencies detailing investigations of specific complaints—both closed and ongoing. *See, e.g.*, ER148-60 (CRCL chart detailing ongoing investigations and complaints closed for lack of substantiating evidence). In addition, even the evidence submitted by plaintiffs as an example of the government's redactions under Exemptions 6 and 7(C), itself includes Reports of Investigations, OIG and CRCL updates on ongoing investigations, and a memorandum from CBP addressing its response to CRCL's Preliminary Findings and Recommendations Report based on site visits conducted in July 2014. *See, e.g.*, ER89-92 (CBP Response to CRCL Preliminary Findings and Recommendations); ER161-67 (July 2014 OIG meeting notes on ongoing investigation by OIG and other components into 116 allegations and others); ER168-94 (sample Reports of Investigation); ER197-98 (CRCL investigation update).

In spite of this evidence, the court simply assumed that "almost none of the over 200 allegations—many of a serious nature—resulted in a completed investigation." ER9. As explained above, the district court's assumption was based on a misunderstanding of the notations on a spreadsheet, and was directly contrary to ample evidence in the record. Moreover, in assuming that no investigations were conducted, the district court failed to apply the presumption of regularity that is required when the public interest alleged is demonstrating that "responsible officials acted negligently or otherwise improperly in the performance of their duties." *Favish*, 541 U.S. at 173. As the Supreme Court explained in *Favish*, the government's official conduct is accorded a "presumption of legitimacy" and "[i]n the absence of clear evidence to the contrary,

courts presume that [public officials] have properly discharged their official duties." *Id.* at 174 (quoting *United States v. Armstrong*, 517 U.S. 456, 464 (1996)).

It is true that few disciplinary records were produced in response to the ACLU's FOIA request, but the agencies have explained why that is so. More than half of the records produced in this case were from OIG and CRCL, which do not have disciplinary authority over DHS employees and do not maintain disciplinary records. *See* ER144 (2d Tyrrell Decl.) (explaining that CRCL does not create or possess disciplinary records as it is not part of CRCL's mission to investigate or discipline individual employees); ER105 (2d Goal Decl.) (explaining that OIG does not maintain disciplinary records for non-OIG employees, including CBP officers). The agencies that do maintain such records explained that "investigation[s] of misconduct by an employee [are] referred . . . for further action only if the allegations are substantiated," and the record makes clear that investigations were either unable to substantiate the allegations or remained ongoing at the time of the 2014 FOIA request, which was the cutoff for the search for responsive records. *See* ER120 (Supp. Pineiro Decl.) (explaining that ICE would not possess responsive records unless an investigation had determined that the claims were substantiated); ER 130 & n.8 (2d Howard Decl.) (explaining that CBP's search would have captured "records involving discipline, misconduct, or abuse" but that "[n]o records of disciplinary action taken against CBP employees for abusing minors were discovered during the responsive period"). There was no basis for the district court to assume, as it did, that the lack of disciplinary

records supported ACLU's assertion that the agency's investigations were negligent, rather than the more likely explanation that none of the allegations were sufficiently substantiated as of 2014 to warrant disciplinary proceedings.

2. Furthermore, ACLU has failed to demonstrate how disclosing the names of the agents investigated would advance the public interest in measuring "the integrity and reliability of" the agencies' investigations, especially given that plaintiffs and the district court acknowledge that they have no independent way to measure the truth or falsity of the underlying allegations. *See* ER7, ER11. Neither ACLU nor the district court sufficiently explained why the release of the names of all DHS agents subject to unsubstantiated allegations would support or refute ACLU's contentions regarding the claimed lack of disciplinary proceedings, especially since ACLU already has thousands of pages of documents detailing the agency's investigations and all of the agencies' disciplinary records.

To overcome the significant privacy interest protected by Exemption 7(C), plaintiffs needed to demonstrate that despite having "a substantial amount of the information they [sought]" on investigations and disciplinary proceedings, the "marginal additional usefulness" of disclosing the names of individual agents subject to investigations "is sufficient to overcome the privacy interests at stake." *Forest Serv. Emps.*, 524 F.3d at 1027. Specifically, as this Court has explained, "[t]his inquiry focuses not on the 'general public interest in the subject matter of the FOIA request,' but on the 'additional usefulness' of the specific information withheld." *Tuffly*, 870 F.3d at

1094 (citation omitted) (quoting *Schrecker v. U.S. Dep't of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003) and *Lahr*, 569 F.3d at 978).

ACLU already has thousands of pages of documents that defendants have produced, including reports of investigations, significant incident reports, case summary reports, and three OIG interim reports, which allow plaintiffs to evaluate whether DHS was properly investigating complaints of alleged abuse of unaccompanied minors. The district court thought that disclosing the names of the DHS agents subject to investigation would help plaintiffs "accomplish their goal of finding alleged repeat offenders," ER7-8, but failed to explain how having the names of individual agents—even of those repeatedly accused of misconduct—would allow ACLU to "examine whether the agencies initiated disciplinary actions," ER8. That is simply a non sequitur. Whether DHS initiated disciplinary actions generally is a distinct question, unrelated to and uninformed by the identities of individuals who were accused more than once.

For example, ACLU makes much of the fact that a Border Patrol agent subject to multiple accusations was identified by reference to a nickname "Mala Cara." *See, e.g.*, Dkt. No. 83, at 8; *see also* ER195-96 (identifying two complaints referencing "Mala Cara"). They have not explained, however, how—absent any information about the veracity of the underlying allegations—having that information supports or refutes any contention regarding the rest of the material that has already been disclosed. In addition, the document on which plaintiffs rely is an internal CRCL email flagging two complaints against "Mala Cara" as "involving similar allegations and potentially the

same person" for referral to OIG. ER195. This document demonstrates that DHS was concerned about and investigating allegations against repeat offenders. It stands to reason that if the record were replete with similar allegations, ACLU would have been able to identify more than a single document of this nature identifying potential repeat offenders.

Neither ACLU nor the district court identified a separate public interest in determining whether DHS was negligent in dealing with individuals who were found to have actually committed multiple offenses, a question that itself would not be illuminated by identifying those who were merely the subject of repeated but unsubstantiated allegations. Without attempting to substantiate the underlying allegations, which ACLU and the Court have expressly disclaimed, there is no basis to conclude that disciplinary actions should have been instituted but were not. Nor is there any basis to conclude that having the names of individuals accused of misconduct would inform the question whether disciplinary actions should have been instituted but were not. And even if there were some reason to think that it might advance a significant public interest to disclose the names of individual agents who had repeatedly been accused of misconduct—where those allegations could be understood to support plaintiffs' claims about "patterns"—that would not support disclosure of the names of other individual agents.

Here, as in this Court's previous cases, the independent Office of the Inspector General "investigated the incident[s] and produced three publicly-available reports."

Forest Serv. Emps., 524 F.3d at 1027; *see also Lahr*, 569 F.3d at 979 ("The situation presented here is for all relevant purposes identical to that in *Forest Service Employees*."). As in *Lahr* and *Forest Service Employees*, ACLU—unsatisfied with the government's internal investigations—seeks disclosure of personal identifying information about government employees in order to conduct its own investigations, and to publicize the names of those employees accused of wrongdoing. As this Court has recognized, however, FOIA litigation is not an appropriate vehicle for identifying and punishing government officers accused of misconduct. *See Forest Serv. Emps.*, 524 F.3d at 1027 (explaining that a plaintiff "seek[ing] to conduct its own investigation" in the face of already available public reports containing "a substantial amount of the information [it] seek[s]" had not demonstrated that release of the names of specific individuals subject to internal investigations would "overcome the privacy interests at stake."); *Hunt*, 972 F.2d at 289 ("Where there is no evidence that the government has failed to investigate adequately a complaint, or that there was wrongdoing on the part of a government employee the public interest in disclosure is diminished.").

The district court distinguished the OIG reports here from those at issue in prior cases on the ground that they were of lesser "substance and scope" than those "contemplated in *Lahr* and *Forest Service Employees*," ER8, but the record demonstrates that the OIG's investigation here involved "extensive fieldwork consisting of over 90 unannounced detention facility site visits," ER95 (2d Goal Decl.). Specifically, OIG investigated "the treatment of unaccompanied alien children in DHS custody, including

the availability of potable drinking water and adequate food;" "access to operable and sanitary toilets and sinks;" "access to emergency medical care;" "the adequacy of detention facility temperatures and ventilation;" "the adequacy of supervision and access to telephones;" "the following of protocols for notifying HHS and USCIS for placement or when UAC raise protection concerns;" and "whether UAC were held in DHS custody for less than 72 hours before transfer to HHS except in exceptional circumstances." *Id.* Similarly, of the 116 cases in ACLU's complaint, CRCL also investigated "38 of the cases . . . which are representative of all of the issues in each Sector and Station. The selected complaints that will serve as lead complaints for investigation cover[ing] a range of issues," including "[m]edical care, medication, food, drink, separation of siblings, sexual abuse, housing minors with adults, credible fear, . . . human trafficking screening, age determination, use of [electronic control devices]/taser, handcuffing/restraints, return of personal property, blankets, access to bathroom, [and] record keeping." ER197; *see also* ER89-92 (CBP Response to CRCL Preliminary Findings and Recommendations).

In this case, as in *Lahr* and *Forest Service Employees*, this Court should conclude that the marginal usefulness of the DHS agents' names would not serve ACLU's interest in determining the sufficiency of DHS's investigations into allegations of abuse, and it should reverse the district court's conclusion to the contrary. *See also Favish*, 541 U.S. at 175 ("It would be quite extraordinary to say we must ignore the fact that five different inquiries into the Foster matter reached the same conclusion.").

C. DHS agents' individual privacy interests outweigh the marginal public interest that could be served by releasing their names.

The "marginal additional usefulness" of disclosing the names of individual DHS agents subject to investigations is not "sufficient to overcome the privacy interests at stake." *Forest Serv. Emps.*, 524 F.3d at 1027. Even based on its erroneous conclusions about the nature and significance of the public interest at issue here, the district court acknowledged that "[w]eighing the privacy interest against the public interest is a difficult task" in this case. ER11. As we have explained, the public interest here is not a "significant" one, and plaintiffs cannot meet their burden to demonstrate that the disclosure of the specific information sought—the names and identifying information of DHS agents subject to unsubstantiated allegations of misconduct—"would she[d] light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Tuffly*, 870 F.3d at 1094 (quoting *Bibles v. Oregon Nat. Desert Ass'n*, 519 U.S. 355, 355–56 (1997) (per curiam) (brackets in original)).

Moreover, as explained above, the harm to the individual privacy interests would be significant because disclosure of the names of DHS agents accused of misconduct would subject those individuals to the public scrutiny and harassment that comes with being labeled a child abuser, based on nothing more than unsubstantiated allegations. The district court's conclusion that the "balance tip[ped] in favor of the public interest" cannot stand and should be reversed. ER11.

As in *Lahr*, "[t]he situation presented here is for all relevant purposes identical" to previous cases decided by this Court, and the district court was thus "bound by the outcome in th[ose] case[s] of the balancing of public and private interests." *Lahr*, 569 F.3d at 979. This Court has repeatedly found that the release of personal information about federal government employees—especially law enforcement officers accused of unsubstantiated misconduct—would implicate serious privacy concerns and is reasonably withheld under FOIA's Exemption 7(C), especially where there has been no significant showing that release of the information would materially serve the public interest. *Id.*; *see also Tuffly*, 870 F.3d at 1095 (Plaintiff "relies on conclusory assertions that the names *might* help him uncover evidence of negligence or misconduct. Those assertions are insufficient to satisfy his burden."); *Forest Serv. Emps.*, 524 F.3d at 1028 ("As a result of the substantial information already in the public domain, we must conclude that the release of the identities of the employees who participated in the Forest Service's response to the Cramer Fire would not appreciably further the public's important interest in monitoring the agency's performance during that tragic event."); *Schiffer*, 78 F.3d at 1410 ("Thus, the district court's determination that Schiffer's interest in disclosure outweighed the privacy interests threatened by disclosure resulted from an improper application of section 552(b)(7)(C)."); *Hunt*, 972 F.2d at 290 (concluding that when privacy interest in disclosure of personal information in FBI file is balanced against public interest in disclosure, "key factors militate strongly against disclosure").

Because ACLU has not—and indeed cannot make such a showing of public interest—the district court's erroneous conclusion requiring disclosure of the names of DHS agents subject to unsubstantiated allegations of misconduct should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellants state that they know of no related case pending in this Court.

s/ Laura E. Myron
LAURA E. MYRON

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,693 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Laura E. Myron
LAURA E. MYRON

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Laura E. Myron
LAURA E. MYRON

ADDENDUM

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5 U.S.C. § 552

§ 552(b)

This section does not apply to matters that are—

. . . .

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy . . .

. . . .