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

REPLY BRIEF FOR APPELLANTS

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises under the Freedom of Information Act (FOIA) and presents this Court with a single question: whether the U.S. Department of Homeland Security (DHS) appropriately redacted—pursuant to FOIA's Exemptions 6 and 7(C)—the identifying information of lower-level DHS agents who were named in unsubstantiated claims of misconduct in agency records concerning complaints and investigations into alleged mistreatment of unaccompanied alien children in immigration detention. Plaintiffs—unsatisfied with the agency's investigation into allegations they lodged against DHS agents in 2014—now seek to publicize the identities of those individual agents as part of an attempt to conduct their own investigation into the "nature, frequency, and extent of serious claims of child abuse." Br. 41. But the district court acknowledged that the underlying complaints alone are not sufficient to demonstrate substantiated misconduct, noting that "one cannot determine the truth of any of the allegations from the documents provided." ER9; *see also* ER7, ER11. And this FOIA litigation does not present an appropriate forum to litigate the underlying complaints of mistreatment of individuals in immigration custody.

Where Exemption 7(C) applies, FOIA requires a reviewing court to "balance the competing interests in privacy and disclosure" and to conclude that "the information [should] not be released if the invasion of personal privacy could reasonably be expected to be unwarranted." *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). The balance in this case supports withholding the identities of the accused

individuals. There is no dispute that the individual privacy interest is real and substantial, and that disclosing the identities of employees accused of unsubstantiated misconduct would subject them to unwarranted stigma, harassment, and even physical danger. The only question is whether plaintiffs have identified a public interest that would be served by releasing individual names, and whether that interest outweighs the individuals' privacy interests.

Before the district court, the American Civil Liberties Union of Arizona, and the American Civil Liberties Union of San Diego and Imperial Counties (collectively ACLU) identified a single putative public interest in an effort to justify disclosure despite the significant privacy interests here, suggesting that knowing the identities of the accused DHS agents would reveal whether any individuals had been subject to multiple complaints, and would allow plaintiffs to evaluate whether DHS was negligent in failing to investigate repeated allegations. But that argument was deeply flawed: There is no evidence DHS was failing to investigate repeat allegations, and there is no reason to expect that knowing the names of all of the individuals, including many *not* subject to multiple allegations, would advance that stated public interest.

Unsurprisingly, plaintiffs have largely abandoned that argument before this Court. For the first time on appeal, plaintiffs now contend that disclosure of individual identities would advance a different public interest, by revealing whether the accused DHS agents complied "with their statutory duties to care for unaccompanied children in their custody." Br. 42. There is no basis to conclude, however, that merely knowing

who the individuals are that were alleged to have mistreated children—when ACLU already has all the other details surrounding the allegations—would be at all helpful in substantiating the complaints. This Court's precedents demonstrate that FOIA Exemptions 6 and 7(C) cannot be overcome merely by pointing to an interest in knowing the identities of government employees who were the subjects of unsubstantiated complaints of misconduct.

In another new argument, ACLU suggests (Br. 47-48) that the names of agents accused of misconduct are the "common thread" that will allow them to uncover whether DHS has generally been negligent in investigating complaints of abuse. But plaintiffs have failed to satisfy the Supreme Court's standard set out in *Favish* that requires a meaningful evidentiary showing that the agency has been negligent in failing to investigate complaints; the underlying complaints are not themselves enough to justify disclosure under *Favish*. Absent actual evidence of a supposed systemic failure to investigate complaints of abuse, this Court should conclude that any public interest in determining whether such negligence occurred cannot outweigh the DHS agents' individual privacy interests. This is especially true since 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 Office of the Inspector General (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).

As in *Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, 524 F.3d 1021 (9th Cir. 2008), and *Lahr v. National Transp. Safety Board*, 569 F.3d 964 (9th Cir. 2009), this Court should reject the attempt by a FOIA requester who "'already ha[s] a substantial amount of the information [it] seek[s]'" but remains dissatisfied with the agency's investigation, to "conduct its own investigation" at the expense of the strong privacy interests of the individual DHS employees, *Forest Serv. Emps.*, 524 F.3d at 1027 (quoting *Painting Ind. of Haw. Mkt. Recovery Fund v. U.S. Dep't of Air Force*, 26 F.3d 1479, 1486 (9th Cir. 1994)). Instead, this Court should follow its well-established precedent, and conclude that the individuals' interest in not being associated unwarrantedly with "allegations involv[ing] 'sexual and professional misconduct [which] could cause the agent[s] great personal and professional embarrassment,'" outweighs the public interest here. *Dobronski v. FCC*, 17 F.3d 275, 279-80 (9th Cir. 1994)) (quoting *Hunt v. FBI*, 972 F.2d 286, 288 (9th Cir. 1992)).

ARGUMENT

I. ACLU HAS NOT DEMONSTRATED THAT DISCLOSING THE NAMES OF INDIVIDUAL DHS AGENTS WOULD ADVANCE A SIGNIFICANT PUBLIC INTEREST.

The district court erred when it concluded that publicizing the names of DHS agents subject to unsubstantiated allegations of misconduct would advance a significant public interest. In order to be entitled to the unredacted versions of the documents at

issue, ACLU must demonstrate that the public interest served by the disclosure is significant and, in addition, that release of the specific information sought will directly advance that particular interest. *See Lahr v. National Transp. Safety Bd.*, 569 F.3d 964, 974 (9th Cir. 2009). Where Exemption 7(C) applies, absent such a showing, "the invasion of privacy" associated with the disclosure must be considered "unwarranted." *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). Here, given that they already have approximately 30,000 pages of documents concerning allegations of, and investigations into, abuse of minors in immigration custody, plaintiffs have failed to demonstrate why the release of the individual DHS agents' names would "'add significantly to the already available information concerning the manner in which [the agency] has performed its statutory duties.'" ER6 (quoting *Cameranesi v. U.S. Dep't of Def.*, 856 F.3d 626, 640 (9th Cir. 2017)). As a result, the public interest should be given "less weight." *Cameranesi*, 856 F.3d at 640.

A. Identifying Individuals Subject To Repeat Allegations Is Not A Significant Public Interest Sufficient To Overcome The Individuals' Privacy Interests.

The district court concluded that the public interest would be served by disclosing the names of the individual DHS agents because it would allow plaintiffs to "find patterns of behavior by certain individuals and determine, among other things, whether the agencies turned a blind eye to those patterns." ER10. This conclusion was mistaken and plaintiffs have largely abandoned it on appeal, although it was their only argument in district court. *See* Dkt. No. 83, at 7-8 (explaining the public interest as

identifying "how many DHS employees have been accused of misconduct in multiple instances"); *see also* ER7 ("Plaintiffs' goal [is] determining whether the same government agents were repeatedly the subject of abuse allegations and whether disciplinary proceedings were initiated in response."). As explained in the government's opening brief (at 22-36), plaintiffs have not produced evidence necessary to satisfy the Supreme Court's standard in *Favish* that would support an assertion that DHS was negligent in failing to investigate repeated allegations against particular agents. *See Favish*, 541 U.S. at 175 ("Allegations of government misconduct are 'easy to allege and hard to disprove,' so courts must insist on a meaningful evidentiary showing.") (quoting *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998)). The only evidence in the record that any individuals were even subject to repeated allegations are two complaints referencing an agent nicknamed "Mala Cara." *See, e.g.*, ER195-96. As explained, the document in question, however, is an internal Office for Civil Rights and Civil Liberties (CRCL) email flagging the complaints discussing "Mala Cara" as "involving similar allegations and potentially the same person" for referral to OIG. ER 195. Thus, the record demonstrates that DHS was actively aware of and investigating the existence of such repeated complaints.

Moreover, disclosing the names of each individual DHS employee would not advance the public interest in identifying whether the government has sufficiently investigated allegations of repeated abuse. Even if plaintiffs are able to identify how many agents were subject to multiple complaints, given that plaintiffs already have thousands of pages of documents detailing the agency's investigations and all of the

relevant disciplinary records, the identities of the accused agents would not shed any additional light on whether DHS was insufficiently investigating complaints or disciplining alleged offenders, especially without any basis to determine whether the allegations are legitimate. *See Forest Serv. Emps. for Envtl Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1026 (9th Cir. 2008) ("[T]o compel the disclosure of the [government] employees' identities, such information must 'appreciably further' the public's right to monitor the agency's action.") (quoting *U.S. Dep't of Def. v. Federal Labor Relations Auth.*, 510 U.S. 487, 497 (1994)).

Disclosure of employees' identities would not advance plaintiffs' stated goal of revealing whether DHS had adequately investigated those allegations. But that disclosure would cause harm to the individual privacy interests protected by FOIA, and that harm would not be outweighed by any cognizable public interest; that interest would see at most only a marginal benefit from being able to count the number of agents subject to repeat allegations, particularly where the allegations have largely been found unsubstantiated by the agency's oversight entities. *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). Indeed, disclosure would require identifying many individuals who are not subject to repeat allegations, or even any legitimate allegations at all, and would put

those individuals at serious risk of stigma, harassment, and undue public attention without serving the identified public interest in any way.

B. ACLU Has Not Identified Any Other Public Interest That Would Be Appreciably Furthered By The Disclosure Of The DHS Agents' Identities.

Plaintiffs have largely abandoned the argument they made below that disclosure would serve the public interest of identifying repeat offenders. Before this Court, plaintiffs instead argue that the release of individual names will serve the public interest by allowing them to "assess the nature, frequency, and extent of serious claims of child abuse and neglect by DHS officials between 2009 and 2014" and will "elucidat[e] how, and how well, DHS oversight entities function." Br. 41, 46. It is a basic tenet of civil litigation, however, as plaintiffs themselves recognize (Br. 51), that arguments not "raised sufficiently for the trial court to rule on" are waived, and thus are not properly before this Court. *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992).[1]

[1] Plaintiffs suggest that the district court's consideration of a different public interest is merely the result of a narrowing construction. Br. 41 n.80. But the district court's understanding of the relevant public interest was derived directly from the plaintiffs' submissions to that court. *See* Dkt. No. 83 (explaining the relevant public interest as the identification of alleged repeat offenders). Moreover, when information is redacted pursuant to Exemption 7(C), it is not enough for a requester to point to the general interest in "let[ting] citizens know what their government is up to." *Forest Serv. Emps.*, 524 F.3d at 1027 (quotation marks omitted). To compel disclosure, ACLU must explain with particularity why the "information reveals something *directly* about the character of a government agency or official." *Id.* (quoting *Hopkins v. U.S. Dep't of Hous. & Urban Dev.*, 929 F.2d 81, 88 (2d Cir. 1991)). Any argument that the release of names would serve the public interest in a different manner than identifying repeat offenders has been waived.

1. The Allegation That Individuals Have Been Accused of Unsubstantiated Wrongdoing Is Not Sufficient to Justify Disclosure.

Even if these arguments were properly preserved, however, plaintiffs have not made an evidentiary showing sufficient for this Court to conclude that releasing the identities of specific individuals named in the redacted documents would reveal any misconduct on the part of DHS, especially in light of the significant amount of information and documents that have already been disclosed that demonstrate that the agency investigated both specific complaints of misconduct and allegations of systemic problems. "[C]onclusory assertions that the names *might* help [ACLU] uncover evidence of negligence or misconduct . . . are insufficient" to "'balance against the cognizable privacy interests in the requested records.'" *Tuffly v. U.S. Dep't of Homeland Sec.*, 870 F.3d 1086, 1095 (9th Cir. 2017) (quoting *Favish*, 541 U.S. at 175); *see also Favish*, 541 U.S. at 174 (explaining that a FOIA requester "must produce evidence that would warrant a belief by a reasonable person that the alleged [g]overnment impropriety might have occurred").

Despite the fact that the district court acknowledged that "one cannot determine the truth of any of the allegations from the documents provided," ER9, plaintiffs now suggest (Br. 42) that *Favish* is satisfied because the documents in the record are sufficient to demonstrate that the alleged mistreatment of children might have occurred. They point to the affidavits from children alleging mistreatment accompanying the complaints, Br. 43, and argue that DHS's records both "corroborate children's reports

of mistreatment," Br. 44, and "evidence widespread *allegations* of DHS's mistreatment or neglect of unaccompanied children," sufficient to satisfy *Favish*, Br. 45 (emphasis added).

But this argument is an improper effort to rely on (admittedly) unsubstantiated allegations as a bootstrap to evade the strict evidentiary requirements the Supreme Court imposed in *Favish*. Mere allegations are not enough to demonstrate the kind of government wrongdoing that is required to establish a cognizable public interest under FOIA Exemption 7(C). *See Favish*, 541 U.S. at 173 ("Allegations of government misconduct are 'easy to allege and hard to disprove,'" so "courts must insist on a meaningful evidentiary showing.") (quoting *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998)). Moreover, even if it were the kind of evidence that would satisfy *Favish*, it is not relevant to the public interest plaintiffs contend will be served by the disclosures.

ACLU has not seriously argued that knowing the identities of the individual DHS agents would advance any public interest in substantiating the underlying allegations, nor is there any basis for such an argument. *See* ER11 ("Plaintiffs have not attempted to demonstrate that the underlying abuse by Defendants' employees actually occurred."). As this Court has explained, the inquiry in the Exemption 7(C) context "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). This is not an appropriate forum to litigate the underlying complaints, nor are the individual complainants before this Court.[2] As explained above, there is no basis to conclude that knowing the identities of the accused individuals would "appreciably further" any public interest in demonstrating whether the accusations were legitimate. *Forest Serv. Emps.*, 524 F.3d at 1027.

Instead, plaintiffs' main argument is that publicizing the names of individual agents subject to complaints—even where the agency has found the complaints unsubstantiated—would serve the public interest in determining whether DHS has been negligent in failing to investigate complaints. But the individuals' names are not relevant or necessary to reveal the extent of any asserted negligence. Under plaintiffs' theory, and the Supreme Court's *Favish* standard, ACLU must put forward a "meaningful evidentiary showing" that would "warrant a belief by a reasonable person that the alleged [failure to investigate complaints] might have occurred," either in each individual case where the name of the individual agent is sought or on a systemic level, such that this Court could conclude that DHS had not investigated any of the relevant complaints sufficiently. *Favish*, 541 U.S. at 175.

[2] The arguments raised in the amicus briefs submitted by Kids in Need of Defense and American Immigration Council and Boston University School of Law, which focus on the underlying complaints, are therefore not relevant to this Court's inquiry.

The existence and form of a complaint itself is not sufficient to call into question the agency's investigation into that complaint or any subsequent determination that no misconduct could be substantiated by the agency's investigator. And the name of any accused employee would add nothing. Moreover, DHS produced records that show that CRCL and OIG were investigating specific complaints and conducting surveys of the agency's overall response to such complaints, which refutes ACLU's argument and supports the government's argument that claims of failure to investigate are unsupported speculation. *See, e.g.*, ER148-60 (CRCL chart, produced in redacted form, detailing ongoing and closed investigations); ER161-67 (July 2014 OIG meeting notes on OIG and other components' ongoing investigation 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); *see also* OIG, *July 30, 2014 Interim Report*, https://go.usa.gov/xEVYa; *August 28, 2014 Interim Report*, https://go.usa.gov/xEVgm; *October 2, 2014 Interim Report*, https://go.usa.gov/xEVgq.

Plaintiffs' attempts (Br. 49-51) to second-guess the adequacy of several individual investigations, based on the timing of various referrals and other actions taken in response to complaints, are not sufficient to demonstrate a systematic failure to investigate that would justify the release of all the DHS employees' identities, especially given the extensive evidence that the components produced, including thousands of

pages of interview notes, facility observation checklists, situation reports, reports of investigation, case narrative forms, investigative plans, draft memoranda, and communications between OIG and CBP, ICE, and FBI. *See supra* p. 12. Nor is general evidence that the government oversight entities identified problems and attempted to make institutional improvements sufficient to demonstrate either a failure to investigate in any specific case, or a complete systemic failure to investigate in all cases, that would be served by the general disclosure of the identities of those who were subject to investigation, as plaintiffs seek here.

As explained in our opening brief (at 26-28), the only evidence the district court actually relied on as "evidence to allow a reasonable person to believe government impropriety occurred"—a spreadsheet of 214 complaints from OIG's Enforcement Data System (EDS) database—does not support the court's conclusion that "virtually no investigations into the complaints took place, or at least were completed," ER9; *see also* ER51-88 (OIG Spreadsheet); ER 207-08 (1st Goal Decl.) (explaining that OIG "provided . . . a narrative list of 214 complaints and investigations" from the EDS database). Plaintiffs and the district court put significant emphasis on the fact that all but one of the complaints in the spreadsheet were marked "Referred—No Reply" and "Closed Not Converted." ER9.

But those notations mean only that the complaints included in the database were referred by OIG to the various components for investigation and that they had not been converted into OIG investigations. *See* OIG, *Definitions of Column Labels* (Nov.

15, 2013), https://go.usa.gov/xEyNF. The lack of a 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.[3]

The record demonstrates that OIG does not itself have the resources to investigate every complaint it receives and instead works together with oversight entities within other components, such as CRCL, and ICE and CBP's Offices of Professional Responsibility. *See* ER161-62; *see also* OIG *Management Directive 0810.1*, https://go.usa.gov/xEVrW, at A-2 (June 10, 2004) (outlining process for referral of complaints to component offices). This is especially true in cases where a complaint alleges misconduct that could lead to administrative, rather than criminal, sanction. Because OIG is not empowered to discipline employees of other DHS components, it often refers complaints that may result in disciplinary action to the relevant component

[3] Plaintiffs suggest that this argument is waived because the government did not correct the district court's misunderstanding about the meaning of these notations before the district court. The plaintiffs did not raise this argument about the spreadsheet of 214 complaints until their response to the government's motion for reconsideration. *See* Dkt. No. 83, at 9. The local rules did not allow the government to reply to that argument and correct plaintiffs' mischaracterization. *See* D. Ariz. R. 7.2(g); Dkt. No. 79 ("No replies are permitted."). This Court should not consider the argument waived. *Cf. Smith v. Arthur Andersen LLP*, 421 F.3d 989, 999-1000 (9th Cir. 2005) (considering a responsive argument not waived where the issue was raised by another party at "the last possible moment" in district court).

agency.[4] *See, e.g.*, ER105. But before complaints are referred to other components, "[a]ll information goes to [OIG's Office of Investigations], who enters it into its data system"—the Enforcement Data System ("EDS"). ER161-62; *see also* ER206 ("[A]ll allegations received by OIG are entered into EDS for accountability and disposition."). EDS is "an electronic case management and tracking information system used to . . . track allegations (i.e., complaints) received/adjudicated and investigations initiated by OIG," ER206, from which the spreadsheet of 214 complaints was generated, ER207-08. Thus, it is expected that while all the complaints received by OIG would be listed in the EDS database, it is perfectly reasonable that there would be significantly more complaints listed in the EDS database than were investigated by OIG.

The government properly pointed to a public document, *Definitions of Column Labels*, to explain the meaning of notations in the contested spreadsheet. That document is a tool for helping FOIA requesters understand agency records disclosed in response to FOIA requests. Because EDS is a "records repository and management system," ER206, documents like the spreadsheet at issue here are often produced in

[4] As explained in our opening brief (at 37), that few disciplinary records were produced in response to the FOIA request can be traced, in part, to the fact that more than half of the records were produced by OIG and CRCL, which do not have disciplinary authority over DHS employees and do not maintain disciplinary records. The components that do maintain such records also explained that few disciplinary records were produced because investigations were either unable to substantiate the allegations or remained ongoing at the time of the cutoff for the FOIA request in December 2014. *See* ER120 (Supp. Pineiro Decl.); ER 130 & n.8 (2d Howard Decl.).

response to FOIA requests. To help FOIA requesters, like plaintiffs, understand terms that may be used in "fields extracted from the Enforcement Data System (EDS)," the document is made available to the public on the FOIA Reading Room section of OIG's website. *Definition of Column Labels*, https://go.usa.gov/xEyNF; *see also U.S. Small Bus. Admin. v. Bensal*, 853 F.3d 992, 1003 n.3 (9th Cir. 2017) ("It is appropriate to take judicial notice of this information, as it was made publicly available by government entities.").[5]

Finally, when OIG refers a complaint to another component and declines to convert it into an investigation, contrary to plaintiffs' assertion, there is no statutory or regulatory obligation to provide any "public accounting or explanation" of the referral or closure decision that DHS is failing to comply with. Br. 52. Similarly, the fact that OIG referred many of the 116 allegations raised by ACLU to ICE, CBP, and CRCL says nothing about the adequacy of the investigations into those complaints. Nor does the fact that OIG was unable to substantiate the complaints it investigated reflect anything about the extent of the investigation. *See, e.g.*, *July 2014 Interim Report*, https://go.usa.gov/xEVYa, at 1-2 (explaining that OIG was unable to substantiate any of ACLU's complaints, but also conducted 87 unannounced site visits at 63 locations); *see also* ER95 (2d Goal Decl.).

[5] In addition, the suggestion that the document is "contradicted by actual record evidence" because it does not "include an explanation for 'Closed Not Converted'" is incomprehensible. Br. 51 n.90. The document includes both a definition of what it means when a complaint is closed and also of what it means when a complaint is, or is not, converted.

Thus, there is no basis to conclude that the closure of the complaints listed in the spreadsheet at issue here suggests that "the government has failed to investigate adequately a complaint, or that there was wrongdoing on the part of a government employee." *Hunt v. FBI*, 972 F.2d 286, 289 (9th Cir. 1992). Absent "clear evidence to the contrary," the Supreme Court has cautioned, "courts presume that [government officials] have properly discharged their official duties." *Favish*, 541 U.S. at 174 (quoting *United States v. Armstrong*, 517 U.S. 456, 464 (1996)). Because ACLU has put forth no meaningful evidence that DHS was failing to investigate complaints of abuse, "the public interest in disclosure [of the identities of those individuals subject to unsubstantiated complaints] is diminished." *Hunt*, 972 F.2d at 289.

2. ACLU Has Not Demonstrated That Publicizing the Identities of Accused Individuals Would Appreciably Further the Public Interest in Monitoring DHS's Oversight Functions.

Setting aside the fact that plaintiffs failed to satisfy the *Favish* standard, they have also not demonstrated that the "disclosure of the information sought"—here, individual agents' names—will appreciably further the interest in determining whether DHS was negligent in failing to investigate claims of abuse either in any individual case or systemically. *Lahr*, 569 F.3d at 974; *see also Forest Serv. Emps.*, 524 F.3d at 1026-27.

Plaintiffs suggest that the names of individual agents are a "common thread" that would "allow the public to understand how a complaint or investigation was handled."

Br. 47-48.[6] But plaintiffs have all of the other information in the various documents concerning the allegations—such as date, time, location, conditions, alleged misconduct, etc.—and the "marginal additional usefulness," *Lahr*, 569 F.3d at 978, of the names of the DHS employees in helping plaintiffs trace the life-cycle of a complaint and investigation cannot possibly outweigh the significant privacy interest of each individual DHS employee in "keeping private [unsubstantiated allegations] that could conceivably subject them to annoyance or harassment." *Hunt*, 972 F.2d at 288.

First, plaintiffs suggest (Br. 46 n.84, 47-48) that disclosure of individual employees' names could serve a public interest in improving the general understanding of how DHS investigations function. But this Court has specifically cautioned that when balancing the interests in the Exemption 7(C) inquiry, the focus is "not on the 'general public interest in the subject matter of the FOIA request.'" *Tuffly*, 870 F.3d at 1094 (quoting *Schrecker*, 349 F.3d at 661). This vague and general interest is insufficient to overcome the individual employees' "strong interest 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 Tuffly*, 870 F.3d at 1095; *Hunt*, 972 F.2d at 288.[7]

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[6] As noted above, this argument is also waived, as plaintiffs did not make it before the district court. *See supra* p. 8.

[7] The amicus brief submitted by the Reporters Committee for Freedom of the Press and 23 Media Organizations misunderstands the point of *Tuffly*. *See* Br. 9-10. In

There is already extensive information made available by OIG and other oversight components of DHS that outlines how agency oversight works, both in the record here and beyond. *See, e.g.*, ER 161-62; *see also, e.g.*, Appellees' Br. 9-10 n.15 (citing resources outlining DHS oversight and process for complaints); OIG, *Frequently Asked Questions*, https://www.oig.dhs.gov/about/faqs; CRCL, *Fiscal Year 2017 Annual Report to Congress*, https://go.usa.gov/xEVYt. Knowing the identities of the specific individuals who have been investigated by DHS oversight entities will not "appreciably further the public's right to monitor the agency's action." *Forest Serv. Emps.*, 524 F.3d at 1026 (quotation marks omitted).

Second, to the extent plaintiffs are arguing that the identities of the individual employees named in the documents are the "common thread" that will demonstrate that "reports of child abuse are insufficiently investigated," Br. 48, it is also not sufficient to overcome the privacy interests at stake. This is especially true because, as explained above, plaintiffs have not put forth a "meaningful evidentiary showing" that

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Tuffly, this Court reiterated that where the FOIA requester "asserts an interest in exposing government negligence or misconduct," an "additional evidentiary showing [is] required," but concluded that while a "public interest in examining the success or failure of governmental programs" was sufficient "to reach the balancing stage of the analysis" it could not overcome the individuals' significant privacy interest. *Tuffly*, 870 F.3d at 1095. So too here is a general interest in understanding how DHS oversight works insufficient to overcome the significant privacy interest of the individuals named in the documents here. *See id.* at 1094 (holding that disclosing the names would not "add significantly to the already available information concerning the manner in which [the agency] has performed its statutory duties.") (quoting *Cameranesi*, 856 F.3d at 640) (alteration in original).

the agency was actually failing to investigate complaints of abuse. Plaintiffs lament (Br. 9) that DHS does not have a single, uniform complaint process. That investigation into allegations of abuse is done by a number of components, including OIG and others, with overlapping jurisdiction and responsibilities cannot justify the disclosure of the names of individual agents subject to unsubstantiated complaints. The inter-component referral process was not designed to let outsiders trace the life-cycle of a complaint in response to a FOIA request and FOIA does not require the agency to maintain or alter its records to make this kind of identification easier. Moreover, even if the names of the individual agents were unredacted, ACLU has not shown that it will be able to demonstrate that the complaints were not investigated, especially since the documents produced do not show all the outcomes at the component level. *See, e.g.*, ER 130 & n.8 (2d Howard Decl.) (explaining that no disciplinary records had been found within the responsive dates). ACLU lodged its 116 complaints with the agency in June 2014, and the FOIA request sought documents through December 3, 2014. As of October 2014, OIG noted that "ICE, CBP, and CRCL investigations of allegations of misconduct are ongoing." *October 2014 Interim Report*, https://go.usa.gov/xEVgq, at 2. Especially where an investigation was ongoing past the date of the FOIA request, having the name of the accused individual would not appreciably further the public interest in tracing the outcome of a complaint.

In addition, Congress exercises a significant oversight role over the agency and its oversight entities. *See, e.g.*, CRCL, *Fiscal Year 2017 Annual Report to Congress*,

https://go.usa.gov/xEVYt. Plaintiffs themselves cite to several reports from entities like the U.S. Government Accountability Office and DHS itself that identify ways the agency could improve standardization and uniformity in its oversight processes. *See* Br. 16-18. Allegations of misconduct against OIG can be referred to the Integrity Committee of the Council of Inspectors General on Integrity and Efficiency, an independent body that reviews and investigates allegations against Inspectors General. *See* CIGIE, *Integrity*, https://www.ignet.gov/content/integrity-0. Given all these available mechanisms for supervision of DHS's oversight entities, ACLU cannot demonstrate that the public interest in tracing how DHS investigations function, or failed to function, would be appreciably furthered by the names of individual agents subject to unsubstantiated allegations of misconduct.

The fact that ACLU has not sought to disclose the names of the investigators it alleges were negligent in failing to take complaints of mistreatment of children seriously, but only the names of the *accused* individuals, also undermines their claims that producing the unredacted documents will help police the DHS oversight entities. Here, plaintiffs would sacrifice the privacy interests of the accused agents in an effort to identify supposed misconduct by others, whose names they specifically have not sought to have unredacted—those who are charged with investigating the accusations of misconduct. *See* 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."). This Court should reject such an intrusion on the individual agent's privacy interests.

II. THE INDIVIDUAL DHS AGENTS HAVE A SIGNIFICANT PRIVACY INTEREST IN NOT BEING ASSOCIATED WITH UNSUBSTANTIATED ALLEGATIONS OF MISCONDUCT.

There is no question that the individual employees who stand to have their names released to the public have a substantial privacy interest at stake. The district court correctly explained that "[p]rior cases have identified the potential for harassment and stigma that could be attached to a sensitive investigation—here, into the abuse of minors—which creates a cognizable, nontrivial privacy interest for the officers involved." ER5; *see also* ER39 (acknowledging that unredacting the names "could conceivably . . . put [agents] in danger due to disclosure of their personal information"). As both this Court and others have recognized, "[a] government employee generally has a privacy interest in any file that reports on an investigation that could lead to the employee's discipline or censure." *Hunt*, 972 F.2d at 288 (citing *Department of Air Force v. Rose*, 425 U.S. 352, 376-77 (1976)); *see also Lahr*, 569 F.3d at 977 (explaining that law enforcement officers "have a legitimate interest in keeping private matters that could conceivably subject them to annoyance or harassment"). Moreover, this Court has expressly recognized that an individual's "privacy interest is heightened when the allegations involve 'sexual and professional misconduct [which] could cause the agent great personal and professional embarrassment.'" *Dobronski v. FCC*, 17 F.3d 275, 279-80 (9th Cir. 1994) (quoting *Hunt*, 972 F.2d at 288).

Plaintiffs suggest that specific and particularized evidence is necessary to demonstrate that releasing the names of each individual agent alleged to have mistreated children would lead to stigma, the possibility of harassment or undue public attention, and personal or professional embarrassment. But neither the Supreme Court nor this Court has required particularized evidence where Exemption 7(C) applies. *See Dobronski*, 17 F.3d at 280 (Exemption 7(C) "prohibits disclosure whenever it '*could reasonably be expected to constitute an unwarranted invasion* of personal privacy.'") (emphasis in original) (quoting 5 U.S.C. § 552(b)(6), (7)(C)). And there can be no real dispute that disclosing the identities of the individuals here would result in harm to individual privacy interests. The documents in question, which have already been publicly released, are reports that specifically allege these individuals mistreated unaccompanied children in immigration custody; indeed, that is the very reason plaintiffs believe the names should be disclosed. *See Tuffly*, 870 F.3d at 1095 ("The privacy interests in this case are particularly strong . . . because of the private information already disclosed by the government that would be linked to the names of the released individuals.").

Plaintiffs cannot seriously contend that publicizing the names of DHS agents associated with allegations of misconduct would not subject them to stigma, harassment, person or professional embarrassment, or undue public attention. *See, e.g.*, *Stern v. FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984) ("A FOIA disclosure that would announce to the world that . . . certain individuals were targets of an FBI investigation, albeit never prosecuted, may make those persons the subjects of rumor and innuendo, possibly

resulting in serious damage to their reputations.") (ellipsis in original; quotation marks omitted). Indeed, plaintiffs themselves trumpet the national attention they have generated concerning the allegations at issue here. *See* Br. 27. Given that—as the district court recognized—"one cannot determine the truth of any of the allegations from the documents provided," ER9, this Court should reject plaintiffs' suggestion that the privacy interest at stake here is not significant.

Plaintiffs point to three factors that they allege diminish the privacy interest of the individual employees whose names have been redacted. None of the three should sway this Court's analysis. First, as explained in the opening brief (at 21), this Court and others have repeatedly recognized that even government employees have a "strong interest" in "not being associated unwarrantedly with alleged criminal activity." *Schiffer*, 78 F.3d at 1410; *see also Lahr*, 569 F.3d at 977; *Forest Serv. Emps.*, 524 F.3d at 1027; *Hunt*, 972 F.2d at 288.

Second, this interest is not diminished by the fact that the information concerns allegations of misconduct. Plaintiffs allege (Br. 40-53) that disclosure of the names will disclose misconduct (1) by DHS official against children in their custody and (2) by oversight entities that failed to investigate the allegations. With regard to the first claim, given that plaintiffs have approximately 30,000 pages of documents outlining the allegations and investigations of misconducts, disclosing the names of individual employees would not reveal any additional misconduct or substantiate any of the allegations beyond the information that plaintiffs already have. *See Lahr*, 569 F.3d at

979 (disclosing the FBI agents' identities would not bring about "additional useful information"). ACLU has not seriously attempted to substantiate any of the underlying allegations, and the district court acknowledged that it "[could not] determine the truth of any of the allegations." ER9; *see also* ER11. The record also demonstrates that internal investigations were unable to substantiate the complaints. *See, e.g.*, ER148-60; ER95.

And this case has nothing to do with the identity of agency investigators who ACLU allege failed to sufficiently investigate misconduct. While this Court has held that "an investigator's privacy interest may be reduced when there are doubts about the integrity of his efforts," *Lahr*, 569 F.3d at 977, plaintiffs here have expressly disclaimed any interest in disclosure of the names of the DHS employees charged with investigating the allegations, *see* Dkt. No. 83, at 3 (explaining that even though DHS redacted the names of investigators, plaintiffs only request the unredacted names of "public employees allegedly responsible for the abuse of minors").

Lissner v. U.S. Customs Service, 241 F.3d 1220 (9th Cir. 2001), and *Dobronski*, 17 F.3d at 280, are not to the contrary. In *Lissner*, the individuals' identities were already public; this Court concluded that two police officers who had been detained by Customs in connection with a smuggling incident did not have a strong privacy interest regarding release of certain information, chiefly "because the officers' identities ha[d] already been released" and the only remaining information was "nothing . . . particularly personal," and only a "general physical description." 241 F.3d at 1223-24. And

Dobronski was a case involving FOIA Exemption 6, not the more protective standard of Exemption 7(C), which applies here. 17 F.3d at 279-80.

Finally, contrary to plaintiffs' assertion, the DHS agents whose names have been redacted are "lower level officials," who "'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). This is not a case involving government employees in supervisory positions that might diminish the privacy interest where that supervisor's role demonstrates some greater level of agency malfeasance. *See Stern*, 737 F.2d at 93-94 (affirming withholding of information about lower-level employees accused of misconduct, but not information about supervisor who covered up that misconduct). Here, ACLU has only sought the disclosure of names of those DHS agents "allegedly [directly] responsible for the abuse of minors," Dkt. No. 61, at 24, not any supervisory officials.

* * *

The district court erred when it concluded that ACLU had identified a "significant" public interest in identifying repeat offenders that would be served by releasing the names of individual DHS employees accused of misconduct, and that decision should be reversed. ACLU has made no serious attempt to defend the district court's reasoning on its own terms. Nor has it put forth any basis on which this Court could conclude that the general public interest in understanding how DHS oversight functions, or the interest in uncovering whether DHS had been negligent in investigating claims of abuse would be appreciably furthered by the release of individual

employees' identities in a manner sufficient to overcome the significant privacy interests of the individual employees.

This case is comparable to *Forest Service Employees* and *Lahr*. As in those cases, a FOIA requester—unsatisfied by the response of OIG and other DHS oversight entities to its allegations—"seeks to conduct its own investigation" into the alleged abuse. *Forest Serv. Emps.*, 524 F.3d at 1027. Given that plaintiffs already have a "substantial amount of the information they seek," this Court should once again conclude that the identities of individual employees included in the documents were properly redacted by the government under FOIA's Exemption 7(C). *Id.*; *see also Lahr*, 569 F.3d at 979 ("The situation presented here is for all relevant purposes identical to that in *Forest Service Employees*, so we are bound by the outcome in that case of the balancing of public and private interests.").

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,896 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 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Laura E. Myron
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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2019, 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.

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