No. 18-15907

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION OF ARIZONA and AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO AND IMPERIAL COUNTIES,

Plaintiffs-Appellees,

versus

U.S. DEPARTMENT OF HOMELAND SECURITY, Office for Civil Rights and Civil Liberties; et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Arizona
The Honorable John J. Tuchi
District Court Case No. 2:15-cv-00247-JJT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellees state the following:

The American Civil Liberties Union of Arizona and the American Civil Liberties Union of San Diego and Imperial Counties are affiliated non-profit membership corporations. They have no stock and no parent corporations.

INTRODUCTION

Since at least 2009, hundreds of children have reported serious mistreatment—including sexual, physical, and verbal abuse—by Department of Homeland Security (DHS) officials. In 2014, more than one hundred children submitted an administrative complaint detailing such abuses. In response, DHS's Office of Inspector General (OIG) investigated only sixteen of the complaints and, in under a month, declared every single one "unsubstantiated" without any public explanation. At a time when even senior DHS officials acknowledged significant deficiencies in the Department's oversight and disciplinary systems, DHS provided no further public information about the children's complaints.

Deeply concerned about the abuses alleged, and "to let some daylight into the bureaucratic swamp," *Dobronski v. FCC*, 17 F.3d 275, 278 (9th Cir. 1994), Plaintiffs filed a Freedom of Information Act (FOIA) request for DHS records related to child abuse.[1] After years of stonewalling, Defendants finally produced more than 30,000 pages of documents reflecting widespread, persistent allegations of misconduct.

Citing FOIA's privacy exemptions, Defendants redacted the names of all DHS officials alleged to have abused children in their custody. By Defendants'

[1] Unless otherwise indicated, all emphasis is added, and quotations and citations are omitted throughout. All URLs were last visited on December 15, 2018.

own design, however, these names are the only common identifiers that would permit the American public to answer two crucial questions: (1) the nature, frequency, and extent of serious claims of DHS child abuse, including whether particular DHS officials allegedly mistreated children on multiple occasions, and (2) whether DHS exercises any meaningful oversight of officials alleged to have committed grave misconduct. Because Defendants chose to provide no other common identifiers, the public cannot assess DHS's handling of any child abuse complaint from receipt through closure. Accordingly, the public cannot assess DHS's compliance with statutes protecting children from trafficking, rape, and other abuses. Likewise, the public cannot evaluate what DHS—which includes U.S. Customs and Border Protection (CBP), America's largest federal law enforcement agency—is "up to." *Tuffly v. DHS*, 870 F.3d 1086, 1094 (9th Cir. 2017).

Defendants' blanket withholdings of the names at issue are legally unjustified and antithetical to FOIA's purpose. The names of law enforcement officials are not categorically exempt from disclosure under FOIA. Rather, the statute's privacy exemptions require a fact- and context-specific balancing of privacy and public interests. The district court properly applied the balancing test and ordered Defendants to release the withheld names given the significant public interest in disclosure.

On appeal, Defendants mischaracterize record evidence and misapprehend governing legal standards. They insist that hundreds of allegations of child abuse over a multi-year period are "unsubstantiated," overlooking the obvious point that where agency investigations are either nonexistent or pro forma, few allegations—however serious or true—will *ever* be "substantiated." This Court should reject Defendants' circular reasoning and attempts to weaponize FOIA's privacy exemptions to obfuscate official misconduct, and affirm.

JURISDICTIONAL STATEMENT

Plaintiffs concur in Defendants' jurisdictional statement.

STATEMENT OF THE ISSUE

FOIA's privacy exemptions permit federal agencies to withhold requested information only when privacy interests outweigh public interests in disclosure. Considering record evidence of DHS's failure to investigate widespread allegations of child abuse, and evidence that warrants a reasonable belief that government impropriety might in fact have occurred, did the district court properly order Defendants to disclose the names of DHS officials credibly alleged to have mistreated detained unaccompanied children?

STATEMENT OF THE CASE

I. BACKGROUND

To comprehend Plaintiffs' FOIA request and the import of this appeal, an understanding of unaccompanied children's experiences while in DHS custody, as

well as the DHS oversight apparatus, are essential. Four key facts must be borne in mind.

First, children have reported a staggering volume of remarkably consistent incidents of serious mistreatment in DHS custody for years. *Second*, senior Department officials are keenly aware of grave deficiencies in DHS's investigation and disciplinary systems—and have been so aware during all times relevant to this FOIA litigation. *Third*, there is abundant record evidence indicating that DHS oversight agencies routinely deem complaints "unsubstantiated" following little or no actual investigation. *Fourth*, DHS has elected to use no unique identifiers *other than officials' names* in records relating to oversight and discipline, rendering the public's comprehension of such records impossible without those names.

A. Unaccompanied Children Migrating to the United States.

Over the past decade, large numbers of children have migrated alone to the United States.[2] Under U.S. law, these minors are referred to as "unaccompanied children" or "unaccompanied alien children" (UAC). 6 U.S.C. § 279(g)(2).

The primary federal agencies responsible for the custody of unaccompanied children are DHS and the Department of Health and Human Services (HHS).[3]

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[2] *See generally* WILLIAM KANDEL, CONG. RESEARCH SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 2–3 (Jan. 18, 2017), https://fas.org/sgp/crs/homesec/R43599.pdf (19,668 unaccompanied children apprehended in FY2009; 16,067 in FY2011; 68,541 in FY2014).

[3] For an acronym reference list, see SER 141–144 (2d Reddy Decl., Ex. 38).

Within DHS, CBP oversees ports of entry, while a CBP subcomponent, the U.S. Border Patrol, patrols between ports.[4]

CBP officers or Border Patrol agents are often the first government officials to encounter unaccompanied children.[5] If, upon doing so, these officials suspect the child has entered the United States without legal authorization, they take that child into CBP custody. Significantly, however, all unaccompanied children must be transferred from DHS/CBP to HHS custody within seventy-two hours, absent "exceptional circumstances." 8 U.S.C. § 1232(b)(3). After transfer, HHS's Office of Refugee Resettlement (ORR) is responsible for refugees, asylees, and other vulnerable immigrant populations, and provides care and placement for unaccompanied migrant children.[6]

Several federal statutes and a federal settlement agreement, with which DHS and HHS must comply, protect unaccompanied children within the United States.

In response to "ongoing concerns" that CBP officials were not properly screening unaccompanied children for trafficking risk and asylum eligibility, Congress enacted the William Wilberforce Trafficking Victims Protection

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[4] CBP, *At Ports of Entry*, https://www.cbp.gov/border-security/ports-entry; CBP, *Border Patrol Overview*, https://www.cbp.gov/border-security/along-us-borders/overview.

[5] *See, e.g.*, KANDEL, *supra* note 2, at 5.

[6] HHS ORR, ADMIN. FOR CHILDREN AND FAMILIES, *What We Do*, https://www.acf.hhs.gov/orr/about/what-we-do; *see also* 6 U.S.C. § 279.

Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044.[7] In addition to setting the aforementioned seventy-two–hour limit on DHS custody, 8 U.S.C. § 1232(b)(3), the TVPRA creates special DHS screening rules, *id.* § 1232(a), and requires HHS to promptly place unaccompanied children "in the least restrictive setting that is in the best interest of the child." *Id.* § 1232(c)(2).

The Prison Rape Elimination Act of 2003 (PREA), Pub. L. No. 108-79, 117 Stat. 972, and the Victims of Child Abuse Act of 1990 (VCAA), Pub. L. 101-647, 104 Stat. 4792, require DHS to safeguard all detainees, including children, from physical or psychological abuse. *See* 34 U.S.C. § 30302 (PREA Purposes), *formerly cited as* 42 U.S.C. § 15602; 6 C.F.R. § 115 (DHS PREA implementing regulations); 34 U.S.C. § 20341(c) (Child Abuse Reporting), *formerly cited as* 42 U.S.C. § 13031. As most relevant here, pursuant to DHS's implementing regulations, CBP has adopted a "zero tolerance policy prohibiting all forms of sexual abuse and assault of individuals in CBP custody," pledging to "cooperate fully with investigations relating to allegations of sexual abuse and assault of detainees" and to "conduct an incident review following each investigation of sexual abuse and assault."[8] CBP employees "who violate the prohibition against

[7] KANDEL, *supra* note 2, at 4.

[8] CBP, MEMORANDUM FROM COMMISSIONER R. GIL KERLIKOWSKE RE: CBP POLICY ON ZERO TOLERANCE OF SEXUAL ABUSE AND ASSAULT TO ALL CBP

sexual abuse and assault" are "subject to disciplinary or adverse action up to and including removal."[9] DHS officials also must report suspected or alleged child abuse both internally and externally to local law enforcement, child protective services, and/or the Federal Bureau of Investigation.[10] 28 C.F.R. §§ 81.2–3.

Finally, a 1997 settlement agreement, known as the *Flores* Settlement, requires DHS and HHS to provide certain baseline protections for immigrant children in federal custody, including: safe, sanitary facilities; access to sinks, toilets, clean drinking water, and edible food; emergency medical assistance; adequate temperature control and ventilation in detention facilities; and adequate supervision in such facilities to protect the children from others, including unrelated adults.[11]

These various legal authorities evidence both a strong public policy of safeguarding unaccompanied children in federal custody and a recognition of these

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EMPLOYEES 1–2 (Mar. 11, 2015), https://www.cbp.gov/sites/default/files/documents/zpt-c1-signed-memo.pdf.

[9] *Id.* at 2.

[10] *Id.* at 3 (internal DHS reporting requirements).

[11] *See* Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) ¶ 12.A (C.D. Cal. Jan. 17, 1997) [hereinafter *Flores* Settlement], https://bit.ly/2Ei7t9m; *see also, e.g.*, KATE MANUEL ET AL., CONG. RESEARCH SERV., R43623, UNACCOMPANIED ALIEN CHILDREN—LEGAL ISSUES: ANSWERS TO FREQUENTLY ASKED QUESTIONS 5–6 (Jan. 27, 2016), https://fas.org/sgp/crs/homesec/R43623.pdf.

children's special needs and unique vulnerabilities. Yet numerous advocacy reports and hundreds of administrative complaints have documented CBP's recurrent violations of these legal protections.[12] CBP holding cells are often referred to as *hieleras* ("ice boxes") because of their freezing temperatures.[13] While in CBP custody, detainees—including children—are often deprived of adequate hygiene supplies, bedding, food, water, and medical care.[14] To effectuate federal law and ensure that vulnerable children are protected while in DHS custody, a functional, robust oversight system is essential. DHS lacks such a system.

B. DHS "Oversight": A Complex and Confounding Web.

DHS has never established a single, uniform complaint process.[15] Additionally, there are multiple DHS components with varying (and occasionally,

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[12] SER 210–211 ¶ 14 & n.1 (Complaint) (citing, *inter alia*, NAT'L IMMIGRANT JUST. CTR., UNACCOMPANIED IMMIGRANT CHILDREN: A POLICY BRIEF (2014), https://bit.ly/2UGZtED (reporting on interviews with 224 children over a three-week period); JESSICA JONES & JENNIFER PODKUL, WOMEN'S REFUGEE COMM'N, FORCED FROM HOME: THE LOST BOYS AND GIRLS OF CENTRAL AMERICA (Oct. 2012), https://bit.ly/2rwZ62j (based on five individual interviews and fourteen focus group discussions with 146 children, aged ten to seventeen, in federal custody); NO MORE DEATHS, A CULTURE OF CRUELTY (2011), https://bit.ly/1GvjHFc (based on 4,130 interviews conducted between 2008 and 2011, with 12,895 individuals who had been held in Border Patrol custody)).

[13] *See* J. Weston Phippen, *A First Look Inside Border Patrol's 'Iceboxes'*, THE ATLANTIC (Aug. 19, 2016), https://bit.ly/2Ep4Bs4; *see also Photo Exhibits in Doe v. Johnson*, AM. IMMIGR. COUNCIL (Aug. 16, 2016), https://bit.ly/2QpwZ3Z.

[14] SER 210–211 ¶ 14 & n.1 (Complaint).

[15] DHS CRCL, *How to File a Complaint with the Department of Homeland Security* (Apr. 2015),

overlapping) authority to investigate alleged misconduct. Together, these competing oversight agencies—and the utter lack of clarity regarding division of responsibility among them—have facilitated accountability "hot potato" within DHS.

1. *DHS Office of Inspector General.* OIG either receives complaints directly or from another DHS component via the Joint Intake Center.[16]

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https://www.dhs.gov/sites/default/files/publications/DHS%20Complaint%20Avenues%20Guide_April%202015.pdf; DHS CRCL, *Civil Rights Complaints Flowchart* [hereinafter DHS Complaints Flowchart], https://www.dhs.gov/sites/default/files/publications/crcl-complaints-flowchart.pdf; *see also, e.g.*, Appellees' Request for Judicial Notice [hereinafter RJN] Ex. 1 (HOMELAND SEC. ADVISORY COUNCIL, FINAL REPORT OF THE CBP INTEGRITY ADVISORY PANEL 2, 6–7 (Mar. 15, 2016) [hereinafter HSAC FINAL], https://www.dhs.gov/sites/default/files/publications/HSAC%20CBP%20IAP_Final%20Report_FINAL%20(accessible)_0.pdf (acknowledging lack of "CBP-wide method to receive, track and respond to public complaints" and recommending various improvements)); RJN Ex. 2 (PIVOTAL PRACTICES CONSULTING LLC, CBP, COMPLAINTS AND DISCIPLINE SYSTEMS REVIEW: PUBLIC REPORT OF FINDINGS AND RECOMMENDATIONS 3 (Nov. 23, 2015) [hereinafter PIVOTAL], https://www.cbp.gov/sites/default/files/assets/documents/2016-Mar/cbp-complaint-discipline-system-review.pdf ("There are multiple gateways for filing complaints, and accessibility varies … There is no single system to record and track misconduct allegations … making it difficult to obtain timely, accurate, and consistent case activity information, particularly volume, timeliness, and disposition.")).

[16] *See, e.g.*, DHS, PRIVACY IMPACT ASSESSMENT FOR THE JOINT INTEGRITY CASE MANAGEMENT SYSTEM (JICMS) 1–2 (July 18, 2017), https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp044-jicms-july2017.pdf; DHS, Notice of Privacy Act System of Records, 79 Fed. Reg. 23361, 23362 (Apr. 28, 2014), https://www.gpo.gov/fdsys/pkg/FR-2014-04-28/html/2014-09471.htm.

According to OIG, it "provide[s] independent oversight"[17] by "conducting audits, investigations, inspections, and other reviews." ER 94 ¶ 5 (2d Goal Decl.). OIG investigators "have statutory law enforcement authority, including the power to make arrests, execute warrants, and carry firearms." ER 94–95 ¶ 6 (2d Goal Decl.).

Pursuant to a 2004 DHS Management Directive, OIG has the right of first refusal to investigate any alleged misconduct within any component of DHS.[18] Yet "OIG's decision whether to investigate is *not* made pursuant to any defined criteria. Rather, the decision is delegated … to OIG agents-in-charge in the field who are given no guidance as to when or when not to investigate a matter."[19] Additionally, there is no timeframe within which OIG must exercise its right of first refusal.[20]

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[17] DHS OIG, *About Us*, https://www.oig.dhs.gov/about; *see also* Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (codified as amended at 6 U.S.C. app. 3); Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, 116 Stat. 2135 (codified at 6 U.S.C. § 101 *et seq.*).

[18] DHS OIG, MANAGEMENT DIRECTIVE 0810.1 § VI.B & app. A (June 10, 2004) [hereinafter MD0810.1], https://www.dhs.gov/xlibrary/assets/foia/mgmt_directive_0810_1_the_office_of_inspector_general.pdf.

[19] RJN Ex. 3 (HOMELAND SEC. ADVISORY COUNCIL, INTERIM REPORT OF THE CBP INTEGRITY ADVISORY PANEL, 11 & n.17 (June 29, 2015) [hereinafter HSAC INTERIM], https://www.dhs.gov/sites/default/files/publications/DHS-HSAC-CBP-IAP-Interim-Report.pdf).

[20] MD0810.1, *supra* note 18 (silent with regards to required timeline); *see also* HSAC INTERIM, *supra* note 19, at 11 & n.17 (describing lack of criteria and resulting delay and confusion in referral process).

When OIG *does* pursue an investigation, investigators "prepare a Report of Investigation ('ROI') regarding the findings." ER 95 ¶ 7 (2d Goal Decl.). If OIG finds evidence of administrative wrongdoing, its report is presented to DHS for "whatever personnel action it deems appropriate." ER 95 ¶ 7 (2d Goal Decl.). If there is evidence of criminal wrongdoing, then OIG investigators are to "work with federal or state prosecutors as appropriate." ER 95 ¶ 7 (2d Goal Decl.). There is little publicly available information clarifying how, or when, OIG follows through on reports of investigation.

If OIG declines to investigate, it can forward (or return) a complaint to the other DHS-wide oversight body, the Office for Civil Rights and Civil Liberties, and/or to the Joint Intake Center for referral to CBP's own internal oversight body.

2. *DHS Office for Civil Rights and Civil Liberties (CRCL).* CRCL is responsible for, *inter alia*, investigating "complaints and information indicating possible abuses of civil rights or civil liberties." 6 U.S.C. § 345(a)(6); *see also* 42 U.S.C. § 2000ee-1(a)(3); ER 224 ¶ 5 (Tyrrell Decl.). CRCL must adhere to specific congressional reporting obligations. *See* 42 U.S.C. § 2000ee-1(f)(2) (required report contents). In its FY2014 report, CRCL described its oversight "system" as follows:

> CRCL begins the complaint process by referring all complaints opened by CRCL to the DHS OIG, which then determines whether or not it will investigate the complaint. If the OIG declines to investigate the complaint, it is returned to CRCL, which determines whether the

> complaint should be retained for CRCL's own investigation or referred to the relevant DHS Component(s) for investigation. If a complaint is referred, the Component issues a Report of Investigation (ROI) to CRCL at the completion of its factual investigation. CRCL reviews the ROI and determines whether additional investigation is warranted and/or whether recommendations should be issued to the Component. In either instance, CRCL notifies the complainant of the general results.[21]

As with OIG, CRCL has not published criteria clarifying how it determines whether a complaint should be retained for its own investigation or, instead, referred.[22] Additionally, CRCL has acknowledged that "[m]any CRCL complaints are investigated and closed without the issuance of formal recommendations to the DHS Component."[23]

3. *CBP Office of Internal Affairs / Office of Professional Responsibility (IA/OPR).* One such DHS component is CBP itself, which houses a third oversight entity.[24] Formerly known as the Office of Internal Affairs (IA), this entity was renamed the Office of Professional Responsibility (OPR) in 2015. SER 93 ¶ 3 & n.1 (2d Tomsheck Decl.). As this name change occurred during this

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[21] DHS CRCL, FISCAL YEAR 2014 ANNUAL REPORT TO CONGRESS 23 (July 28, 2015) [hereinafter CRCL FY2014 REPORT], https://www.dhs.gov/sites/default/files/publications/crcl-fy-2014-annual-report_0.pdf; *id.* app. B ("Complaints Tables").

[22] *See* DHS Complaints Flowchart, *supra* note 15.

[23] CRCL FY2014 REPORT, *supra* note 21, at 28.

[24] There is also record evidence of "unauthorized" misconduct investigations by the Border Patrol, undertaken "to assert independence" from OIG and IA/OPR and "to conceal derogatory information." SER 93 ¶¶ 3–4 & n.1 (2d Tomsheck Decl.).

litigation, this entity will be referred to as IA/OPR for clarity.

IA/OPR is "responsible for ensuring compliance with all CBP-wide programs and policies relating to corruption, misconduct, or mismanagement." ER 265 ¶ 37 (Howard Decl.). Within IA/OPR, investigators are to conduct "fair, thorough, accurate, timely, and professional investigations into allegations of criminal and other serious misconduct by CBP employees and contractors." ER 265 ¶ 38 (Howard Decl.). Before August 2014, however, IA/OPR investigators lacked the authority to investigate potential criminal misconduct, and could investigate only administrative violations.[25] In any event, in cases involving alleged criminal misconduct, IA/OPR cannot initiate an administrative investigation until prosecution has been declined.[26]

Because OIG has the right of first refusal, IA/OPR also cannot act on a complaint while OIG evaluates whether to commence its own investigation.[27] There are no case referral guidelines establishing clear accountability and

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[25] *See, e.g.*, HSAC INTERIM, *supra* note 19, at 7. Before IA/OPR investigators were authorized to investigate criminal matters involving CBP, any criminal misconduct investigations DHS OIG declined were handled by Immigration and Customs Enforcement (ICE)'s Office of Professional Responsibility—an entity distinct from CBP's IA/OPR. *Id.* at 6 n.6.

[26] PIVOTAL, *supra* note 15, at 9, 37 (Recommendation A.3.R.11).

[27] *See, e.g.*, HSAC INTERIM, *supra* note 19, at 2 (Recommendation 4.c).

responsibility for misconduct investigations as between OIG and IA/OPR.[28] If and when IA/OPR does initiate an investigation, it is to prepare a Report of Investigation upon the conclusion of that investigation.[29] No clear timeframes exist for IA/OPR investigations or the provision of information about complaints to complainants.[30]

4. *CBP Office of Human Resources Management (OHRM).*

Crucially, none of the oversight entities described above has any power to *discipline* DHS officials. For CBP, this role is assigned to yet another bureaucracy: OHRM.[31] Within OHRM, Labor and Employee Relations (LER) specialists "determine[ ] whether employee misconduct is substantiated," based in part on reports of investigation received from any oversight entity.[32] If a DHS oversight entity does not conduct a timely or meaningful investigation and refer alleged

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[28] HSAC INTERIM, *supra* note 19, at 10 (finding "the OIG relationship with CBP's Internal Affairs is broken"); *see also* HSAC FINAL, *supra* note 15, at 6 (Recommendation 24); PIVOTAL, *supra* note 15, at 8 (Recommendation A.3.R.1).

[29] PIVOTAL, *supra* note 15, at 29; *see also, e.g.*, SER 111–113 (2d Reddy Decl., Ex. 26-B) (example of IA/OPR ROI); ER 127 n.2 (2d Howard Decl.) (referring to ROIs that would have been generated by CBP Tucson Sector).

[30] PIVOTAL, *supra* note 15, at 14, 45 (Recommendations T.1.R.5 & T.1.R.6).

[31] *See generally* DHS CBP OHRM, CBP DISCIPLINE OVERVIEW: FISCAL YEAR 2015, https://www.cbp.gov/sites/default/files/assets/documents/2018-Mar/FY15-discipline-report-5-4-17.pdf; *see also* ER 264 ¶ 34 (Howard Decl.).

[32] PIVOTAL, *supra* note 15, at 29; *see also* ER 264–65 ¶¶ 34–35 (Howard Decl.); ER 130–31 ¶ 14 & n.8 (2d Howard Decl.).

misconduct to OHRM, therefore, discipline may *never* occur.[33] Thus, information that permits the public to evaluate how, and how well, DHS oversight entities function *also* informs the public's understanding of whether DHS disciplinary systems are working properly.

C. DHS Acknowledgment of Broken Oversight System.

Beginning in 2014, senior DHS officials commissioned a series of independent studies on DHS/CBP oversight and discipline—each of which found significant transparency and accountability failures.

First, in September 2014, then-CBP Commissioner Gil Kerlikowske sought a "comprehensive" examination "of CBP's misconduct review process from intake, referral, investigation and discipline to improve our handling of these situations and improve transparency."[34] Pivotal Practices Consulting LLC ("Pivotal") completed the assessment and issued a public report in November 2015.[35] Pivotal urged several reforms, including clarification of case referral

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[33] U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-405, DEPARTMENT OF HOMELAND SECURITY: COMPONENTS COULD IMPROVE MONITORING OF THE EMPLOYEE MISCONDUCT PROCESS 13 (2018) [hereinafter GAO DHS MISCONDUCT REPORT] https://www.gao.gov/assets/700/693587.pdf (Figure 1: General Employee Misconduct Process at CBP); *id.* at 7–12 (overview of interplay between DHS oversight (investigative process) and discipline (adjudicative process)); *see also, e.g.*, *id.* at 9 n.16 (noting that in FY2014–2016, IA/OPR did not refer all allegations to OHRM for adjudication).

[34] PIVOTAL, *supra* note 15, at ii.

[35] *See generally* PIVOTAL, *supra* note 15.

guidelines between DHS OIG and IA/OPR;[36] the development of a "case processing roadmap" that explicated each step in CBP misconduct investigations;[37] and the creation of standardized case handling checklists "to enhance consistency."[38] Although CBP publicly concurred "with the vast majority of [Pivotal's] recommendations,"[39] the agency has yet to implement most of them.[40]

Second, shortly after Kerlikowske engaged Pivotal, then-Secretary of Homeland Security Jeh Johnson asked the Homeland Security Advisory Council to create a CBP Integrity Advisory Panel to evaluate "efforts to deter and prevent corruption and the use of excessive force."[41] Like Pivotal, the Panel determined that CBP's processes for receiving, tracking, and investigating complaints were significantly flawed, and observed that the agency's "disciplinary process takes far too long to be an effective deterrent" for misconduct.[42] The Panel issued fifty-three separate recommendations to improve accountability and oversight, but little

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[36] *Id.* at 8, 36 (Recommendation A.3.R.1).

[37] *Id.* at 6, 34 (Recommendation A.1.R.1).

[38] *Id.* at 6, 34 (Recommendation A.1.R.4).

[39] CBP, *CBP Statement on Complaints and Discipline Systems Review* (Mar. 18, 2016), https://www.cbp.gov/newsroom/speeches-and-statements/cbp-statement-complaints-and-discipline-systems-review.

[40] *See, e.g.*, GAO DHS MISCONDUCT REPORT, *supra* note 33, at 42 & n.65.

[41] HSAC INTERIM, *supra* note 19, at 1.

[42] HSAC FINAL, *supra* note 15, at 1, 21.

public information on the status of CBP's implementation of these improvements is available.[43]

Both Pivotal and the Panel also warned that the bureaucratic morass of DHS oversight could promote or shield corruption, thereby compromising the Department's integrity and mission.[44]

The humanitarian crisis that unfolded along the southern U.S. border in 2014 coincided, therefore, with acute structural deficiencies in DHS oversight and disciplinary systems, of which DHS was well aware.

D. The Humanitarian Crisis of 2014.

In the first eight months of FY2014, DHS officials apprehended a record number of unaccompanied children.[45] After transfer from DHS custody, some of

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[43] HSAC INTERIM, *supra* note 19, at 2–4; HSAC FINAL, *supra* note 15, at 3–8 (recommendations).

[44] *See, e.g.*, HSAC FINAL, *supra* note 15, at 12 (emphasizing "dysfunctionality created by the current fragmentation of responsibility for investigating allegations of serious misconduct by CBP personnel, including corruption and unlawful use of force"); PIVOTAL, *supra* note 15, at 31 ("CBP's mission makes it vulnerable to corruption within its workforce …"); HSAC INTERIM, *supra* note 19, at 9–10 ("OIG's investigations are reactive, chronically slow and not prioritized to focus on [corruption]. The true levels of corruption within CBP are not known, nor is there an evaluation based on sophisticated risk analysis. This means that pockets of corruption could fester within CBP, potentially for years.").

[45] WILLIAM KANDEL ET AL., CONG. RESEARCH SERV., R43628, UNACCOMPANIED ALIEN CHILDREN: POTENTIAL FACTORS CONTRIBUTING TO RECENT IMMIGRATION 2–3 (July 3, 2014), https://fas.org/sgp/crs/homesec/R43628.pdf (CBP apprehended 52,000 unaccompanied children between October 1, 2013 and June 15, 2014).

these children reported mistreatment or outright abuse.[46] Advocates compiled some of these reports into a formal administrative complaint that was submitted to OIG and CRCL on behalf of 116 unaccompanied children in June 2014. SER 211–212 ¶ 15 (Complaint).

Although held in different DHS facilities throughout the southwest, these children reported remarkably consistent abuses. One quarter of the children reported physical abuse by CBP officials, such as the use of stress positions, punching, kicking, and sexual assault.[47] Some children reported being shackled.[48] More than half reported various forms of verbal abuse, including racially- or sexually-charged comments and death threats.[49] Half of the children also reported being denied medical care; some eventually required hospitalization.[50] More than eighty percent of the children reported inadequate food and water while in CBP custody.[51] Many of the children reported being denied blankets and bedding and being forced to sleep on the floors of unsanitary, crowded, frigid cells in which the

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[46] *See generally, e.g.*, RJN Ex. 4 (NAT'L IMMIGRANT JUST. CTR. ET AL., SYSTEMIC ABUSE OF UNACCOMPANIED IMMIGRANT CHILDREN BY U.S. CUSTOMS AND BORDER PROTECTION (June 11, 2014) [hereinafter Administrative Complaint], http://bit.ly/XqyyOt).

[47] Administrative Complaint, *supra* note 46, at 2, 7–8, 8–10.

[48] *Id.* at 17–18.

[49] *Id.* at 2, 8, 10–12.

[50] *Id.* at 2, 8, 12–14.

[51] *Id.* at 2, 7, 14–16.

overhead fluorescent lights were never turned off.[52] And approximately seventy percent of these children reported being detained by CBP for longer than the seventy-two–hour maximum period allowed under federal law.[53]

In response to the Administrative Complaint, Commissioner Kerlikowske acknowledged that the children's reports were "absolutely spot-on," at least insofar as they related to substandard detention conditions.[54] He and other senior DHS leaders promised to investigate the complaints thoroughly.[55]

E. OIG's Interim Reports.

On July 30, 2014, OIG announced it would investigate sixteen of the 116 complaints included in the Administrative Complaint.[56] OIG neither explained its

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[52] *Id.* at 11–17.

[53] *Id.* at 2, 8. The Administrative Complaint reflected a "representative sample" rather than an "exhaustive compilation," as children likely "dramatically under-reported" mistreatment. *Id.* at 8. Reasons for underreporting included lack of access to child welfare advocates, fear of retaliation, unrecognized mistreatment, and lack of opportunities to discuss treatment in CBP custody during ORR legal orientations. *Id.*

[54] SER 213 ¶ 17 & n.5 (Complaint) (citing NAT'L PUB. RADIO, Transcript: Commissioner Kerlikowske's Full Interview (July 18, 2014), https://n.pr/2G6R3Dp).

[55] SER 213 ¶ 17 & n.6 (Complaint) (citing *Press Briefing: Unaccompanied Immigrant Children* 12:15–12:25, 29:26–31:06 (C-SPAN Broadcast June 12, 2014), https://www.c-span.org/video/?319951-1/dhs-secretary-johnson-unaccompanied-immigrant-children).

[56] RJN Ex. 5 (DHS OIG, OVERSIGHT OF UNACCOMPANIED ALIEN CHILDREN 2 (July 30, 2014) [hereinafter OIG 1ST INTERIM], https://www.oig.dhs.gov/assets/Mgmt/2014/Over_Un_Ali_Chil.pdf).

selection criteria nor why it would only investigate such a small fraction of the total complaints submitted.[57] Less than one month later, OIG declared it had been "unable to substantiate any" of these sixteen allegations.[58] No explanation was provided.[59]

OIG also initiated "ongoing unannounced site visits to determine the conditions of detention" for unaccompanied children in DHS custody, using a newly developed checklist based on the *Flores* Settlement and TVPRA.[60] The checklist identified the bare minimum requirements for CBP detention facilities—e.g., operable toilets, telephones, and ventilation systems; available food and first

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[57] According to OIG, CRCL had deemed thirty-eight of the complaints "potential CRCL violations" and was to "conduct separate reviews as appropriate." *Id.* IA/OPR was to pursue ninety-nine of the allegations; ICE OPR, one more. *Id.* Like OPR, none of these DHS oversight entities provided any public explanation of their selection criteria or investigative timelines. Moreover, although these numbers exceeded 116, no clarification was offered as to which complaints would be assessed by more than one oversight agency, or why.

[58] RJN Ex. 6 (DHS OIG, OVERSIGHT OF UNACCOMPANIED ALIEN CHILDREN 1 (Aug. 28, 2014) [hereinafter OIG 2D INTERIM], https://www.oig.dhs.gov/assets/pr/2014/Sig_Mem_Over_Unac_Alien_Child090214.pdf).

[59] OIG represented that it would "continue to monitor the remaining 100 allegations" purportedly being investigated by CRCL, IA/OPR, and ICE OPR. *Id.* OIG did not, however, ever issue further public statements about these complaints.

[60] OIG 1ST INTERIM, *supra* note 56, at 1; *see also supra* notes 7 and 11 and accompanying text.

aid kits; and separate holding areas for children and unrelated adults.[61] Recognizing that this checklist alone would not capture critical qualitative information about children's experiences in DHS custody, OIG represented that its investigators would pair the checklist "with observations and interviews."[62] OIG did not, however, provide any information about any such interviews (e.g., quantity of interviews completed, questions asked, or interview subjects).

OIG completed a first round of site visits between July 1 and 16, 2014.[63] OIG summarized its findings in a four-page report, which documented (1) children being held for longer than the seventy-two–hour legal limit; (2) inconsistent detention facility temperatures; (3) inconsistent CBP record-keeping regarding *Flores* Settlement and TVPRA compliance; (4) inadequate food in at least one location; (5) inconsistent tracking of children's personal property; and (6) inconsistent ratios of DHS employees to unaccompanied children.[64]

Although the report referenced "random interviews of UAC," OIG provided no details regarding how many children were interviewed, what questions they

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[61] OIG 1ST INTERIM, *supra* note 56, at 1 & Attach. 2 (Facility Observations Checklist).

[62] *Id.* at 1.

[63] *Id.* at 1 & Attach. 1 (identifying sixty CBP sites visited).

[64] *Id.* at 2–3 & Attach. 3 (compliance chart).

were asked, or whether interviewed children had been provided a private and secure place from which to speak freely with OIG investigators.[65]

OIG completed a second round of site visits between July 17 and August 20, 2014, which were summarized in a three-page report.[66] Although hardly one month had passed since its first report, OIG now concluded that "most" DHS facilities "were compliant with UAC laws, regulations, and policies," and that "Border Patrol capacity to provide care to UAC [had] improved."[67] Nothing in the second interim report indicated any qualitative assessment of DHS officials' treatment of children in their custody.

OIG completed a third round of visits between August 21 and September 26, 2014, which it summarized in one final three-page report.[68] OIG "found that not all CBP personnel were trained to manage routine UAC processing," such as "ensur[ing] that food and water were readily available" to children in custody.[69]

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[65] *Id.* at 2.

[66] OIG 2D INTERIM, *supra* note 58, at 1; *id.* Attach. 1 (identifying forty-two CBP sites visited).

[67] *Id.* at 2 ("Agents at several Border Patrol stations told us that their UAC case processing skills had improved.").

[68] RJN Ex. 7 (DHS OIG, OVERSIGHT OF UNACCOMPANIED ALIEN CHILDREN 1 (Oct. 2, 2014), [hereinafter OIG 3D INTERIM], https://www.oig.dhs.gov/sites/default/files/assets/Mga/2016/Over_Un_Ali_Child_100214.pdf; *id.* Attach. 1 (identifying two CBP sites visited)).

[69] *Id.* at 2.

Yet, citing CBP's "improved" "capacity to provide medical screening, facility cleaning, food service, and case processing" for unaccompanied children, OIG announced it would "curtail [the] routine spot inspections of CBP facilities."[70] Although OIG claimed to "continue [] oversee[ing]" investigations pertaining to the Administrative Complaint, it provided no further public information.[71]

The superficiality of OIG's three "interim" reports contrasted markedly with advocates' extensive documentation of substandard DHS detention conditions and recurrent abuses of unaccompanied children. Indeed, OIG's characterizations of DHS facilities could not withstand even the most minimal scrutiny.[72]

F. Plaintiffs' FOIA Request and Subsequent Lawsuit.

Citing "years of persistent allegations of child abuse in CBP detention facilities" and "the apparent failure of DHS oversight agencies to take corrective

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[70] *Id.* at 1; *see also* DHS OIG, *Press Release: Improvements Continue at Detention Centers* (Oct. 6, 2014), http://1.usa.gov/1oKw2Kq.

[71] OIG 3D INTERIM, *supra* note 68, at 1.

[72] As children provided emotional congressional testimony about frigid cells, for instance, OIG deemed DHS holding rooms "compliant" with temperature policies based solely on working thermostats—while simultaneously recording actual room temperatures as low as fifty degrees Fahrenheit. *Compare Congressional Progressive Caucus: Meeting on Unaccompanied Immigrant Children* 20:55–21:42 (C-SPAN Broadcast July 29, 2014), https://cs.pn/2PsUJPh (twelve-year-old girl testified about four days in Border Patrol custody, during which she was unable to sleep due to the cold and watched her little sister's lips turn blue) *with* OIG 1ST INTERIM, *supra* note 56, Attach. 3, OIG 2D INTERIM, *supra* note 58, Attach. 3, *and* OIG 3D INTERIM, *supra* note 68, Attach. 3 (compliance charts).

action and ensure agent accountability" for such abuses, Plaintiffs filed a FOIA request in December 2014. SER 220–231 (FOIA Req.); SER 215 ¶ 22 (Complaint).

Plaintiffs' request covered a five-year period between 2009 and 2014, and sought records relating to: (1) any alleged or actual abuse of children in DHS custody; (2) DHS compliance with child abuse reporting requirements, including under the VCAA; (3) DHS's implementation of and compliance with the PREA; (4) complaints submitted to DHS concerning alleged or actual abuse of children in DHS custody, or concerning conditions of confinement experienced by children in DHS custody, and records related to or responding to such complaints; (5) OIG's three interim reports and decision to curtail routine site inspections, plus any other DHS investigations of complaints concerning alleged or actual abuse of children or conditions of confinement in DHS custody; and (6) discipline resulting from alleged or actual misconduct by DHS officials involving children in their custody. SER 224–225 (FOIA Req.); SER 215 ¶ 22 (Complaint).

Although Plaintiffs requested expedited processing, neither DHS nor any of its component agencies responded to the request within the statutorily-allotted timeframe. SER 215–217 ¶¶ 23–37 (Complaint). Consequently, in February 2015, Plaintiffs filed suit to compel release of the records requested. 5 U.S.C. §§ 552(a)(3) & (a)(6).

Defendants did not begin producing records until June 2015, nearly one year after the Administrative Complaint and six months after Plaintiffs' FOIA request. Dkt. 18. In response to the agencies' further delays, the district court ordered Defendants to complete production no later than May 2016. Dkt. 20. By the time Defendants finally moved for summary judgment in February 2017—after requesting four further production deadline extensions—they had produced approximately 30,000 pages of records and thirty-five audio files. SER 149 ¶ 3 (Reddy Decl.).

The records reveal troubling patterns of alleged child abuse and neglect by DHS officials. *See, e.g.*, SER 149–150 ¶ 4 (Reddy Decl.); SER 103–104 ¶ 15 (2d Reddy Decl.); ER 47–49 ¶¶ 3–4 (3d Reddy Decl.). They also reflect DHS oversight entities' incomplete or rote "investigations." *See, e.g.*, ER 47–49 ¶ 3 (3d Reddy Decl.); SER 113 (2d Reddy Decl., Ex. 26-B) (DHS OIG "closed" investigation regarding Border Patrol agent who allegedly punched a child and denied that child medical treatment and water, without providing any information as to whether these allegations were deemed substantiated). Only one DHS component, ICE, produced any disciplinary records—exactly six pages, all of which related to a single incident. ER 47 ¶ 2 (3d Reddy Decl.).

Plaintiffs have begun to synthesize and publish these records, which continue to attract widespread public interest.[73]

G. Significance of DHS Officials' Names.

As relevant here, Defendants have withheld the names of DHS officials alleged to have mistreated children, citing FOIA Exemptions 6 and 7(C). Plaintiffs seek disclosure of this information solely because these names are the only common identifier that would permit the public to answer two central questions: (1) the nature, frequency, and extent of serious claims of child abuse and neglect by DHS officials between 2009 and 2014, including whether certain DHS officials allegedly mistreated children on multiple occasions, and (2) whether DHS exercises any meaningful oversight concerning substantial claims of misconduct by its officials, and if so, how.

Although other unique identifiers (e.g., badge or employee number) are ostensibly available to refer to individual DHS employees, Defendants have chosen

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[73] *See generally* UNIV. OF CHICAGO L. SCHOOL INT'L HUM. RIGHTS CLINIC, ACLU BORDER LITIGATION PROJECT & ACLU BORDER RIGHTS CENTER, NEGLECT AND ABUSE OF UNACCOMPANIED IMMIGRANT CHILDREN BY U.S. CUSTOMS AND BORDER PROTECTION (May 2018), https://bit.ly/2zRynCa; *id.* app. https://bit.ly/2KSdWIp (publishing subset of CRCL records); *see also, e.g.*, Antonio Olivo, *ACLU alleges that immigrant minors were mistreated in custody during Obama years*, WASH. POST (May 23, 2018), https://wapo.st/2RHysze; *Denuncian supestos abusos de EEUU a niños que cruzan la frontera*, TELEMUNDO (May 24, 2018), https://bit.ly/2G992cu; Richard Gonzales, *ACLU Report: Detained Immigrant Children Subjected to Widespread Abuse by Officials*, NAT'L PUB. RADIO (May 23, 2018), https://n.pr/2xdRKWV.

not to use such identifiers in agency records pertaining to misconduct investigations. *See, e.g.*, SER 109–110 (2d Reddy Decl. Ex. 23-D); SER 111–113 (2d Reddy Decl. Ex. 26-B).

Likewise, DHS oversight agencies do not consistently use complaint or case numbers when discussing specific instances of alleged misconduct. *See, e.g.*, SER 110 (2d Reddy Decl., Ex. 23-D) (CBP email referring three complaints for investigation includes only one-sentence summaries of complaints with no information that would permit public tracking of those complaints other than the officials' redacted names). Defendants' records also indicate that at times the agencies combine multiple complaints into one document, including complaints from different DHS facilities, without assigning each allegation a unique number. SER 182–183 (Reddy Decl., Ex. 14-C) (grouping together "into one CRCL complaint" four separate complaints from four different Texas cities over four-month period). Moreover, even where complaint or case numbers are used, each DHS oversight entity has its own system of complaint numbering—and, upon referral from one agency to another, a complaint may be assigned a new and unrelated number. *See, e.g.*, SER 168 (Reddy Decl., Ex. 3-A) (OIG case summary report describing single complaint including (1) OIG case number (2) CBP case number (3) "reference" case number and (4) "CBP INFO Center Complaint"

number). This means that complaint numbers also cannot serve as a common identifier that would facilitate the public's understanding of Defendants' records.

Nor can the allegations themselves serve as a common identifier—as Defendants' productions reflect instances where the agencies deemed children's allegations "similar or identical" and grouped them together under generic headings (e.g., "Excessive or Inappropriate Use of Force" "Inferior Hold Room Conditions"). SER 116 n.1 (2d Reddy Decl., Ex. 31).

Without a common identifier assigned to each individual official, there is no way to review Defendants' production and identify the *number* of officials who allegedly mistreated children. In fact, Defendants have *never* established the number of officials whose names are in question. Furthermore, without a common identifier, the public cannot identify officials who allegedly mistreated children *more than once*. Plaintiffs have managed to identify only one such DHS official, and only because he is referred to in some records by a unique identifier: his nickname, "Mala Cara" ("Bad Face"). SER 154–155 ¶ 22 (Reddy Decl.); SER 179–180 (Reddy Decl. Ex. 13).

Similarly, without a common identifier, there is no way to review Defendants' production and trace a complaint alleging misconduct from intake through investigation (or referral, or closure). This, in turn, inhibits the public from evaluating how, and how well, DHS oversight functions.

The names of the DHS officials at issue, therefore, are essential to decode and understand these records.

II. PROCEDURAL HISTORY

A. Cross Motions for Summary Judgment.

As noted, after seeking multiple extensions, Defendants finally "completed" their productions and moved for summary judgment in February 2017. Dkt. 56.[74] Plaintiffs cross-moved for summary judgment, challenging the adequacy of Defendants' searches and propriety of Defendants' withholdings pursuant to various FOIA exemptions. Dkt. 62.

In August 2017, the district court issued an order granting and denying in part each parties' motion. ER 14–42 (Dkt. 76). As relevant here, the district court held that Defendants could not withhold the names of DHS officials alleged to have abused children in government custody pursuant to Exemption 6 or 7(C). ER 38–39. The court agreed with Plaintiffs that disclosure of the withheld information would advance a public interest cognizable under FOIA by facilitating an understanding of DHS investigations related to Defendants' statutory duties and performance thereof. ER 38–39. The court, however, granted Defendants leave to

[74] In actuality, Defendants continued to "locate" responsive records throughout summary judgment briefing. *See* Dkt. 71; Dkt. 74 at 5–6.

seek a protective order "that would prevent public disclosure of [the] names while allowing Plaintiffs unfettered access to the information." ER 39.[75]

B. Reconsideration.

Defendants moved for reconsideration. Dkt. 77. Relying on *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004) [hereinafter *Favish*], Defendants explained that protective orders are not recognized in the FOIA context. Defendants then argued, once more, that Exemptions 6 and 7(C) shielded the names of DHS officials alleged to have abused children in government custody. In opposing Defendants' motion, Plaintiffs agreed that no protective order was available in the FOIA context, but further explicated why the relevant balancing tests required disclosure of the names at issue. Dkt. 83.

The court granted Defendants' motion in part, recognizing it had erred in suggesting that a protective order might be available. ER 2, 12 (Dkt. 85). Nevertheless, applying the Exemption 6 and 7(C) balancing tests, ER 2–4, the court reaffirmed its holding requiring the release of the names of DHS officials alleged to have abused children in custody.

[75] The district court also held that CBP improperly had withheld case numbers pursuant to Exemption 7(E) and ordered that agency to reproduce all records with case numbers unredacted. ER 39–40. CBP completed re-production in February 2018. *See* Dkt. 95.

Although concluding that "a cognizable, nontrivial privacy interest" was implicated, ER 4–5, the court emphasized the public's "particularly strong interest in knowing if government agencies turned a blind eye to allegations of a pattern of abuse or misconduct by individual government officials." ER 11. This strong public interest existed irrespective of the fact that the underlying allegations "have not been proven." ER 11.

Reviewing the record, the court highlighted evidence of government impropriety. In particular, the court noted a DHS OIG spreadsheet summarizing 214 complaints alleging physical, verbal, and/or sexual abuse in DHS custody, lodged by children over a five-year period. ER 9; *see also* ER 48 ¶ 3(e) (3d Reddy Decl.) & ER 51–88 (OIG Spreadsheet). All but one complaint was "Referred—No Reply" to CBP and marked "Closed Not Converted." ER 9. "[I]t appears from this document," the court concluded, "that virtually no investigations into the complaints took place, or at least were completed." ER 9. "[O]ne can reasonably believe that agency investigations were insufficient if the documents show that almost none of the over 200 allegations—many of a serious nature—resulted in a completed investigation." ER 9. Accordingly, "Plaintiffs' evidence establishes more than a bare suspicion of government misconduct in the form of insufficient investigations into the allegations of abuse." ER 9–10.

Additionally, the court concluded disclosure of the names at issue "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." ER 10 (citing 3d Reddy Decl., ER 46–50 & Exs. A–G, SER 1–88).

The court then balanced the officials' privacy interests against the public interest in disclosure. ER 11. Noting that Plaintiffs sought the names of "only specific employees accused of misconduct," the court opined that release of those names would show "(1) if individual employees were the subject of multiple misconduct allegations, and (2) whether Defendants engaged in any investigation and, if necessary, disciplinary action with regard to those employees who allegedly engaged in a pattern of abuse or an improper course of conduct." ER 11. Concluding that "the balance tips in favor of the public interest," the court reaffirmed its prior decision requiring release of the names at issue.

Defendants timely appealed. ER 43–44.

STANDARD OF REVIEW

Consistent with "the policy and purpose of FOIA," district court decisions on summary judgment in FOIA cases are reviewed *de novo*. *Animal Legal Def.*

Fund v. FDA, 836 F.3d 987, 990 (9th Cir. 2016) [hereinafter *ALDF*] (en banc) (per curiam).

SUMMARY OF ARGUMENT

The district court correctly applied the fact-intensive and context-specific balancing test FOIA's privacy exemptions require, and properly concluded that Defendants cannot withhold the names at issue.

While DHS officials' names may implicate nontrivial privacy interests, these interests are diminished for at least three reasons. First, federal employees have diminished privacy interests because of the corresponding public interest in knowing how public employees perform their jobs. Second, a government employee's privacy interests may be diminished to the extent the information *might* disclose official misconduct. Third, the significant responsibilities and awesome power of these DHS officials vis-à-vis unaccompanied children—from apprehension through detention—further diminishes these officials' privacy interests.

On the other side of the ledger, release of these names would further at least two significant public interests. First, the information would allow the public to assess the extent of allegations of child abuse and neglect by DHS officials between 2009 and 2014, and to determine whether certain government employees allegedly mistreated children in multiple instances—and, if so, how many, and

with what consequences. Second, release of the names would elucidate how, and how well, DHS oversight entities function. The context of this FOIA litigation—allegations of child abuse—further heightens these public interests. To the extent these public interests involve illuminating negligent or improper government conduct, the record is replete with "evidence that would warrant a belief by a reasonable person that the alleged government impropriety might have occurred." *Favish*, 541 U.S. at 174.

For these reasons, this Court should affirm the district court's order directing disclosure of the names at issue. In the alternative, at a minimum, this Court should remand with instructions requiring Defendants to provide more particularized information regarding the DHS officials' privacy interests, to permit additional balancing of the relevant interests. *Am. Immigr. Law. Ass'n v. EOIR*, 830 F.3d 667, 675–76 (D.C. Cir. 2016) [hereinafter *AILA*].

ARGUMENT

I. FOIA FIRST PRINCIPLES.

Congress enacted FOIA for one "basic purpose," namely, "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see also, e.g.*, *ACLU of Northern Cal. v. FBI*, 881 F.3d 776, 778 (9th Cir. 2018). The statute is designed "to pierce the veil of administrative secrecy and to open agency action to

the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). "Without question," therefore, "the Act is broadly conceived." *EPA v. Mink*, 410 U.S. 73, 80 (1973). FOIA "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *Id.*

Although there are nine "exemptions from compelled disclosure" under FOIA, "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361. FOIA exemptions, therefore, must be narrowly construed. *Id.* (citing *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973)); *see also, e.g.*, *Lahr v. NTSB*, 569 F.3d 964, 973 (9th Cir. 2009). Moreover, "[c]onsistent[] with [FOIA's] purpose, as well as the plain language of the Act, the strong presumption in favor of disclosure places the burden on the agency to justify the withholding" of responsive information. *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991); *see also* 5 U.S.C. § 552(a)(4)(B).

In meeting this burden, "the government may not rely upon conclusory and generalized allegations of exemptions." *Church of Scientology of Cal. v. Dep't of Army*, 611 F.2d 738, 742 (9th Cir. 1979), *overruled on other grounds by ALDF*, 836 F.3d 987 (9th Cir. 2016). Nor may an agency rely on unsupported assertions that disclosure of information will or may result in a particular consequence;

instead, the government must provide sufficient information "to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991). Particularized information is necessary to minimize the distortions in the adversary process inherent in FOIA litigation, in which "only the party opposing disclosure will have access to all the facts." *Id.*

II. FOIA'S PRIVACY EXEMPTIONS.

The government has withheld the names of DHS employees alleged to have engaged in child abuse and related misconduct pursuant to Exemptions 6 and 7(C). Exemption 6 permits the government to withhold "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). Exemption 7 applies to "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." 5 U.S.C. § 552(b)(7)(C).[76]

"The protection available under each exemption is not co-extensive." *Hunt v. FBI*, 972 F.2d 286, 288 (9th Cir. 1992). Exemption 7(C) is "more protective of

[76] Plaintiffs assume for the sake of this appeal that the threshold inquiries under either privacy exemption are satisfied.

privacy than Exemption 6." *Dep't of Defense v. FLRA*, 510 U.S. 487, 496 n.6 (1994) [hereinafter *FLRA*].[77]

In alluding to "unwarranted" invasions of privacy, both exemptions require courts "to balance the … privacy interest against the public interest in disclosure." *Favish*, 541 U.S. at 171; *see also Hunt*, 972 F.2d at 287–88; *Stern v. FBI*, 737 F.2d 84, 91 (D.C. Cir. 1984). The only distinction between the Exemption 6 and 7(C) balancing tests is "the magnitude of the public interest that is required to override the respective privacy interests." *FLRA*, 510 U.S. at 496 n.6. Because Plaintiffs' asserted public interests are of sufficient magnitude to override Defendants' privacy interests here, Exemption 7(C)'s more stringent requirements are satisfied, and Defendants must disclose the names.[78]

[77] To invoke Exemption 6, the government must establish that disclosure of the information at issue *would* constitute a *clearly* unwarranted invasion of personal privacy. By contrast, Exemption 7(C) protects from disclosure information that *could* reasonably be expected to constitute *an* unwarranted invasion of privacy.

[78] This Court need not assess Exemption 6 separately. *Tuffly*, 870 F.3d at 1092 ("Because we affirm on the basis of Exemption 7(C), we need not consider Exemption 6."); *Roth v. DOJ*, 642 F.3d 1161, 1173 (D.C. Cir. 2011) ("no need to consider Exemption 6 separately because all information that would fall within the scope of Exemption 6 would also be immune from disclosure under Exemption 7(C)").

III. THE BALANCE OF INTERESTS REQUIRES DISCLOSURE OF THE NAMES OF DHS OFFICIALS CREDIBLY ALLEGED TO HAVE MISTREATED CHILDREN IN CUSTODY.

The Exemption 7(C) balancing test consists of three steps. *Tuffly*, 870 F.3d at 1092. First, the court "must determine whether the disclosure implicates a personal privacy interest that is nontrivial or more than de minimis." *Id.* "Second, if such a privacy interest is at stake, the requester must show that the public interest sought to be advanced is a significant one and that the information is likely to advance that interest." *Id.* at 1093. "If both factors are present," then the court "must proceed to balancing the two." *Id.*

The names of law enforcement officials are not categorically exempt under FOIA. Rather, the "Exemption 7(C) balancing test must be applied to the specific facts of each case." *Stern*, 737 F.2d at 91. "A particular record may be protected in one set of circumstances, but not in others." *Id.*; *see also AILA*, 830 F.3d at 675–76 (privacy interest in government officials' names context-dependent).

A. Nontrivial Privacy Interest.

Defendants summarily assert that the names requested here implicate such privacy interests as avoidance of stigma, the possibility of harassment or undue public attention, and personal or professional embarrassment. AOB 20–21. At no point in this litigation, however, have Defendants provided competent evidence of

the specific weight of these purported privacy interests.[79] Indeed, Defendants have never even identified the *number* of officials whose names would be subject to disclosure, much less provided any specific contextual information that would permit a court to assess the actual privacy interests in play.

The district court concluded that Defendants had established a nontrivial privacy interest in the withheld names. ER 6. Even assuming this is so, the weight that should be afforded to such privacy interest is minimal, and certain caveats must be considered when this privacy interest is balanced against the public interest in disclosure. These considerations are discussed in Argument III.C, below.

B. Release of the Names at Issue Is Likely to Advance Significant Public Interests.

At step two, a FOIA requester "bears the burden of showing (1) that the 'public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake,' and (2) that the information is 'likely to advance that interest.'" *Tuffly*, 870 F.3d at 1094 (quoting *Favish*, 541 U.S. at

[79] Defendants cite two CBP declarations, two ICE declarations, and part of CBP's *Vaughn* Index. Dkt. 77 at 5 (citing Goal Decl., ER 217–218 ¶ 61; 2d Goal Decl., ER 111 ¶ 46; Pineiro Decl., ER 250 ¶ 68; Suppl. Pineiro Decl., ER 122–23 ¶ 29; & CBP *Vaughn* Index at 1, SER 184). These submissions contain only boilerplate statements of generic privacy interests that *might* be implicated *any time* a government official's name is released. Additionally, factual claims in a *Vaughn* Index are unattested to and have no identifiable source.

172). With respect to the significance of the public interest, the relevant inquiry "is the extent to which disclosure of the information sought would she[d] light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to.'" *Id.* (quoting *Bibles v. Or. Natural Desert Ass'n*, 519 U.S. 355, 355–56 (1997) (per curiam)).

Here, release of the information at issue would advance at least two distinct, significant public interests.[80]

1. ***Shedding Light on What DHS Officials Are "Up To."***

Release of these names would allow the public to assess the nature, frequency, and extent of serious claims of child abuse and neglect by DHS officials between 2009 and 2014. This information would also permit the public to determine whether certain DHS officials allegedly have mistreated children in multiple instances—and, if so, how many, and with what consequences.

As explained, neither aspect of this public interest can be achieved without the names at issue.[81] Because of the chaos created by DHS's failed oversight

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[80] The district court construed the relevant public interests more narrowly. ER 9. This Court, however, reviews that court's result, not the reasoning, and may affirm on any basis supported by the record. *See, e.g.*, *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1047 (9th Cir. 2009). In any event, even under the district court's narrower characterization, Plaintiffs still prevail.

[81] *See supra* Statement of the Case, Part I.G. Throughout, cross references to "Parts" are to the Statement of the Case.

system, it is impossible to determine the number of DHS officials alleged to have mistreated children—i.e., the extent of the problem—without each official's name. It is also impossible to ascertain whether certain DHS officials are repeat offenders.

Release of the names, therefore, would advance a "significant" public interest by "shed[ding] light" on DHS officials' compliance with their statutory duties to care for unaccompanied children in their custody, and otherwise let the public "know what their government is up to." *Tuffly*, 870 F.3d at 1094.[82] Additionally, this information is "likely" to advance this public interest, since the public cannot fully assess the nature, frequency, and extent of allegations of child abuse and neglect by DHS officials without the officials' names. *Id.*

"[W]here there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties," a FOIA requester "must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Favish*, 541 U.S. at 174. Plaintiffs have more than satisfied this standard.

[82] *See supra* Part I.A, and especially text accompanying notes 7–11 (discussing legal requirements under TVPRA, PREA, VCAA, and *Flores*).

First, the record includes signed, sworn affidavits from children alleging abuse by DHS officials spanning a five-year period. *See, e.g.*, SER 163–166 (Reddy Decl., Ex. 1-B) (affidavit attesting to an assault by a Border Patrol agent); SER 173 (Reddy Decl., Ex. 12-B) (affidavit attesting to an assault by Border Patrol agents upon apprehension and sleep and food deprivation during detention in "hielera"); SER 22–23 (3d Reddy Decl., Ex. D) (affidavit attesting to physical abuse by Border Patrol agent necessitating eventual hospitalization); SER 175–176 (Reddy Decl., Ex. 12-C) (affidavit attesting to verbal and physical abuse by DHS official in "hielera"); SER 13–14 (3d Reddy Decl., Ex. C) (affidavit attesting to threat of bodily harm by Border Patrol agent). Such affidavits satisfy *Favish*. *Casa de Maryland v. DHS*, 409 F. App'x 697, 700–01 (4th Cir. 2011) [hereinafter *Casa*] (affidavits which "suggested" government misconduct cognizable evidence under *Favish*).

Defendants insist that the allegations of abuse are "unsubstantiated," conveniently overlooking the fact that DHS's nonexistent or pro forma oversight is effectively designed to avoid finding claims of abuse substantiated. Defendants also imply that, unless the children's complaints *are* substantiated, Plaintiffs cannot satisfy *Favish*. AOB 24–26. This is not the law. The Supreme Court has expressly rejected a circular requirement that FOIA requesters have proof of the matter in question before seeking disclosure of government records relevant to that

matter. *Favish*, 541 U.S. at 174 (FOIA requester must only "produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred"); *Union Leader Corp. v. DHS*, 749 F.3d 45, 56 (1st Cir. 2014) (*Favish* satisfied even without "conclusive evidence of negligence, or other wrongdoing on the part of" the government); *see also Dobronski*, 17 F.3d at 279 ("[W]e decline to adopt a circular rule that an inquiry must be buttressed by possession of objective proof of the facts to be disclosed before the agency will be required to disclose the relevant records. Such a requirement would be antithetical to the FOIA's policy goals."). Likewise, to the extent Defendants imply that the "presumption of legitimacy" afforded to official government conduct requires Plaintiffs to adduce clear and convincing evidence of misconduct, AOB 30–31, Supreme Court precedent forecloses their position. *Favish*, 541 U.S. at 174 ("where the presumption is applicable, clear evidence is usually required to displace it … [g]iven FOIA's prodisclosure purpose, however, the less stringent standard we adopt today is more faithful to the statutory scheme").

Second, Defendants' own records corroborate children's reports of mistreatment. One CRCL document, for example, describes a child who claimed Border Patrol agents "hit [him] on the head with a flashlight," causing a scalp laceration that required staples. SER 161–162 (Reddy Decl., Ex. 1-A). The CRCL document confirms the child received medical attention. SER 162 (nurse "removed

three staples and cleansed the laceration"). Elsewhere, a CRCL spreadsheet memorializes a child's report of "ha[ving] a shaking episode" and "faint[ing]" while in Border Patrol custody, and confirms the child was hospitalized. ER 148.

Third, Defendants' own records evidence widespread allegations of DHS's mistreatment or neglect of unaccompanied children. *See, e.g.*, SER 104 ¶ 15(c) (2d Reddy Decl.); SER 135 (2d Reddy Decl. Ex. 33) (acknowledging "the huge amount" of "serious complaints"). In July 2014, a joint memorandum from CRCL and DHS's Office of General Counsel summarized thirty "particularly egregious" complaints of child abuse in Border Patrol's Rio Grande Valley (RGV) Sector. SER 103–104 ¶ 15(a) (2d Reddy Decl.); SER 116–128 (2d Reddy Decl. Ex. 31). Another memorandum compiles CRCL's findings following July 2014 RGV site visits; multiple violations of both the *Flores* Settlement and TVPRA are documented. SER 104 ¶ 15(b) (2d Reddy Decl.); SER 130–133 (2d Reddy Decl. Ex. 32).[83] A DHS OIG "case summary report" documents horrific RGV Border Patrol detention conditions. SER 104 ¶ 15(e) (2d Reddy Decl.); SER 140 (2d Reddy Decl. Ex. 35) ("children have been denied basic lifesaving first aid" "forced to sit in their own feces and crammed into cells").

[83] A comparison of this document and OIG's first interim report (reflecting the latter's own contemporaneous RGV site visits) reveals striking differences in how these two DHS oversight entities characterize CBP compliance with federal laws. *See supra* notes 60–65 and accompanying text.

Fourth, there is some record evidence that certain DHS officials mistreated children on multiple, independent occasions. SER 104 ¶ 15(d) (2d Reddy Decl.); SER 137 (2d Reddy Decl. Ex. 34). Plaintiffs have been able to identify one such official *only because* he is referred to in some records by his nickname, "Mala Cara" ("Bad Face"). SER 154–155 ¶ 22 (Reddy Decl.). Without additional names, the public cannot determine whether other "repeat bad actors" exist (and, if so, whether such officials were known to DHS oversight agencies and/or ever referred for discipline).

Together, these non-exhaustive examples are all *Favish* requires: evidence that "warrant[s] a belief by a reasonable person" that DHS officials might have abused unaccompanied children in their care. 541 U.S. at 174.

2. ***Public Assessment of DHS Oversight.***

Separate and apart from allowing the public to assess the true extent of child abuse allegations, release of these names will likely advance a second significant public interest: elucidating how, and how well, DHS oversight entities function.[84]

[84] This aspect of the second public interest at stake—the question of *how* DHS oversight functions—does not implicate *Favish*. *Tuffly*, 870 F.3d at 1095 ("if the FOIA requester does not allege any government impropriety, the *Favish* reasonable belief standard may be inapplicable"); *ACLU v. DOJ*, 655 F.3d 1, 14 (D.C. Cir. 2011) [hereinafter *ACLU*] (where requester is "not (or at least not only) seeking to show" government policy "is legally improper, but rather to show what that policy is and how effective . . . it is," *Favish* inapplicable).

As explained, DHS has never established a uniform complaint process.[85] There are no public guidelines clarifying when one oversight entity retains a complaint for investigation or refers it to another oversight entity.[86] Nor is an oversight entity's responsibility for follow-through on a referred complaint clear. "One of the purposes of the FOIA was to let some daylight into the bureaucratic swamp." *Dobronski*, 17 F.3d at 278.

Crucially, the information in question—the DHS officials' names—is not only "likely" to advance this public interest, *Tuffly*, 870 F.3d at 1094: it is essential to do so. The government has released tens of thousands of pages of records reflecting widespread and persistent allegations of child abuse or neglect by DHS officials over a multi-year period. Because DHS elected to use no other unique identifiers, it is impossible to trace a single allegation or complaint from initiation of investigation (if any) to recommendation of discipline (if any). SER 150 ¶ 8 (Reddy Decl.). Likewise, it is impossible to see whether a specific complaint was referred from one oversight entity to another, and, if so, whether the referring entity ever followed up with the receiving entity. The only "common thread" that would allow the public to understand how a complaint or investigation was

[85] *See supra* notes 15–16 & 21, and accompanying text.

[86] *See, e.g.*, *supra* notes 18–19, 22, & 28 and accompanying text.

handled is the name of the DHS official therein.[87] Such an understanding, in turn, would help the public assess how OIG, CRCL, and IA/OPR perform their oversight responsibilities.

In addition to understanding *how* DHS oversight functions, the public has a significant interest in comprehending *how well* oversight agencies work. This public interest is heightened here, where record evidence shows that DHS oversight entities routinely closed investigations prematurely or referred investigations to other components without any follow-through. *Lissner v. U.S. Customs Serv.*, 241 F.3d 1220, 1223 (9th Cir. 2001) ("public interest in ensuring the integrity and reliability of government investigation procedures is greater where there is some evidence of wrongdoing" by government officials).

Plaintiffs' concerns that reports of child abuse are insufficiently investigated hardly rest on "speculation." AOB 12. On the contrary: Defendants' productions *bolster* this disquietude and serve as "evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Favish*, 541 U.S. at 174.

[87] *See supra* Part I.G (explaining that Defendants' records contain no other common identifiers—e.g., badge or employee numbers, or complaint or case numbers—that would permit comprehensive public assessment of allegations of misconduct and DHS's handling thereof).

In one case, CRCL received a complaint from a minor alleging verbal abuse and denial of food, but waited eight months to forward that complaint to CBP. ER 47 ¶ 3(a) (3d Reddy Decl.); SER 2–3 (3d Reddy Decl. Ex. A). In turn, CBP waited more than eighteen months to respond, and did not rebut the allegations. SER 3. CRCL then *closed* the complaint "with no further action," solely due to "the length of time since the incident." SER 3.[88]

In another case, CRCL received a complaint alleging that a DHS official had kicked a child in the lower back. ER 48 ¶ 3(b) (3d Reddy Decl.); SER 5–9 (3d Reddy Decl. Ex. B). CRCL forwarded the complaint to CBP, which again waited a year and a half to respond. SER 5, 7. In its response, CBP claimed that no Border Patrol agents "could recall" the child's apprehension "due to the length of time that had passed." SER 7. Nearly seven months later—and *two years* after the original complaint—CRCL issued a complaint "closure" letter which claimed that CBP had

[88] The only reason Plaintiffs can discern this timeline is because this information is summarized in a single CRCL document. Most of the production, however, is too disorganized to permit such comprehension. *See* SER 150 ¶ 8 (Reddy Decl.). Additionally, as the names of the DHS officials are redacted from this document, there is no way for Plaintiffs to review CBP's own production to assess what investigation, if any, CBP undertook upon receipt of the CRCL referral (or why it took CBP eighteen months to respond).

"interviewed relevant officers and documentation [sic]" and stated that CRCL "found no evidence to substantiate" the alleged mistreatment. SER 9.[89]

In a third case, CRCL received a complaint and signed affidavit in which a child alleged that a Border Patrol agent had held a gun to his neck and threatened to kill him. ER 48 ¶ 3(c) (3d Reddy Decl.); SER 11–17 (3d Reddy Decl. Ex. C). In its response to the complainant, CRCL stated it had recorded the incident "in a database" but had not initiated an investigation because it already had "an open complaint investigation addressing" similar issues. SER 16.

In another instance, DHS OIG received a complaint and signed affidavit in which a child alleged that a Border Patrol agent had placed him in handcuffs so tight that his left hand went numb; stepped on him; choked him; and dragged him across the ground. ER 48 ¶ 3(d) (3d Reddy Decl.); SER 19–27 (3d Reddy Decl. Ex. D). Although photos reflected at least one of the resulting injuries, OIG closed the complaint one day after receipt, with no explanation. SER 24–27.

One final and particularly egregious example is an OIG spreadsheet summarizing 214 complaints from children alleging physical, verbal, and/or sexual abuse by DHS officials. ER 48–49 ¶ 3(e) (3d Reddy Decl.); SER 29–66 (3d Reddy Decl. Ex. E). As the district court noted, "all but one complaint was 'Referred—No

[89] All known information about this case was also found in a single CRCL document. *See supra* note 88.

Reply' to CBP and marked 'Closed Not Converted.'" ER 9. The court concluded "it appears from this document that virtually no investigations into the complaints took place, or at least were completed." ER 9.

On appeal, Defendants raise an entirely new argument regarding the import of the notations on the OIG spreadsheet. AOB 26–28. As Defendants did not make this argument below, it is waived. *E.g.*, *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 516 (9th Cir. 1992) (appellate court will not consider argument on appeal that was not "raised sufficiently for the trial court to rule on it"). Moreover, Defendants did not produce below the only document cited in support of this new argument—even though, based on the document's date, it was available throughout the pendency of the lower court litigation. AOB 28. Nor have Defendants authenticated or laid an adequate foundation for this document; they provide only the unsworn statements of defense counsel, who has not established personal knowledge of predicate facts. *Cf. Shors v. Treasury Inspector Gen. for Tax Admin.*, 68 F. App'x 99, 100 (9th Cir. 2003) (discussing what constitutes proper evidence in Exemption 7(C) analysis). Indeed, defense counsel's improper characterizations are contradicted by actual record evidence.[90]

[90] Defendants' purportedly exhaustive list of four "final" OIG actions, AOB 28 n.5, does not include an explanation for "Closed Not Converted," even though this notation appears throughout the OIG spreadsheet here, SER 29–66 (3d Reddy

In any event, Defendants' assertion that Plaintiffs and the district court misunderstood "how OIG handles complaints before it" is incorrect. AOB 27. To the contrary: Plaintiffs, and the court, are rightly concerned about evidence that OIG routinely refers and then "closes" complaints *without any public accounting or explanation*. As the district court observed, "one can reasonably believe that agency investigations were insufficient if the documents show that almost none of the over 200 allegations—many of a serious nature—resulted in a *completed* investigation" by OIG *itself*. ER 9.

Lastly, in response to Defendants' assertion that investigations are totally distinct from disciplinary actions, AOB 15, 33, it bears repeating that DHS oversight agencies' failures to generate timely, meaningful reports of investigation also undermine DHS discipline, since authorities like OHRM rely in part on such reports in assessing whether discipline is warranted.[91]

To summarize: there is a significant public interest in understanding *how* and *how well* DHS oversight agencies function—and this interest is likely to be advanced by release of the names of DHS officials alleged to have mistreated

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Decl. Ex. E), and elsewhere in the record, SER 27 (3d Reddy Decl. Ex. D) & SER 78 (3d Reddy Decl. Ex. F).

[91] *See supra* notes 31–32 and accompanying text (explaining function of oversight entities' reports of investigation in DHS disciplinary decisions).

children, which would permit the public to track complaints and ensuing investigations, if any, through Defendants' FOIA production.

C. The Balance of Interests Decidedly Favors Disclosure.

In effect, Defendants have attempted to weaponize FOIA's privacy exemptions to obscure what the government is "up to." *Tuffly*, 870 F.3d at 1094. Where, as here, the public interests outweigh the privacy interest, such attempts must fail. It is by Defendants' own design that DHS officials' names are the only available common identifier in these critical government records. Although Defendants could use badge or employee numbers—release of which might implicate lesser or no privacy interests—they have *chosen* not to. The practical consequence of this design choice is an "all or nothing" situation in which either the public has access to the officials' names (and can assess misconduct allegations and DHS oversight) or does not (and remains in the dark). Considering this context, the district court correctly held that the balance of interests favors disclosure. ER 11.

1. ***Diminished Privacy Interests.***

The DHS officials whose names are at issue here have diminished privacy interests for at least three reasons.

First, federal employees may have diminished privacy interests "because of the corresponding public interest in knowing how public employees are performing

their jobs." *Stern*, 737 F.2d at 92; *Lissner*, 241 F.3d at 1223; *Providence J. Co. v. Dep't of Army*, 981 F.2d 552, 568 (1st Cir. 1992) [hereinafter *Providence*].

Second, "a government employee's privacy interests may be diminished to the extent [the information] *might* disclose official misconduct." *Lissner*, 241 F.3d at 1223; *see also Forest Serv. Emp. for Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1026 (9th Cir. 2008) [hereinafter *FSEEE*]. Two types of misconduct might be disclosed via the names at issue: misconduct by DHS officials charged with caring for unaccompanied children in their custody, and/or misconduct by oversight entities that fail to pursue meaningful investigations in response to voluminous complaints of serious abuse.

Defendants counter by claiming that no "official misconduct" has occurred, and that the officials in question have been "unwarrantedly" associated with "unsubstantiated" wronging. AOB, *passim*. This is inaccurate. As explained, *all* the officials whose names are sought allegedly have mistreated children—and, in many instances, these abuse allegations are supported by victim affidavits and other record evidence.[92] Additionally, the records show that DHS oversight entities deemed many credible allegations "unsubstantiated" solely on the basis of cursory or incomplete investigations.[93] Courts have explained that such allegations,

[92] *See supra* Argument III.B.1.

[93] *See supra* Argument III.B.2.

"although determined unsubstantiated by the agency" "may nevertheless be true, and may pose a serious threat to the public interest." *Providence*, 981 F.2d at 569. Alternatively, "an 'unsubstantiated' allegation may bear upon a claim, supported by independent evidence, that the investigating agency actively engaged in the concealment of the target official's misconduct or otherwise failed to perform its mission." *Id.* This Court has recognized "that the public interest in ensuring the integrity and reliability of government investigation procedures is greater where there is some evidence of wrongdoing on the part of the government official." *Hunt*, 972 F.2d at 289–90; *Favish*, 541 U.S. at 174. These principles control here.

The cases on which Defendants rely are readily distinguished. AOB 12, 21; *Stern*, 737 F.2d at 91 (Exemption 7(C) balancing test "must be applied to the specific facts of each case"). In *Schiffer*, the requester—citing only his "great personal interest"—sought information contained in FBI files pertaining to the agency's investigation of himself. *Schiffer v. FBI*, 78 F.3d 1405, 1407–08 (9th Cir. 1996). In affirming the FBI's Exemption 7(C) withholdings, this Court expressly found "*no* evidence suggesting that the FBI engaged in any wrongdoing." *Id.* at 1410. In *Forest Service Employees*, the Court found none of the government employees in question had "been accused of official misconduct." *FSEEE*, 524 F.3d at 1026. Likewise, in *Lahr*, this Court found "*no* evidence" "that the particular FBI agents mentioned in the requested documents themselves behaved improperly,

or that their individual efforts were unreliable." 569 F.3d at 977. Finally, in *Hunt*, this Court reviewed an FBI investigative file *in camera* and concluded that it "was internally consistent and contained credible evidence that the misconduct had *not* occurred." 972 F.2d at 289. The record here, of course, presents diametric facts.

Third, "the level of responsibility held by a federal employee, as well as the activity for which such an employee has been censured, are appropriate considerations" in balancing the privacy and public interests. *Stern*, 737 F.3d at 92; *FSEEE*, 524 F.3d at 1025–26. Line-level DHS officials are responsible for apprehending and initially caring for unaccompanied children.[94] These officials' awesome power over an exceptionally vulnerable population must be considered in balancing the interests in play. Because they are *the* government officials charged with safeguarding unaccompanied children and complying with federal statutes like the TVPRA, these officials' privacy interests are diminished. *See, e.g.*, *Casa*, 409 F. App'x at 698, 701 (ordering release of names of line-level ICE agents responsible for conducting immigration raid); *Providence*, 981 F.2d at 569 (low-ranking agency official's privacy interest may vary where official has "greater authority or importance").

[94] *See supra* notes 2–4 & 45 and accompanying text.

Defendants' arguments that "lower level" DHS officials necessarily have a "stronger interest in personal privacy than do senior officials," AOB 21, are unavailing.[95] Many of Defendants' records are silent as to rank. *See, e.g.*, SER 116–128 (2d Reddy Decl., Ex. 31) (CRCL memo summarizing complaints without specifying DHS officials' rank). Regardless, as just explained, an official's rank is rarely dispositive. Rather, in assessing an official's privacy interests, courts evaluate that official's role in context. *See, e.g.*, *Lahr*, 569 F.3d at 977 (assessing lower-level FBI agents' privacy interests in context of role in "especially controversial event[]"); *Lissner*, 241 F.3d at 1223–24 (assessing privacy interests of two line-level city police officers fined for smuggling steroids into the country); *see also, e.g.*, *AILA*, 830 F.3d at 675 (explaining that factors such as "types of complaints and circumstances of individual immigration judges" must be considered in evaluating whether balance favored disclosure of judges' names); *Providence*, 981 F.2d at 569 (explaining contextual "considerations [that] lend

[95] Defendants, referring to the General Schedule (GS) classification and pay schedule, state they have withheld the names of all DHS officials "at the GS-14 level or lower." AOB 1, 6. That schedule's highest grade is GS-15. *See Pay & Leave: General Schedule Classification and Pay*, U.S. OFF. OF PERSONNEL MGMT., https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule/. Thus, Defendants' arbitrary delineation effectively amounts to the blanket withholding of nearly all DHS employees' names. Such categorical withholdings of information are antithetical to the FOIA.

themselves to no mechanical rule of disclosure or non-disclosure" in context of lower-level officials' names).

2. ***Paramount Public Interests.***

Balanced against the officials' diminished privacy interests are the paramount public interests previously explicated: (1) assessing (a) the nature, frequency, and extent of allegations of DHS child abuse and neglect during the relevant time period and (b) whether particular government employees allegedly have mistreated children in multiple instances (and, if so, how many, and with what consequences); and (2) elucidating how, and how well, DHS oversight entities function.

The public interest is heightened given the specific context at issue: the federal government's treatment of vulnerable children who have migrated alone to the United States. As evident from multiple Congressional enactments over the past two decades, unaccompanied children deserve and are legally entitled to special concern.[96] The American public has a profound interest in ensuring that DHS officials comply with these federal laws and treat defenseless children entrusted to their custody with care and respect. Likewise, the American public

[96] *See supra* Part I.A, and especially text accompanying notes 7–11 (discussing TVPRA, PREA, VCAA, and *Flores* safeguards for unaccompanied children in DHS custody).

must have access to information sufficient to permit an assessment of whether DHS oversight actually works.[97] This is all the more crucial given evidence that DHS oversight does *not* function.[98] Otherwise, dysfunction can fester and misconduct proliferate, unchecked by "the light of public scrutiny." *Rose*, 425 U.S. at 361.

Defendants contend that, given the thousands of pages they have produced, release of the DHS officials' names are of insufficient "marginal additional usefulness" to overcome the privacy interests. AOB 14–16, 32–34, 37 (citing *FSEEE*, 524 F.3d at 1027).[99] Defendants persistently confuse the *quantity* of records released (only after years of delay and litigation) with the *quality* of information available to the public via those records. Plaintiffs have explained why, without the names at issue, it is impossible to trace the handling of a specific complaint or investigation through Defendants' confused and confusing

[97] Although Defendants often frame the public interest with reference to the ACLU, "the identity of the requesting party has no bearing on the merits of his or her FOIA request." *Roth*, 642 F.3d at 1177.

[98] *See supra* Part I.C (discussing official acknowledgement of serious failures in DHS oversight and discipline systems).

[99] Unlike the FOIA requester in *FSEEE*, Plaintiffs here have never sought to conduct their "own investigation" of the underlying complaints. *Cf.* SER 90–91 ¶¶ 4–5 (Ebadolahi Decl.).

productions.[100] *See ACLU*, 655 F.3d at 14–15 ("The fact that the public already has some information does not mean that more will not advance the public interest.").

Defendants also claim that their records and OIG's three interim reports "demonstrate[ ] multiple ongoing and completed investigations conducted by OIG and the component agencies." AOB 29. This is preposterous. DHS OIG—the oversight entity with the right of first refusal—discontinued routine site inspections of detention facilities just four months after receipt of an administrative complaint that included more than one hundred separate allegations of child abuse by DHS officials.[101] OIG never explained this decision. Nor did OIG ever explain why it chose to investigate only sixteen of the 116 complaints submitted to it, or why it was "unable to substantiate any of the allegations" in those complaints.[102] Moreover, there is abundant record evidence of investigations that were never completed.[103] More generally, Defendants misapprehend the critical distinction between *whether* investigations occurred and whether those investigations were *meaningful*. AOB 12–13, 22–23.

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[100] *See supra* Part I.G.

[101] *See supra* notes 70–71 and accompanying text.

[102] OIG 2D INTERIM, *supra* note 58, at 1; *see supra* notes 56–59 and accompanying text.

[103] *See supra* Argument III.B.2.

Once again, Defendants' cases are readily distinguished. AOB 34–36. In *Lahr*, for example, the National Transportation Safety Board (NTSB) completed "the most expensive and most extensive" civil investigation in its history after the explosion of a commercial plane in New York. 569 F.3d at 969–70. Following this investigation, the NTSB issued a "comprehensive final report" that "explain[ed] its analysis and conclusions in detail." *Id.* at 971. That report, "as well as almost 3,000 documents from the investigation," were made publicly available. *Id.* Lahr, convinced that the investigation "resulted in a massive government cover-up of the real cause" of the plane crash, *id.*, sought the names of FBI investigators "in part to contact them about alleged impropriety by *other* FBI agents involved in the suspected cover-up." *Id.* at 978. Accordingly, "the only way that the identities" of the "FBI agents mentioned in the documents already released would have public value" was by facilitating the direct contact of those individuals by Lahr or the media. *Id.* at 979. Likewise, in *Forest Service Employees*, four different federal agencies had completed investigations of a single incident, and "produced three publicly-available reports." 524 F.3d at 1027. Plaintiff sought release of the names of Forest Service employees withheld from the fourth report. Admitting that "the identities of the employees alone [would] shed no new light on the Forest Service's performance of its duties," Plaintiff stated a desire "to contact these employees

itself to determine what occurred at the Cramer Fire and to confirm the veracity of the publicly-available reports." *Id.*[104]

The district court properly found *Lahr* and *Forest Service Employees*—which both involved extensive, *completed* investigations—entirely distinguishable from the record here. ER 8 ("Plaintiffs show an *absence* of disciplinary investigations on the part of the agencies"); *id.* (OIG's three "interim reports were not of the [same] substance and scope" as *Lahr* or *FSEEE*).

Where, as here, the record reflects an extended game of accountability "hot potato" by various federal agencies, the public interest in disclosure is heightened. *See Dobronski*, 17 F.3d at 280 ("[I]f there is a bureaucratic cover-up going on, that is all the more reason" to compel disclosure). Moreover, DHS oversight entities' apparent failure to pursue meaningful, timely investigations of egregious, recurrent child abuse violates the public's trust, further amplifying the public interest in disclosure. *Cochran v. United States*, 770 F.2d 949, 956 (11th Cir. 1985).

Because the public interests outweigh the privacy interests, this Court should affirm the district court and order Defendants to release the names of the DHS officials at issue. Furthermore, because the information in question does not satisfy

[104] Contrary to Defendants' unsubstantiated claims, AOB 15, 35, Plaintiffs *do not* seek the names of the DHS officials to contact them independently, and have never sought any personally-identifying information that would facilitate such contact (such as address or phone number). SER 90–91 ¶¶ 4–5 (Ebadolahi Decl.).

Exemption 7(C)'s more exacting requirements, it also cannot be withheld pursuant to Exemption 6. *Tuffly*, 870 F.3d at 1092; *Roth*, 642 F.3d at 1173.

In the alternative, and at a minimum, this Court should remand this matter to the district court and require Defendants to provide particularized information regarding the DHS officials' privacy interests and the nature and extent of the misconduct alleged against these officials. *See, e.g.*, *AILA*, 830 F.3d at 676 (remanding for federal agency to "make a more particularized showing for defined subgroups of [officials] and for individual [officials]" to justify name withholdings). Such information would allow the lower court to better assess "the variety in types of complaints and circumstances" concerning each individual DHS official alleged to have mistreated children, which in turn would facilitate additional balancing of the private and public interests at stake. *Id.* at 675; *see also AILA v. EOIR*, 281 F. Supp. 3d 23 (D.D.C. 2017) (applying "particularized analysis required by the D.C. Circuit" on remand).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court to affirm the district court's order requiring Defendants to release the names of the DHS officials here at issue, or, alternatively, to remand with instructions requiring Defendants to provide more particularized information to permit additional balancing of the relevant interests.

Dated: December 17, 2018

ACLU FOUNDATION OF SAN DIEGO AND IMPERIAL COUNTIES

By: */s/ Mitra Ebadolahi*
Mitra Ebadolahi

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STATEMENT OF RELATED CASES
PURSUANT TO CIRCUIT RULE 28-2.6

Plaintiffs-appellees are unaware of any related cases pending in this Court.

s/ Mitra Ebadolahi
Mitra Ebadolahi

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 18-15907

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- ( ) complies with the length limit designated by court order dated _____.
- ( ) is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/Mitra Ebadolahi **Date** 12/17/2018

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 15. Certificate of Service for Electronic Filing

Instructions for this form: http://www.ca9.uscourts.gov/forms/form15instructions.pdf

9th Cir. Case Number(s) 18-15907

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

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Appellees' Answering Brief

Signature /s/Mitra Ebadolahi **Date** 12/17/2018

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