ORAL ARGUMENT NOT YET SCHEDULED

NO. 15-5201

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN IMMIGRATION LAWYERS ASSOCIATION,
Plaintiff-Appellant,

v.

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, *et al.*,
Defendants-Appellees.

On Appeal from a Final Order of the
U.S. District Court for the District of Columbia
(Honorable Christopher R. Cooper)

APPELLANT'S OPENING BRIEF

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October 15, 2015

CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

(1) Parties and Amici. The American Immigration Lawyers Association was the plaintiff in the district court and is the appellant in this Court. The U.S. Executive Office for Immigration Review, its Director, the Department of Justice, and the Attorney General were defendants in district court and are the appellees in this Court.

(2) Rulings Under Review. The rulings under review are the order and accompanying memorandum opinion entered by the Honorable Christopher R. Cooper on December 24, 2014, granting defendants' motion for summary judgment in part and denying plaintiff's cross-motion for summary judgment in part (Joint Appendix (JA) 568-81); the opinion and order entered on June 23, 2015, denying plaintiff's motion to enforce or, in the alternative, to clarify the December 24, 2014, order and opinion (JA637-40); and the final order entered on July 2, 2015 (JA641). The December 24, 2014, memorandum opinion is published. *See Am. Immigration Lawyers Ass'n v. Executive Office for Immigration Review*, 76 F. Supp. 3d 184 (D.D.C. 2014). The June 23, 2015, opinion and order were selected for publication and are available on Westlaw. *See Am. Immigration Lawyers Ass'n v. Executive Office for Immigration Review*, __ F. Supp. 3d __, No. 13-840, 2015 WL 3875801 (D.D.C. June 23, 2015).

(3) Related Cases. This case has not previously come before this Court or any other court. Counsel is aware of no related cases pending before this Court or any other court within the meaning of D.C. Circuit Rule 28(a)(1)(C).

/s/ Julie A. Murray
Julie A. Murray

CORPORATE DISCLOSURE STATEMENT

The American Immigration Lawyers Association (AILA) is a national association of immigration lawyers organized under section 501(c)(6) of the Internal Revenue Code. AILA's mission is to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members. AILA does not have a parent corporation, and no publicly-held company has a 10% or greater ownership interest in it.

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STATUTES, REGULATIONS, AND RULES

MISCELLANEOUS

GLOSSARY

AILA	American Immigration Lawyers Association
APA	Administrative Procedure Act
DOJ	Department of Justice
EOIR	Executive Office for Immigration Review
FOIA	Freedom of Information Act
JA	Joint Appendix

INTRODUCTION

On any given day, roughly 250 immigration judges are at work in our nation's immigration courts. Many judges do an admirable job ensuring that noncitizens receive thorough hearings and fair decisions. A minority, however, have been the subject of complaints—for some judges, more than twenty in just a few years—involving abusive behavior, evident bias, and other wrongdoing. Defendant-appellee Executive Office for Immigration Review (EOIR), which oversees immigration courts, implemented a process for investigating complaints, but the process has been shrouded in secrecy and panned as ineffective.

This case involves an effort by a Freedom of Information Act (FOIA) requester to shine light on the complaint process and misconduct allegations by requesting all complaints against immigration judges and various related records. Although EOIR released many records, it withheld as private information under FOIA Exemption 6 the names of all immigration judges who have been subject to complaints, regardless of complaint outcome or the nature of the alleged misconduct. It also withheld selected information from released records on the ground that the redacted portions are "non-responsive." In addition, EOIR refused to publish online all complaint resolutions, as FOIA, 5 U.S.C. § 552(a)(2), requires for final orders or opinions made in the adjudication of cases.

This appeal challenges the district court's decision largely approving the government's actions. Immigration judges play a powerful role in our country's immigration process. Their decisions can result in "loss of both property and life, or of all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). Records regarding complaints against these judges should be open for public scrutiny.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B). It filed a final order on July 1, 2015. JA641. Plaintiff-appellant timely appealed on July 15, 2015. JA6. This Court has jurisdiction under 28 U.S.C. § 1291.

STATUTES AND REGULATIONS

FOIA Exemption 6, 5 U.S.C. § 552(b)(6), exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

FOIA's affirmative disclosure provision, 5 U.S.C. § 552(a), provides in part:

> (2) Each agency, in accordance with published rules, shall make available for public inspection and copying—
>
> > (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
> > . . .

> unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. . . . Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published.

STATEMENT OF ISSUES

(1) Whether FOIA Exemption 6 allows the government to withhold names and other identifying information of immigration judges about whom complaints are filed with EOIR;

(2) Whether the government may withhold as "non-responsive" portions of records otherwise released in response to a FOIA request that sought "complaints" against immigration judges and a variety of "records" relating to those complaints; and

(3) Whether resolutions of complaints against immigration judges constitute final opinions or orders under FOIA, such that public disclosure and publication online are required, even in the absence of a FOIA request.

STATEMENT OF FACTS AND OF THE CASE

I. The Role of Immigration Judges

EOIR, an office within defendant-appellee Department of Justice (DOJ), oversees immigration courts and immigration judges. Immigration judges conduct

formal court proceedings to determine whether noncitizens are subject to removal from the United States. The judges also determine whether removable individuals are entitled to relief from removal, such as asylum.

Immigration judges routinely make decisions that deeply affect the lives of litigants. They may order asylum seekers to return to countries in which the individuals fear persecution, including death. They may order the deportation of immigrant parents who will leave behind U.S.-born children. They may decide the fates of unaccompanied teenagers who are detained in shelters or institutions for extended periods. And they may adjudicate the rights of individuals who claim U.S. citizenship and are thus not subject to deportation.[1]

In rendering these critical decisions, immigration judges, who are appointed by the Attorney General and are DOJ employees, *see* 8 U.S.C. § 1101(b)(4), are required to "exercise independent judgment," JA334. They must do so with a markedly vulnerable population: Forty-five percent of noncitizens appearing in immigration court are pro se, and many are unable to afford an attorney. EOIR, 2014 Statistical Year Book (2015), Tab F1, *available at* http://goo.gl/vxrsTr. Immigration judges must ensure that pro se individuals understand their rights and

[1] For one example of harm that may result from errors in these decisions, see *Lyttle v. United States*, 867 F. Supp. 2d 1256 (M.D. Ga. 2012), and William Finnegan, *The Deportation Machine*, The New Yorker, Apr. 29, 2013, *available at* http://www.newyorker.com/magazine/2013/04/29/the-deportation-machine.

obligations, and the judges "generally participate[] in questioning" pro se litigants and their witnesses. EOIR, Immigration Court Practice Manual (2008), Ch. 4, at 69, 81, *available at* http://www.justice.gov/eoir/office-chief-immigration-judge-0.

Despite the significant consequences of errors, immigration judges usually provide the last word on the fate of individuals seeking to remain in the United States. Decisions ordering a person removed are final unless appealed or certified to the Board of Immigration Appeals, which is also a part of EOIR. *See* 8 U.S.C. § 1101(a)(47)(B); 8 C.F.R. § 1003.39. Only 10 percent of the more than 136,000 decisions by immigration judges in Fiscal Year 2014 were appealed at the administrative level, *see* EOIR, 2014 Statistical Year Book, Tab V1, *available at* http://goo.gl/vxrsTr, and the Board limits its review of factual findings to clear error, 8 C.F.R. § 1003.1(d)(3). Immigration judges' determinations are also "subjected to particularly narrow appellate scrutiny" in the federal courts of appeals on petitions for review. *Abdulrahman v. Ashcroft*, 330 F.3d 587, 599 (3d Cir. 2003); *see also* 8 U.S.C. § 1252(b)(4).

II. Public Concern Regarding Immigration Judges' Conduct

Whether immigration judges fulfill their obligations is a topic of longstanding public concern. News reports recount worrisome incidents involving immigration judges' biased or abusive treatment of litigants, and document

weaknesses in the integrity of the immigration courts.[2] Scholars have discussed such problems as well.[3]

Moreover, federal courts of appeals routinely complain that some immigration judges are intemperate, treat litigants unfairly, and are incompetent. They have taken to criticizing immigration judges by name in published opinions. For example, the Ninth Circuit identified Immigration Judge Anna Ho in an opinion noting that she had "exhibit[ed] a fundamental disregard for the rights of individuals who look to her for fairness." *Cruz Rendon v. Holder*, 603 F.3d 1104, 1111 n.3 (9th Cir. 2010); *see also, e.g.*, *Yung Ying Shi v. Holder*, 337 F. App'x

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[2] *See, e.g.*, Interview Transcript with Jacqueline Stevens and Emily Guzman, *"Lawless Courts": Lack of Accountability Allows Immigration Judges to Violate Laws, Deport US Citizens* (Oct. 22, 2010), *available at* http://goo.gl/OBC7; Nina Bernstein, *Judge Who Chastised Weeping Asylum Seeker Is Taken Off Case*, N.Y. Times, Sept. 20, 2007, *available at* http://goo.gl/iEh7WC; Gaiutra Bahadur, *'Bullying' Immigration Judge Absent, Replaced*, Phila. Inquirer, June 2, 2006, *available at* http://goo.gl/7ZBDNw; Ann M. Simmons, *Some Immigrants Meet Harsh Face of Justice: Complaints of Insensitive—Even Abusive—Conduct by Some U.S. Immigration Judges Have Prompted a Broad Federal Review*, L.A. Times, Feb. 12, 2006, *available at* http://goo.gl/6gCGoZ.

[3] *See, e.g.*, Michele Benedetto, *Crisis on the Immigration Bench*, 73 Brook. L. Rev. 467, 469-70 (2008) (stating that "[m]any immigration judges appear to be determining cases in a haphazard manner, with decisions influenced more by personal preferences than by careful consideration of facts and law" and that, "[a]s a result, litigants in immigration court can no longer be assured of ethical and accurate decision-making when they present their case to an immigration judge"); Lindsey R. Vaala, Note, *Bias on the Bench: Raising the Bar for U.S. Immigration Judges to Ensure Equality for Asylum Seekers*, 49 Wm. & Mary L. Rev. 1011, 1040 (2007) (noting that "misconduct by [immigration judges], even one-time offenders, can be shockingly egregious").

666, 668 (9th Cir. 2009) (concluding that Judge Ho "badgered [the petitioner] with loaded, pejorative questions and effectively abandoned her role as a neutral fact finder"). In a different opinion, that court surveyed cases in which it had reversed Judge Ho's credibility findings and stated that it could not "help but question whether this [immigration judge] has, at least in some instances, improper hostility towards asylum applicants who appear before her." *Smolniakova v. Gonzales*, 422 F.3d 1037, 1047 & n.2 (9th Cir. 2005).

Similarly, the Third Circuit has criticized Immigration Judge Annie Garcy for becoming "the functional equivalent of counsel for one of the parties" during a hearing. *Abulashvili v. Attorney Gen.*, 663 F.3d 197, 207-08 (3d Cir. 2011). It remarked that the case was "not the first time that Judge Garcy's conduct in a hearing ha[d] come to [the Court's] attention," and it described two previous cases, including one in which the "tone, the tenor, the disparagement, and the sarcasm of the [immigration judge] seem[ed] more appropriate to a court television show than a federal court proceeding." *Id.* at 208 n.11 (internal quotation marks omitted).

Unfortunately, the steady stream of public exposés and judicial criticism has been insufficient to address concerns. Judges Ho and Garcy, for example, remain on the bench. *See* EOIR, Immigration Court Listing, http://www.justice.gov/eoir/eoir-immigration-court-listing (updated Sept. 2015). Likewise, Judge Craig Zerbe remained a sitting immigration judge years after the Seventh Circuit directed the

court clerk to send the appellate court's opinion to the Attorney General to determine whether disciplinary action against the judge was warranted. *Floroiu v. Gonzales*, 481 F.3d 970, 976 (7th Cir. 2007). In 2013, that court again felt "compelled to note" in a published opinion that Judge Zerbe's conduct during a hearing was "inappropriate," and that the judge "seemed only interested in answers that parroted back the exact language of [a] Wikipedia entry" on which he relied to gather information about the petitioner's religion. *Singh v. Holder*, 720 F.3d 635, 643-44 (7th Cir. 2013); *see also, e.g.*, *Islam v. Gonzales*, 469 F.3d 53, 56-57 (2d Cir. 2006) (noting that the case marked "the seventh time that [the court] ha[d] criticized" Immigration Judge Chase's on-the-bench conduct and remanding for further proceedings before a different immigration judge).

III. EOIR's Complaint Process

In response to this widespread criticism, the Attorney General initiated a review of immigration courts in 2006. Based on that review, he directed EOIR to take steps to improve the immigration courts. As relevant here, he mandated that EOIR review its "procedures for handling complaints against its adjudicators, and . . . develop a plan based on that review to (i) standardize complaint intake procedures; (ii) create a clearance process that w[ould] clearly define the roles of EOIR, [DOJ's Office of Professional Responsibility], and [DOJ's Office of Inspector General] in the handling of any particular complaint; and (iii) ensure a

timely and proportionate response." Memo. from Alberto Gonzales to the Deputy Attorney General, et al., Measures To Improve the Immigration Courts and the Board of Immigration Appeals 4 (Aug. 9, 2006), JA420.

Following the Attorney General's instruction, EOIR adopted what it described to Congress as "new, rigorous procedures for reporting and investigating allegations of judicial misconduct." *See* EOIR: Hearing Before the Subcomm. on Immigration, Citizenship, Border Security, & Int'l Law of the H. Comm. on the Judiciary, 110th Cong., 2d Sess. (Sept. 23, 2008) (testimony of Kevin Ohlson, EOIR Director), JA430. EOIR encouraged the public to use its complaint process and to submit complaints online. *See*, *e.g.*, Government Accountability Office, Executive Office for Immigration Review: Caseload Performance Reporting Needs Improvement 27-29 (2006), JA412-14.

EOIR and DOJ also made formal personnel changes to implement the procedures. DOJ amended its regulations to add to the EOIR director's "duties" the "[i]mplement[ation] [of] a process for receiving, evaluating, and responding to complaints of inappropriate conduct by EOIR adjudicators." 8 C.F.R. § 1003.0(b)(1)(viii), *as amended by* DOJ, Authorities Delegated to the Director of the Executive Office for Immigration Review and the Chief Immigration Judge, 72 Fed. Reg. 53,673 (2007). In addition, EOIR created the position of Assistant Chief Immigration Judge for Conduct and Professionalism to be "responsible for

reviewing and monitoring all complaints against immigration judges." Memo. from Kevin D. Rooney, EOIR Director, to All EOIR Employees: The Attorney General's Directives, JA435. That individual works with the Chief Immigration Judge, DOJ's Office of Professional Responsibility, and DOJ's Office of Inspector General "to ensure that investigations of complaints are concluded as quickly as possible and that disciplinary action, if appropriate, is imposed in an expeditious manner." *Id.*, JA437. Over the next several years, EOIR created an electronic database to track complaints, and it released some additional information about the complaint process. JA142-43, ¶¶ 17, 19; JA151-56.

Under the current process, EOIR receives complaints from various sources, including noncitizens appearing in immigration court, their attorneys, the Board of Immigration Appeals, federal courts of appeals, the media, and government employees. JA145, ¶ 25. EOIR can resolve complaints by imposing discipline (termination, suspension, or reprimand); taking corrective action, such as training or oral counseling; dismissing the complaint, for example, where a complainant fails to state a claim; or concluding a complaint where an intervening development—such as a judge's retirement—renders the complaint moot. JA153-54, JA156. Where EOIR takes disciplinary action against an immigration judge, the judge may challenge that action "by either filing a grievance under the negotiated grievance procedure or by pursuing applicable statutory remedies."

JA146, ¶ 28; *see also, e.g.*, *Levinsky v. DOJ*, 99 M.S.P.R. 574, 2005 WL 2320078 (M.S.P.B. Sept. 9, 2005), *aff'd*, 208 F. App'x 925 (Fed. Cir. 2006).

EOIR's complaint process has been the subject of significant criticism. Some observers are concerned about EOIR's willingness to discipline judges and its ability to be a neutral arbiter. For example, the American Bar Association received comments that the "discipline of immigration judges is almost wholly contained within EOIR and DOJ, without external review in most instances." American Bar Ass'n, Reforming the Immigration System 2-23, 2-24 (2010), *available at* http://goo.gl/eGHp9a. The organization concluded that this fact, "[w]hen coupled with a lack of transparency," contributed to the risk of "misuse and abuse of disciplinary procedures." *Id.* at 2-24. Based on the perception that EOIR has failed to act, others have questioned whether the complaint process should be removed from current decisionmakers or whether EOIR staff should themselves be investigated for their alleged mishandling of misconduct allegations. *See* Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens As Aliens*, 18 Va. J. Soc. Pol'y & L. 606, 715 (2011); Benedetto, *Crisis on the Immigration Bench*, 73 Brook. L. Rev. at 520.

Others have documented the lack of transparency in EOIR's complaint process. The American Bar Association concluded in 2010 that aside from some basic statistics from 2006, "information about the complaint process and resulting

disciplinary actions [was] generally not available." Reforming the Immigration System 2-23. A news report that same year cited immigration lawyers who believed that "complaints against immigration judges to [EOIR] seem[ed] to go into a 'black hole.'" Marcia Coyle, *Bad Behavior by Judge Reverses Asylum Ruling*, Nat'l Law J., Jan. 25, 2010. Two years later, a report indicated that despite improvement, EOIR still did not provide specific information on the disciplinary actions taken against immigration judges. *See* Betsy Cavendish & Steven Schulman, Reimagining the Immigration Court Assembly Line: Transformative Change for the Immigration Justice System (2012), JA448. That report also revealed that EOIR urged some immigration judges "to retire or resign without any formal disciplinary proceeding." *Id.*, JA447.

IV. The FOIA Request and This Litigation

The American Immigration Lawyers Association (AILA)—the FOIA requester in this case—is a national association of more than 13,000 attorneys and law professors who practice and teach immigration law. JA461, ¶ 3. AILA and its members have expertise on issues relating to immigration courts and proceedings. JA462-63, ¶ 15.

Disturbed by the scarcity of information about EOIR's investigation and resolution of complaints against immigration judges, AILA submitted a FOIA

request to EOIR in November 2012 seeking:

> (1) All complaints filed against immigration judges;
>
> (2) All records that reflect the resolution of complaints filed against immigration judges, including the type of informal action taken, if any, or formal discipline imposed, if any;
>
> (3) All records that reflect the reasons for resolving complaints against immigration judges and/or findings relied on to resolve complaints against immigration judges, including any reports or memoranda from the Department of Justice Office of Professional Responsibility (OPR) or Office of the Inspector General (OIG);
>
> (4) All records incorporated by reference in documents that reflect the resolution of complaints filed against immigration judges; and
>
> (5) An index of the records described in paragraphs (2), (3), and (4) to the extent that those records constitute final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases, pursuant to 5 U.S.C. § 552(a)(2)(A).

JA121. The request initially covered complaints resolved on or after January 1, 2007, JA122, but AILA subsequently narrowed the covered time period to complaints resolved after September 30, 2009, JA338-39. Pursuant to 5 U.S.C. § 552(a)(2), which provides that an agency must disclose certain information even absent a FOIA request, AILA also requested that EOIR "post on its website all final opinions, including concurring and dissenting opinions, and orders made in the adjudication of complaints against immigration judges." JA122.

EOIR denied AILA's request for a public interest fee waiver, and AILA administratively appealed to DOJ. JA26, ¶¶ 8-9. More than five months later, after

receiving no response, AILA filed suit against EOIR and DOJ. Its complaint sought disclosure of the records and a waiver or reduction in processing fees. *See* JA16-17, ¶¶ 31-40. AILA also asserted that defendants violated FOIA's affirmative disclosure provision, 5 U.S.C. § 552(a)(2), by failing to make electronically available final opinions and orders resolving complaints. JA17-18, ¶¶ 41-45. In the event the court held that it lacked authority to order affirmative electronic publication under FOIA, AILA sought that relief in the alternative under the Administrative Procedure Act, 5 U.S.C. § 706, and Mandamus and Venue Act, 28 U.S.C. § 1361. *See* JA18-19, ¶¶ 46-54. It named the Attorney General and EOIR Director as defendants for this purpose.

EOIR began producing records to AILA without charge, and AILA posted releases on its public website. *See* AILA, AILA Receives Records Relating to EOIR Misconduct in FOIA Lawsuit, http://www.aila.org/infonet/eoir-records-relating-misconduct; *see also* JA340, ¶ 8. By August 2014, the documents had been viewed more than 4,800 times. JA463, ¶ 5. However, the requested records contained many redactions. As relevant here, the government relied on FOIA Exemption 6, which protects from disclosure certain personal, private information, to redact information that it determined would identify immigration judges, including the judges' names and genders, the cities where judges are based, and media articles and cases identifying judges. EOIR provided AILA with a key that

assigned a unique identifier to each judge about whom at least one complaint was filed; that key matched the identifier with all corresponding complaints. JA339, ¶ 7. In addition to the Exemption 6 withholdings, the government redacted as "non-responsive" full or partial sentences, paragraphs, and pages of information from responsive records. The government did not post any of the complaint resolutions online, as FOIA, 5 U.S.C. § 552(a)(2), requires for final orders and opinions. The government produced *Vaughn* indices with respect to the Exemption 6 redactions, *see, e.g.*, JA165-66, and a small number of the redactions marked as non-responsive, JA340, ¶ 10.

The parties filed cross-motions for summary judgment. With its opposition, the government provided a new *Vaughn* index to account for redactions marked "non-responsive." JA480-87. It explained that those redactions either "concern[ed] a matter unrelated to the complaint and its resolution" or "concern[ed] unrelated complaints." *E.g.*, JA480. The government stated that it redacted information that concerned "unrelated complaints" to make "it easier" for AILA "to understand the subject complaint file." JA477, ¶ 7.

The district court granted summary judgment to the government with respect to the Exemption 6 redactions. It concluded that, "[a]s non-supervisory, career civil servants, immigration judges retain privacy rights that outweigh the incremental public interest in revealing their identities." JA569. Without responding to the

specific public interests in disclosure identified by AILA, the district court concluded that revealing immigration judges' identities would not "appreciably illuminat[e] the agency's performance of its duties." JA577.

With respect to the affirmative disclosure claim, the court concluded in two paragraphs that "because the [complaint] resolutions are not the result of an adversarial process and do not carry the force of law," they do not constitute final orders or opinions under FOIA that must be posted electronically. JA569. It portrayed EOIR's complaint process as voluntary and emphasized that the process is not mandated by statute. JA579.

The district court ambiguously dealt with AILA's claim involving redactions marked "non-responsive" because the information was purportedly either unrelated to any complaint or related to complaints not at issue in the complaint file in which the information appeared. The court first provided an outline of its decision indicating Exemption 6 redactions were proper but that summary judgment was granted to AILA "with respect to EOIR's redaction of other information in the complaint files." JA569. In a later part of the opinion (and in the order), however, the district court did not address the government's assertion that it could withhold information as "non-responsive" if the information was unrelated to *any* complaint. Rather, in a single paragraph of the opinion, the court explained why the government must disclose information marked "non-responsive" if the government

had redacted that information based on an asserted intent to make it easier for AILA to understand the complaint file. JA577-78; *see also* Order, JA580-81.

The government then produced some information previously withheld as non-responsive but contended that it had no obligation to provide information initially redacted on the ground that it was unrelated to any complaint. AILA notified EOIR that the government had failed to comply with the court's order. JA585-88. In response, the government produced some additional information previously withheld as non-responsive and a new *Vaughn* index for remaining redactions marked as non-responsive. Those redactions covered portions of more than 60 pages of records. *See* JA590-609.

AILA filed a motion to enforce or, in the alternative, to clarify the court's decision. The court denied the motion, stating that it "never meant to suggest that EOIR could not redact *any* material as 'non-responsive'" and that "[t]he practice of redacting non-responsive materials from documents produced in response to FOIA requests has been approved by courts in this Circuit." JA638. In the court's view, "so long as the information in question is clearly and without any doubt unrelated to the subject of the request, and its redaction will not interfere with AILA's ability to understand or contextualize the responsive material, EOIR is not obligated to produce it." JA639 (internal quotation marks and citation omitted). Relying on the government's new *Vaughn* index, the court concluded that the redacted

information was "irrelevant" to AILA's request and not subject to release. *Id.* It did not address AILA's argument that the plain language of the request sought "complaints" and "records," not just "information," such that any document released to AILA was responsive in its entirety.

The district court entered a final order in July 2015, JA641, and this appeal followed.

SUMMARY OF ARGUMENT

Immigration judges' names and other identifying information, as they appear in complaints and related records, are not covered by FOIA Exemption 6, which requires a balancing of the public interest in disclosure against the privacy interests at stake. The district court's conclusion exempting such information from release suffers from three fatal flaws. First, the district court did not address *any* evidence introduced by AILA with respect to the public interest served by further disclosure, and it assumed—contrary to this Court's case law—that disclosure of an employee's name reveals nothing about the operations or activities of the government. Second, although the district court appropriately took stock of immigration judges' responsibilities in conducting Exemption 6 balancing, it selectively viewed the facts relevant to that inquiry and deemed case law in dissimilar circumstances controlling of the outcome here. Third, the district court erred in applying a categorical approach to withholding that treats all complaint

files equally, without regard to the nature of the complaints and the seriousness of the conduct alleged. That approach is inconsistent with this Court's decision in *Prison Legal News v. Samuels*, 787 F.3d 1142 (D.C. Cir. 2015).

The district court likewise erred in permitting the redaction of information deemed "non-responsive" from records released to AILA. Because AILA's request sought "complaints" and "records" related to complaints, any responsive record was responsive in its entirety. Moreover, the redactions are improper because they are at odds with FOIA's broad disclosure aim, as DOJ has recognized in guidance to federal agencies. In addition, case law in the discovery context, in which the weight of authority disapproves of such redactions, further calls into question the district court's decision. Redacting information as non-responsive from responsive records will also create inefficiencies by encouraging requesters to file follow-up requests seeking precisely the same material, lead to inevitable delay that benefits no one but agencies bent on circumventing FOIA, and draw federal courts into disputes over material that, if released, threatens no cognizable harm under FOIA.

Finally, the district court misconstrued FOIA's affirmative disclosure provision, 5 U.S.C. § 552(a)(2)(A), when the court determined that complaint resolutions are not final orders or opinions for which affirmative electronic disclosure is required. EOIR's complaint process is not voluntary, and the fact that it does not derive from a statutory obligation is irrelevant. And contrary to the

district court's conclusion, the complaint process *is* adversarial and the resolutions *do* have binding effect within EOIR.

STANDARD OF REVIEW

This Court reviews de novo decisions granting summary judgment in FOIA cases. 5 U.S.C. § 552(a)(4)(B); *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1112 (D.C. Cir. 2007). It must determine whether the agency has met its burden of showing that requested records are exempt from disclosure. *Summers v. DOJ*, 140 F.3d 1077, 1080 (D.C. Cir. 1998).

ARGUMENT

I. Immigration Judges' Identities Are Not Covered by Exemption 6.

FOIA Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). AILA does not dispute that the requested records constitute files "similar" to those covered by Exemption 6 or that immigration judges have more than a de minimis privacy interest in the release of their names and identifying information in the complaint files. Accordingly, this Court need only address whether any privacy interest accorded immigration judges outweighs the public interest in their identities, such that disclosure would constitute a clearly unwarranted invasion of the judges' privacy. *Id.*; *see, e.g.*, *Jurewicz v. USDA*, 741 F.3d 1326, 1332 (D.C. Cir. 2014); *Nat'l Ass'n of Home*

Builders v. Norton, 309 F.3d 26, 33 (D.C. Cir. 2002). In making that assessment, the Court must be mindful that "FOIA's strong presumption in favor of disclosure is at its zenith" under Exemption 6. *Jurewicz*, 741 F.3d at 1332 (internal quotation marks and citation omitted).

A. The District Court Ignored Key Evidence of the Public Interest in Disclosure.

Under Exemption 6, the public interest measures "the extent to which disclosure would serve" FOIA's central purposes "by contributing significantly to public understanding of the operations or activities of the government." *Nat'l Ass'n of Home Builders*, 309 F.3d at 33 (internal quotation marks and alteration omitted). Disclosure of immigration judges' names would help hold individual judges accountable for their conduct; encourage additional reporting of complaints, which would in turn further inform EOIR and the public about immigration judges' actions; and help AILA and the public effectively evaluate EOIR's processing and resolution of complaints.

Although the district court recited AILA's arguments in this regard, *see* JA574, it did not respond to them. It merely stated that while "AILA has raised important public policy concerns regarding the operation of the nation's immigration courts, AILA can pursue these objectives through the records EOIR has already released." JA577. The court concluded that additional disclosure "would encroach upon [judges'] privacy interests without appreciably illuminating

the agency's performance of its duties." *Id.* The district court's conclusory decision ignores the substantial evidence on the public side of Exemption 6's balancing test.

1. Disclosure will shed light on immigration judges' conduct and help hold judges and EOIR accountable.

The district court's opinion presumes that disclosing an immigration judge's name will reveal nothing about EOIR's operations. This Court's precedent is to the contrary. In *Stern v. FBI*, for example, this Court ordered the government to release the identity of a high-level official who engaged in a cover-up regarding illegal agency activity. *Stern* recognized a public interest in "knowing *who* the public servants are that were involved in the governmental wrongdoing, in order to hold the governors accountable to the governed." 737 F.2d 84, 92 (D.C. Cir. 1984). Likewise, in *Prison Legal News*, this Court recognized a public interest in identifying federal employees alleged to have engaged in wrongdoing for which the agency paid money in connection with lawsuits or claims brought against it. 787 F.3d at 1151. The Court stated:

> Identifying employees who repeatedly engage in tortious or discriminatory conduct will shed light on an agency's performance of its statutory duties. This, in turn, will further the public interest in ensuring that disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner.

Id. (internal quotation marks, citations, and alteration omitted); *see also Baez v. DOJ*, 647 F.2d 1328, 1339 (D.C. Cir. 1980) (noting that "the public interest might be served by the release of the names of particular [Federal Bureau of

Investigation] agents" in instances "in which the performance of a particular agent . . . is called into question").

The evidence here supports the same public interest recognized in these cases. As one declarant with expertise regarding the immigration courts and EOIR's complaint process stated, "[g]reater public scrutiny is likely to encourage greater voluntary compliance with ethics standards, standards of judicial conduct, and DOJ policies than the current system." JA464, ¶ 11; *see also* JA470, ¶ 12 (similar observation from another declarant). Moreover, as another declarant explained, there are ongoing efforts in at least four cities by immigration attorneys and other members of the public to monitor certain judges' dockets; these monitoring groups are based on a "shared view that [EOIR's] complaint process is completely ineffectual." JA469-70, ¶ 9. Release of immigration judges' names in relation to complaints would allow these groups to direct their attention to courtrooms where complaints "suggest or confirm a pattern of misconduct or abusive behavior by particular judges." JA470, ¶ 13.

One need only look at some of the complaint files in this case (and the many federal court decisions describing immigration judge misconduct) to confirm that identifying immigration judges is of great public interest. For example, the files describe a judge who referred in court to a litigant's child with autism as a "wild animal posing as a child." JA343, ¶ 19; JA388-99. Records indicate that EOIR

recognized this judge as a repeat offender, and a government employee expressed the opinion that the judge should not be on the bench. JA343-44, ¶ 20; JA400-06. Other records describe a judge who repeatedly engaged in unfounded speculation in credibility findings; inappropriately called a respondent "simple" and commented on her illness and mastectomy; stated that he or she could not imagine a particular female noncitizen supervising a construction site because she was "exceedingly mousy"; and observed that a noncitizen seeking asylum on the basis of sexual orientation did not *seem* gay, thus leading a court of appeals to conclude that the judge engaged in impermissible stereotyping. JA341-42, ¶ 15.

The public's interest in identifying immigration judges extends beyond substantiated complaints resulting in disciplinary action. As discussed above, the integrity of the complaint process itself is in doubt. *See*, *e.g.*, JA468, ¶ 6 (declarant expressing concern that EOIR's process "is entirely an 'in-house' operation" and that National Immigration Project members perceive the process as "not effective at holding judges accountable"); *see also supra*, pp. 11-12. Moreover, the records released to AILA demonstrate that EOIR rarely takes disciplinary action against judges, even those against whom many complaints have been lodged. For example, seven judges were the subject of 20 or more complaints resolved after late 2009, and were responsible for 186, or nearly a quarter, of all complaints in the release.

JA341, ¶ 13. Of those seven judges, five were never subjected to disciplinary action. *Id.*; *see also, e.g.*, JA342, ¶ 17 (describing one such judge).

Beyond this raw data, an examination of complaint files reveals disturbing conduct by immigration judges subject to no formal discipline. For example, Judge "OPU" was the subject of 29 complaints in the sample, 24 of which were resolved by "oral counseling" and one by "training." JA 342, ¶ 16. This judge was the subject of numerous complaints regarding his or her intemperate comments and demeanor at hearings, including one complaint related to the judge's "overwhelming hostility, sarcasm[, and] intimidation" in juvenile immigration proceedings. *Id.* In response to one noncitizen seeking asylum who did not know who had killed his uncle, the judge asked, "Okay then who do you believe shot your uncle? The butcher, the baker, the candlestick maker, the priest, the nun?" *Id.*

In addition, some judges drew complaints that were closed without action when the judges retired. For example, 30 complaints were filed against Judge "HKX" in the sample released to AILA, and the judge was, at most, subject to "oral counseling" as a result of those complaints. JA341, ¶ 14. EOIR resolved 24 of the complaints by concluding that no further action was needed when the judge retired. *Id.* This data reflects EOIR's admission that it urges some judges to "retire or resign without any formal disciplinary proceeding," and that EOIR's full "efforts to address unprofessional conduct" are therefore not captured by aggregate

data describing complaint resolutions. Cavendish & Schulman, Reimagining the Immigration Court Assembly Line 35, JA447; *see also* JA147, ¶ 29 (EOIR declarant stating that complaints may be concluded without action because of an intervening event, such as a judge's retirement or resignation).

The startling patterns of misconduct evidenced by the complaint records underscore the public's interest in knowing immigration judges' identities.

2. Disclosure will encourage complaint reporting and more fully inform EOIR and the public.

Release of immigration judges' identities will likely encourage further reporting, thus strengthening EOIR's complaint process. As one declarant who works with immigration attorneys observed, "[w]ithout any knowledge of which immigration judges have been subject to complaints, private attorneys have legitimate concerns that filing a complaint might subject them or their clients to retaliation by certain immigration judges." JA464, ¶ 12; JA468-69, ¶ 8 (another declarant describing an instance in which a private immigration attorney was subject to retaliation for questioning an immigration judge's conduct). The declarant indicated that private attorneys will feel more comfortable reporting a complaint if they know that the conduct about which they are filing a report has been experienced by others. JA464-65, ¶ 12; JA471, ¶ 14 (another declarant noting that there would be "strength in numbers" if the public knew which judges had been subject to complaints). Since private attorneys now compose roughly one-

third of all complainants, *see* EOIR, Executive Office for Immigration Review, Complaint Statistics for Oct[.] 1, 2013, to Sep[t.], 30, 2014, *available at* http://goo.gl/W5gKcR; *see also* JA136 (providing data for an earlier year), an increase in their reporting is likely to generate more information helpful to EOIR and the public.

3. Identifying immigration judges will facilitate effective evaluation of EOIR's complaint process.

Although the public can draw some conclusions from anonymized records, more effective analysis could be performed if immigration judges' names were available. *See Am. Civil Liberties Union v. DOJ*, 655 F.3d 1, 15 (D.C. Cir. 2011) ("The fact that the public already has some information does not mean that more will not advance the public interest."). For example, in a different context, the Government Accountability Office has used immigration judges' names to find public biographical data helpful in assessing which individual characteristics predict a judge's willingness to grant asylum. *See* GAO, U.S. Asylum System: Significant Variation Existed in Asylum Outcomes Across Immigration Courts 65-67, Appendix I (2008), JA456-58. Using a similar approach, researchers could use the information sought here to assess whether the characteristics of judges—such as gender or experience—affect the likelihood of a complaint being filed against a judge or the agency's resolution of complaints. *See Am. Civil Liberties Union*, 655

F.3d at 15-16 (recognizing that Exemption 6's public interest includes derivative uses of information in requested records).

Identifying immigration judges would also ensure that the public can use records already released in conjunction with records related to future complaints, and thus assess how EOIR imposes progressive discipline going forward. FOIA does not require the creation of records, and EOIR is not bound to use the unique identifier key that it developed for this litigation or to create similar keys for future releases pursuant to 5 U.S.C. § 552(a)(2)(A) or other FOIA requests. Accordingly, immigration judge names are necessary to ensure that the public can match existing information with information released in the future.

B. In Performing Exemption 6 Balancing, the District Court Misunderstood the Role of Immigration Judges and Relied on Case Law Involving Dissimilar Employees.

Exemption 6 "does not categorically exempt individuals' identities," including the identities of federal employees implicated in misconduct. *Prison Legal News*, 787 F.3d at 1147 (internal quotation marks omitted). When determining whether a public interest in disclosure of alleged misconduct outweighs a federal employee's interest in privacy, this Court has stated that it will "ordinarily be enough for the court to consider . . . the rank of the public official involved and the seriousness of the misconduct alleged." *Kimberlin v. DOJ*, 139 F.3d 944, 949 (D.C. Cir. 1998); *Prison Legal News*, 787 F.3d at 1150-51. The

Court supplements these non-exclusive factors in some cases, including by examining the strength of evidence that wrongdoing has occurred. *Beck v. DOJ*, 997 F.2d 1489, 1494 (D.C. Cir. 1993); *see also Kimberlin*, 139 F.3d at 949 (considering the extent to which an investigation of employee conduct had been publicly acknowledged); *accord Jefferson v. DOJ*, 284 F.3d 172, 180 (D.C. Cir. 2002).

The district court erred in considering only one factor (the responsibilities of immigration judges) in its Exemption 6 balancing. A court has an obligation to consider not only the role of the employees at issue but also the seriousness of the misconduct alleged and, in the appropriate case, the strength of the evidence of wrongdoing. *See Kimberlin*, 139 F.3d at 949; *Beck*, 997 F.2d at 1494; *Prison Legal News*, 787 F.3d at 1150-51. Yet the district court here paid no heed to these considerations, an error discussed further in Part I.C, below. Even looking only to the one factor considered by the court, however, the court's conclusion that immigration judges' responsibilities bring the judges' identities within the scope of Exemption 6 cannot be sustained.

The district court held that because immigration judges are not "political appointees or senior managers," and instead are "unionized, non-supervisory civil servants," the balancing test favors withholding. It concluded that immigration judges have no more responsibility than Drug Enforcement Agency agents or

Assistant U.S. Attorneys—the employees at issue in *Beck*, 997 F.2d 1489, and *Kimberlin*, 139 F.3d 944, whose personal information this Court held exempt from disclosure under Exemptions 6 and 7(c), respectively.

Under this Court's precedent, however, the district court should have deemed immigration judges high-level officials about whom the public has a strong interest in disclosure. For example, in *Stern*, this Court held that Exemption 7(c) did not bar disclosure of the identity of a Federal Bureau of Investigation agent censured for knowingly taking part in a cover-up. 737 F.2d at 93-94. Exemption 7(c)—which applies only to records compiled for law enforcement purposes—is *more* protective of privacy interests than Exemption 6. *See DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989). *Stern* determined that the Exemption 7(c) balancing favored disclosing the agent's identity despite evidence that the agent was "follow[ing] specific directions" from his superior to engage in the misrepresentation. 737 F.2d at 87. Moreover, with respect to two lower-level employees who were inadvertently involved in improper agency activities, the Court held that, although their names need not be disclosed from censure letters, the issue was a "close one" under Exemption 7(c). *Id.* at 93-94.

The case for releasing immigration judges' names is as compelling, if not more so, than the case for disclosure of the high-level agent's name in *Stern*. Most

obviously, this case involves Exemption 6, not 7(c), so the government must show that disclosure "*would* constitute a *clearly* unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6) (emphasis added), not just that it "could reasonably be expected to constitute an unwarranted invasion of personal privacy," *id.* § 552(b)(7)(C). Moreover, far from "follow[ing] specific directions" like the agent in *Stern*, 737 F.2d at 87, immigration judges are expected to exercise independent judgment, JA334. And unlike *Stern*, where the FOIA requester sought censure records based on a one-time investigation, here AILA seeks employee names in records that oftentimes demonstrate repeated investigations.

This Court's decision in *Bast v. DOJ* further supports disclosure. *Bast* involved an allegation that a federal judge unlawfully directed a court reporter to delete portions of a court transcript. 665 F.2d at 1252. The government investigated but declined to prosecute the judge. A FOIA requester then sought records related to the incident and the government's investigation. This Court declined to order the release under Exemption 7(c) of some documents because they contained personal medical information or "reveal[ed] allegations of wrongdoing by suspects who never were prosecuted or the names of third parties who had some role in an investigation." *Id.* at 1254. The Court held that Exemption 7(c), however, did not cover material in which an investigating agent "attribute[d] to [the judge] remarks which could be interpreted to indicate that the judge was

biased in favor of the government." *Id.* at 1255. The Court noted that "even the possibility that [the judge] could have intended to reveal a bias raises a significant issue of public concern," and it recognized that "[j]udicial impartiality is essential to the integrity of the nation's courts." *Id.* at 1255. Similarly, in this case, the withheld information will reveal information that may suggest judges' bias on the bench or other misconduct not in keeping with standards for immigration judges.

Accordingly, under this Court's precedent, the public interest in disclosing immigration judges' identities outweighs the judges' privacy interest. *See also Dobronski v. FCC*, 17 F.3d 275, 280 (9th Cir. 1994) (holding that release of sick-leave records with employee's name was appropriate where public had a strong interest in knowing whether agency's sick-leave policy was being abused); *Chang v. Dep't of Navy*, 314 F. Supp. 2d 35, 44 (D.D.C. 2004) (holding that release of information about disciplinary action taken against a commander of a ship after a publicized collision would be permissible under FOIA Exemption 6).

In permitting withholding under Exemption 6, the district court read *Beck* and *Kimberlin* to require withholding here. But immigration judges are not analogous to the employees at issue in those cases. Immigration judges serve a judicial function, not a prosecutorial or investigatory function like the Assistant U.S. Attorney in *Kimberlin* or the drug enforcement agents in *Beck*. Immigration judges are also expected to exercise independent judgment. JA334. Their decisions

are typically the final word on the fate of the individuals who come before them, and the judges' factual determinations, to the extent they are subject to review, are reviewed only for clear error. 8 C.F.R. §§ 1003.1(d)(3); 1003.39. In these respects, immigration judges differ dramatically from assistant prosecutors or drug enforcement agents whose actions are subject to close review in a bureaucratic chain of command. In light of their responsibilities, immigration judges are properly treated as high-level officials in Exemption 6's balancing process. Moreover, *Kimberlin* approved withholding under FOIA Exemption 7(c), which—as discussed above—is far more protective of privacy interests than Exemption 6. *See* 139 F.3d at 949.

Beck is distinguishable for other reasons as well. There, the Court held that Exemption 6 permitted the withholding of Office of Professional Responsibility investigatory documents concerning two "relatively low-level" drug enforcement agents accused of unethical conduct by a criminal defendant. 997 F.2d at 1491-93. Critically, the Court emphasized the speculative nature of the allegations and that the case was not one in which there had been a demonstrated public interest. *Id.* at 1493-94. Therefore, it concluded that it "need not linger over the balance" between the public interest in disclosure and the privacy interest because the request "implicate[d] no public interest at all." *Id.* (internal quotation marks and alteration omitted). The Court noted that "something outweighs nothing every time." *Id.*

Here, in contrast, there is a demonstrated public interest in release of the information, and the disclosures made by EOIR confirm that the agency has found instances of wrongdoing, which it addresses through formal discipline or corrective action. Unlike in *Beck*, AILA has also submitted evidence calling into question the integrity of the complaint process. *See supra*, pp. 11-12.

The district court also relied on *Department of Air Force v. Rose*, 425 U.S. 352 (1976). *Rose*, however, addresses disclosure of information about Air Force Academy cadets, not agency employees with significant responsibility and independence, and the requesters sought access to information about cadets "with personal references or other identifying information deleted." *Id.* at 380 (internal quotation marks omitted). *Rose* thus had no reason to consider the circumstances in which disclosure of the names of government employees and other identifying information could serve the public interest. Indeed, although the Supreme Court in a later case suggested that releasing names and identifying information in *Rose* would not have served the public interest in information about the Air Force Academy's conduct, it did so based on the presumption that cadets should be treated like private citizens. *See Reporters Comm.*, 489 U.S. at 774-75 (discussing *Rose* as illustrative of the point that release of "private citizens[']" information "would not shed any light on the conduct of any Government agency or official" (internal quotation marks omitted)).

C. The District Court Wrongly Approved a Categorical Approach to Withholding.

In addition to misapplying case law regarding the import of employees' responsibilities under Exemption 6 balancing, the district court erred in adopting an overly broad categorical approach to withholding. Although all immigration judge names should be disclosed in this case, the district court should have, at least, considered as part of its balancing obligation the nature of the alleged misconduct, including whether there were cumulative complaints against a judge, and the agency's findings with respect to that conduct. This Court's precedent requires as much, and this more tailored approach would be consistent with treatment of similar information by the federal judiciary and EOIR. Under this standard, the government has not met its burden to justify withholding.

1. A categorical approach to withholding under FOIA is permissible only when the government's "definitions of relevant categories are sufficiently distinct to allow a court to determine whether specific claimed exemptions are properly applied." *Prison Legal News*, 787 F.3d at 1150 (internal quotation marks omitted). "The range of circumstances included in the category must characteristically support an inference that the statutory requirements for exemption are satisfied." *Id.* (internal quotation marks and alteration omitted). Where it does not, categorical withholding is improper. *See, e.g.*, *Citizens for Responsibility & Ethics in Wash. v. DOJ*, 746 F.3d 1082, 1095-96 (D.C. Cir. 2014)

(refusing to approve categorical withholding of investigative records related to DOJ's public corruption investigation of Rep. Tom Delay).

As discussed in Part I.B above, the district court based its categorical privacy assessment on the general premise that immigration judges will suffer embarrassment or stigma if they are associated with alleged wrongdoing, *see* JA574, JA576 (citing *Beck* and *Kimberlin*), and its treatment of immigration judges as low-level officials. The court's broad categorical approach cannot be reconciled with this Court's recent opinion in *Prison Legal News*, 787 F.3d 1142. That case reversed and remanded a decision permitting categorical withholding of all names mentioned in records "showing money the [Bureau of Prisons] paid in connection with lawsuits and claims." *Id*. at 1145. The primary claims involved were "those inmates filed under the Federal Tort Claims Act . . . and those employees filed with the Equal Employment Opportunity Commission or Merit Systems Protection Board." *Id.* at 1148. This Court concluded that the privacy interests of federal employees accused of wrongdoing hinged in part on the nature of the alleged conduct, ranging from throwing a screw at another employee to sexual assault to employment discrimination. *Id.* It indicated that federal employees' identities could not be withheld categorically on the sole basis that the employees were alleged wrongdoers. *See id.* at 1150; *cf. id.* at 1151-52 (stating that an agency "may" be justified in withholding all employee names on a specific showing and citing

Judicial Watch, Inc. v. FDA, 449 F.3d 141, 153 (D.C. Cir. 2006), in which the government introduced evidence of threats of kidnapping and murder of employees associated with a drug that induces abortions).

Under *Prison Legal News*, as well as this Court's other precedent, the district court should have at least considered the nature of the misconduct allegations before permitting blanket withholding of immigration judges' identities. For example, although 9 percent of complaints dealt with "out-of-court" conduct in one recent year, JA135, the vast majority dealt with immigration judges' conduct on the bench or performance of other official duties. Data indicate that 27 percent of the complaints involved allegations of due process violations, 8 percent involved assertions of bias, and 42 percent involved what EOIR vaguely termed "in-court conduct." *Id.* A judge's interest in keeping secret a complaint involving his actions taken in open court is weaker than his interest as it applies to a complaint involving his personal affairs. Likewise, disclosing an investigation related to allegations of bias or due process violations hardly encroaches on a judge's "personal privacy." 5 U.S.C. § 552(b)(6). Indeed, the presumptive lack of a strong personal privacy interest in such information explains why so many federal courts of appeals have identified immigration judges by name in criticizing the judges' conduct on the bench. *See supra*, pp. 6-8.

The district court also erred in failing to consider the seriousness of the misconduct alleged, including with respect to cumulative complaints against the same judges. The court should have at least considered the extent to which alleged misconduct has been substantiated and resulted either in formal discipline or some form of corrective action, such as oral counseling or training. As this Court recognized in *Prison Legal News*, the public has a substantial interest in "[i]dentifying employees who repeatedly engage in tortious or discriminatory conduct." 787 F.3d at 1151. So, too, does the public have an interest in identifying judges who repeatedly engage in abusive behavior or unethical conduct in the courtroom, as confirmed by EOIR findings. Where a judge has at last been disciplined or subject to corrective action for misconduct, the public has a strong interest in both the complaint leading to that action and in all previous complaints against the judge, because of the purportedly progressive nature of discipline that EOIR imposes and because of the evidence that EOIR's complaint system fails to redress misconduct until complaints accumulate.

2. A narrower categorical approach would also be consistent with similar practices of the federal judiciary and EOIR. For example, written orders regarding substantiated allegations against Article III judges—including the identities of the judges—are disclosed to the public where remedial action other than a private censure or reprimand is taken. *See* 28 U.S.C. § 360(b); Judicial Conference of the

U.S., Judicial-Conduct and Judicial-Disability Proceedings Rule 24(a)(4) and Commentary (2015), *available at* http://goo.gl/i8QcOm; *see also*, *e.g.*, *In re Compl. of Judicial Misconduct*, C.C.D. No. 13-01, 2013 WL 8149446, at *5 (U.S. Judicial Conf. Comm. on Judicial Conduct & Disability Jan. 17, 2014) (requiring publication of Ninth Circuit Judicial Council Order sanctioning judge in response to complaint about inappropriate e-mails sent from judge's court e-mail account). Even in cases where a complaint against an Article III judge becomes moot or a resolution is unnecessary due to the judge's resignation or retirement, the judicial council investigating a complaint after a special investigation committee has been formed may choose to identify the judge. Judicial-Conduct Rule 24(a)(2) & Commentary.

EOIR's own practice in dealing with complaints regarding the conduct of immigration attorneys, whom it has authority to discipline, *see* 8 C.F.R. § 1292.3, is also instructive. EOIR may disclose information about complaints against attorneys when, among other things, "a practitioner has caused, or is likely to cause, harm to client(s), the public, or the administration of justice." *Id.* § 1003.108(a)(1)(i). When a complaint leads to a Notice of Intent to Discipline an immigration attorney, the notice and subsequent proceedings other than private censures become public; disciplinary hearings are generally public as well. *Id.* § 1003.108(c); *see*, *e.g.*, *Matter of Ronald S. Salomon*, 25 I. & N. Dec. 559 (BIA

July 12, 2011). EOIR also maintains on its website a list of currently suspended immigration attorneys (http://www.justice.gov/eoir/discipline.htm) and a list of previously disciplined attorneys who have been reinstated (http://www.justice.gov/eoir/prev-discipline-english.htm). Comparable information about judges in immigration proceedings implicates similar public and private interests and should likewise be publicly available.

3. In the district court, EOIR argued in a footnote that "[b]ecause of the manner in which the complaint files have been disclosed," that is, in conjunction with a key assigning judges unique identifiers and linking them to complaints, "the release of [judges'] names or identifying information in relation to any subset of the complaint files would lead to the release of such information in other subsets of the complaint files." Dist. Ct. Doc. 24, Defs.' Opp. at 3 n.1. That is, the government sought to insulate the disclosure of all identifying information by arguing that disclosure of a subset of information would be infeasible without disclosing the entire set.

The government's contention is factually inaccurate and does not justify blanket withholding under Exemption 6 of immigration judges' identities. First, as a matter of commonsense, the government cannot use its litigation choices to transform a non-exempt document into an exempt one. Second, even if, for example, this Court held that complaints based on out-of-court conduct should not

be released, many judges against whom complaints were filed never faced a complaint involving allegations based on such actions. Likewise, this Court could order the release of immigration judges' names where EOIR has substantiated at least one complaint, resulting in formal discipline or corrective action, without revealing the identities of immigration judges against whom a complaint has never been deemed well-founded. Although all of the names should be disclosed, the district court further erred in failing even to consider a narrower approach than a total categorical withholding.

II. The Government Improperly Redacted Non-Exempt Information from Responsive Records.

The district court's approval of redactions marked "non-responsive" from more than 60 pages of released records is at odds with the language of AILA's FOIA request and inconsistent with FOIA's presumption of disclosure, as reaffirmed by DOJ's own guidance for FOIA processing. If upheld, the court's decision will invite agencies to use the "non-responsive" label to withhold information they find embarrassing but for which they cannot justify an exemption, as occurred in this case. It will also lead to duplicative FOIA requests that serve no purpose other than frustrating FOIA requesters' efforts, and it will draw federal courts into disputes over concededly non-exempt information. Because the district court's decision is both legally indefensible and unwise, it should be reversed.

A. AILA's FOIA request sought "complaints," "records that reflect" resolution of the complaints and the reasons for those resolutions, and "records incorporated by reference" in complaint resolutions. JA121. AILA is therefore entitled to responsive documents ("complaints" and "records") in their entirety, subject to redactions only for material that falls within one of FOIA's nine "exclusive" exemptions. *Rose*, 425 U.S. at 361 (internal quotation marks omitted). That AILA's request should be read to seek whole documents, as opposed to information within those documents, is plain from its text and underscored by this Circuit's recognition that the government "has a duty to construe a FOIA request liberally." *People for the Ethical Treatment of Animals v. NIH*, 745 F.3d 535, 540 (D.C. Cir. 2014) (internal quotation marks omitted).

Indeed, the government's position here is at odds with defendant DOJ's own guidance to agencies on FOIA processing, which applies even if a requester seeks "information" on a subject, rather than "complaints" and related "records," as AILA did here. DOJ's guidance states that agencies may redact non-responsive information from responsive documents, but should not do so "on less than a page-by-page basis." DOJ, Office of Information Policy Guidance: Determining the Scope of a FOIA Request, FOIA Update, Vol. XVI, No. 3 (1995), *available at* http://www.justice.gov/oip/foia_updates/Vol_XVI_3/page3.htm. If a portion of a page is responsive, the "entire page should be included as within the scope of th[e]

[FOIA] request." *Id.* In addition, even with respect to whole pages of non-responsive material, DOJ has cautioned that an "agency must have a firm basis for reaching the conclusion that the document pages in question deal with a subject that is *clearly* beyond the scope of the requester's evident interest in the request." *Id.* (emphasis added). And where a requester disagrees with an agency's decision to deem pages of a document non-responsive, "the document pages involved should be included *without question* by the agency." *Id.* (emphasis added).

Here the government made redactions on a page-by-page basis even after AILA raised concerns about them during the production period. *See* JA556, ¶ 10. Dismissing the guidance as non-binding, JA639, the district court failed to appreciate that the guidance serves as a persuasive indicator of how agencies should construe even ambiguous requests for information in light of FOIA's "goal of broad disclosure." *DOJ v. Tax Analysts*, 492 U.S. 136, 151 (1989).

The district court never wrestled with AILA's squarely presented argument based on the plain language of its FOIA request. Rather, the court stated that "so long as the information in question is clearly and without any doubt unrelated to the subject of the request, and its redaction will not interfere with AILA's ability to understand or contextualize the responsive material, EOIR is not obligated to produce it." JA639 (internal quotation marks and citation omitted). It then concluded, based on the government's second *Vaughn* index devoted to redactions

marked "non-responsive," that the withheld information was "irrelevant" to the request. *Id.* The district court's conclusion should be reversed because its fundamental premise—that information within a document sought in its entirety can nevertheless be irrelevant to a request—contradicts itself.

B. The district court cited other lower court decisions as permitting the redaction of information as "non-responsive." JA638. At least some of those cases are inapposite. For example, in *Freedom Watch, Inc. v. National Security Agency*, the plaintiff never argued that requested documents were responsive in their entirety on the ground that the request sought "records," not information within records. 49 F. Supp. 3d 1, 7 (D.D.C. 2014), *aff'd on other grounds*, No. 14-5174, 2015 WL 1873141 (D.C. Cir. Apr. 24, 2015). Likewise, although *Wilson v. Department of Transportation* suggests that "non-responsive" redactions from an agency log sought by a requester might be permissible, that language was dicta, as the Court had earlier held that the entire log was non-responsive. 730 F. Supp. 2d 140, 156 (D.D.C. 2010). This Court affirmed on the alternative ground that the pro se plaintiff had "forfeited any argument concerning the agency's redactions" from the log. *Wilson v. Dep't of Transp.*, No. 10-5295, 2010 WL 5479580, at *1 (D.C. Cir. Dec. 30, 2010). To the extent the decisions cited by the district court are on point, they underscore why it is necessary for this Court to set the law straight, lest

the government and district courts continue the "text-light approach" to FOIA requests evinced in this case. *Milner v. Dep't of Navy*, 562 U.S. 562, 573 (2011).

C. The inconsistency between FOIA's purpose and a practice of redacting portions of records as "non-responsive" is further evidenced by the likelihood of abuse that the practice engenders. Allowing agencies to mark bits of records as "non-responsive" will encourage agencies to selectively apply the practice when information is non-exempt but revealing or embarrassing. And, in most cases, there will be no opportunity for requesters to assess the basis of the agency's "non-responsive" determinations. Although the government in this case eventually produced a *Vaughn* index of redactions marked "non-responsive," it has no obligation to do so. *See*, *e.g.*, *Vaughn v. Rosen*, 484 F.2d 820, 826 (1973) (describing index to test "allegations of exempt status").

Examples of redactions made in this case illustrate the danger that agencies will redact as "non-responsive" portions of responsive records as a method for avoiding embarrassing disclosures, even ones relevant to the FOIA request. Here, records released after the district court's first opinion confirm that the government initially withheld as "non-responsive" information that was plainly responsive to AILA's FOIA request, not just because the information was found in records sought in their entirety, but because the specific information related—under any

reasonable interpretation of the request—to AILA's interest in analyzing complaints and the complaint process.

For example, the government initially released an e-mail from an Assistant Chief Immigration Judge entitled "[(b)(6) training]," and it provided AILA with the first sentence of that e-mail, which stated "Judge Weil and I have completed [Immigration Judge] [(b)(6)] remedial training." JA611. The government redacted the remainder of that e-mail as "non-responsive" because it purportedly included "[i]nformation concerning a matter unrelated to the complaint and its resolution." JA484; *see* Dist. Ct. Doc. 35, Pl.'s Mot. to Enforce at 7 (identifying complaint file). However, the later-released version of that document shows that the government had redacted an in-depth description of the training that took place and the trainer's statement that the immigration judge's "lack of mastery of the most basic skills of an [Immigration Judge] is jeopardizing the cases [(b)(6)] is completing." JA614-15.

Similarly, in multiple complaint files for an immigration judge, the government redacted as "non-responsive" varying portions of an e-mail chain that appeared in each of the files. *See*, *e.g.*, JA617-19. The later-released version of that e-mail chain includes a list of cases in which the immigration judge engaged in inappropriate behavior on the bench—complete with quotes of the most outrageous and offensive statements by the judge. JA621-23. Before this recent release, AILA

would have had to piece together copies of the same document in nine different complaint files to see the complete list. The government also redacted a sentence in each of the complaint files in which an Assistant Chief Immigration Judge confirmed that certain cases were never referred to DOJ's Office of Professional Responsibility. JA621. The government thus used the "non-responsive" rationale to keep from public view a complete compilation of information about repeated abuses by a judge and evidence about EOIR's response (or lack thereof) to cumulative wrongdoing.

In another responsive record, the government initially redacted as "non-responsive" a portion of a line from a responsive e-mail from EOIR staff discussing a judge's need for training. A portion of the e-mail as originally released stated: "[NON-RESPONSIVE] We may have a lot more work/training then [sic] I previously thought, I did not realize that some of [(b)(6)] remarks were this bad . . . . All based on nothing that is contained in the record!!" JA625. The later release shows that, in the portion initially redacted, the government official states, "Oooouuucchh!"—suggesting that the official was pained by the immigration judge's behavior and reflecting the degree of seriousness with which the government itself viewed the misconduct. JA627.

Other examples abound in the records (and AILA cannot determine what examples exist in the records that still have redactions of non-exempt text marked

as "non-responsive"). That the government marked these initial redactions as "non-responsive" even in litigation, with its attendant threat of judicial scrutiny, demonstrates that the district court's decision is a recipe for agency abuse in FOIA processing and inconsistent with FOIA's broad disclosure goal.

D. The district court's rationale also introduces a host of inefficiencies in the FOIA process by inviting follow-up FOIA requests. Under the district court's opinion, AILA or another FOIA requester could file a new request seeking "all information withheld as 'non-responsive' from records already released to AILA" in this litigation. Since the government has not claimed that information is exempt, it would be compelled to release it.

That outcome in this and other cases serves no legitimate purpose. Particularly in light of notorious agency backlogs, FOIA staff should not spend time redacting non-exempt information as "non-responsive" or re-reviewing the same documents after a savvy requester submits a new request for information the agency initially deemed "non-responsive." All the while, FOIA requesters—many of whom lack counsel—will experience delays in obtaining full copies of documents responsive to their requests. Having not received what they wanted from their initial requests, many will go to the "end of the line" to wait for the agency to process additional ones. And some untold number of requesters will just give up. Should the dispute result in litigation, a federal judge will be called on to

police redactions of purportedly non-responsive information, the disclosure of which threatens no cognizable harm under FOIA. Other than those looking to circumvent FOIA, no one benefits under this scenario.

E. The treatment of "non-responsive" redactions in the context of document discovery, where the propriety of such redactions is frequently litigated, further counsels against the district court's approach. "[T]he weight of authority" in that context holds that such redactions are improper. *Sexual Minorities of Uganda v. Lively*, No. 12-30051, 2015 WL 4750931, at *4 (D. Mass. Aug. 18, 2015); *see, e.g.*, *United States v. McGraw-Hill Co., Inc.*, No. 13-0779, 2014 WL 8662657, at *4 (C.D. Cal. Sept. 25, 2014); *U.S. ex rel. Simms v. Austin Radiological Ass'n*, 292 F.R.D. 378, 386-87 (W.D. Tex. 2013); *Burris v. Versa Prods., Inc.*, No. 07-3938, 2013 WL 608742, at *3 (D. Minn. Feb. 19, 2013); *Bartholomew v. Avalon Capital Grp., Inc.*, 278 F.R.D. 441, 451-52 (D. Minn. 2011); *Orion Power Midwest, L.P. v. Am. Coal Sales Co.*, No. 05-555, 2008 WL 4462301, at *2 (W.D. Pa. Sept. 30, 2008).

Courts reaching this conclusion have rested on rationales largely applicable to the FOIA context. Like Federal Rule of Civil Procedure 34, which concerns the production of "documents," FOIA requires the production of "records," not merely responsive "information" within those records. 5 U.S.C. § 552(a)(3). Moreover, in discovery, parties may redact information only on one of a few specific bases, such

as privilege or work-product protection, *Burris*, 2013 WL 608742, at *3, and they must produce a privilege log for those redactions. This scheme leaves no room for parties to "unilaterally redact information on the basis of relevance." *Bartholomew*, 278 F.R.D. at 452. Likewise, FOIA provides specific bases for withholding—the nine exclusive exemptions, *see* 5 U.S.C. § 552(b)—and a log (*Vaughn* index) is intended to identify the asserted exemptions. The redaction of information as "non-responsive" has no place in this regime.

Many of the policy considerations used to disapprove purportedly non-responsive redactions in the discovery context are also applicable to FOIA processing. As one court noted,

> Parties making [purportedly non-responsive] redactions [in discovery] unilaterally decide that information within a discoverable document need not be disclosed to their opponents, thereby depriving their opponents of the opportunity to see information in its full context and fueling mistrust about the redactions' propriety. . . . [I]f the Court were to allow such a practice it would improperly incentivize parties to hide as much as they dare. That is a result at odds with the liberal discovery policies, the adversary process, and the Court's obligation to read the Rules to secure the just, speedy, and inexpensive determination of every action and proceeding.

Burris, 2013 WL 608742, at *3. Likewise, redacting purportedly non-responsive information from responsive records under FOIA breeds mistrust, creates an incentive for agencies to redact non-exempt information despite a presumption of disclosure, and fosters delay in what should be a speedy and efficient process.

III. FOIA Requires the Proactive Electronic Disclosure of Complaint Resolutions.

In addition to requiring disclosure upon request, FOIA requires agencies proactively to make available to the public records that constitute "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases." 5 U.S.C. § 552(a)(2)(A). Agencies must make final orders and opinions created after 1996 available by "computer telecommunications" or, if the agencies have not established computer telecommunications, "other electronic means." *Id.* § 552(a)(2). In practice, agencies meet this requirement by posting records online in their FOIA "reading rooms." *See*, *e.g.*, EOIR, FOIA Library, http://www.justice.gov/eoir/foia-library. Complaint resolutions constitute "orders" and, where accompanied by reasons, "final opinions," as FOIA uses those terms. 5 U.S.C. § 552(a)(2)(A). This Court should reverse the district court's contrary conclusion.

A. Complaint Resolutions Are Final Opinions and Orders Under *Sears* and Its Progeny.

The test for whether a document is a final "opinion" or "order" "made in the adjudication of [a] case[]," *id.*, is a functional one informed by the definitional section of the APA, of which FOIA is a part. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138, 159 (1975); *Bristol-Meyers Co. v. FTC*, 598 F.2d 18, 25-26 (D.C. Cir. 1978).

In *National Labor Relations Board v. Sears, Roebuck*, for example, the Supreme Court held that the agency had to disclose publicly certain "Advice Memoranda" and "Appeals Memoranda." 421 U.S. at 155-59. *Sears* focused on the administrative context in which the documents were created. Through that process, private parties filed "charges" alleging unfair labor practices, which the agency's General Counsel evaluated. Where warranted, the General Counsel brought a "complaint" against the party subject to the charge, leading to an agency adjudication. In the process of determining whether to bring a complaint, the General Counsel created Advice and Appeals Memoranda.

Sears held that where the General Counsel determined not to bring a "complaint," thus denying relief to the charging party, the corresponding memoranda constituted "final opinions" in the adjudication of cases under 5 U.S.C. § 552(a)(2). In reliance on the APA's definitional section, the Court explained:

> The decision to dismiss a charge is a decision in a 'case' and constitutes an 'adjudication': an 'adjudication' is defined under the [APA] . . . as 'agency process for the formulation of an order,' 5 U.S.C. [§] 551(7); an 'order' is defined as 'the whole or a part of a final disposition, whether affirmative (or) negative . . . of an agency in a matter . . . ,' 5 U.S.C. [§] 551(6) . . . ; and the dismissal of a charge . . . is a 'final disposition.' Since an Advice or Appeals Memorandum explains the reasons for the 'final disposition' it plainly qualifies as an 'opinion'; and falls within 5 U.S.C. [§] 552(a)(2)(A).

421 U.S. at 158-59 (footnote omitted).

In *Bristol-Meyers Co.*, 598 F.2d 18, this Court also addressed whether a document constitutes a final opinion or order under § 552(a)(2). The Court read "*Sears* to establish as a general principle that action taken by the responsible decisionmaker in an agency's decision-making process which has the practical effect of disposing of a matter before the agency is 'final' for purposes of FOIA." *Id.* at 25. "If such action is accompanied by a written explanation of the decisionmaker's reasoning, that explanation constitutes a 'final opinion' and must be disclosed." *Id.* Applying this standard, the Court held that if the Federal Trade Commission created a memorandum explaining its decision to "terminate an adjudicatory proceeding" against a company or "not to include a proposed charge in a complaint," the document would constitute a "final opinion" made in the adjudication of a case and would be subject to § 552(a)(2). 598 F.2d at 25-26.

Similarly, EOIR's decision to resolve a complaint disposes of the complaint and constitutes a final "order" under the APA. *See* 5 U.S.C. § 551(6) (defining "order"' to mean "the whole or a part of a final disposition, whether affirmative [or] negative . . . of an agency in a matter other than rulemaking"). And this order is made in an "adjudication," that is, the "agency['s] process for the formulation of an order." *Id.* § 551(7). Where the order is accompanied by a statement of reasons, it constitutes an opinion. Accordingly, under the test set forth in *Sears* and *Bristol-*

Meyers Co., resolutions of complaints against immigration judges constitute final opinions and orders. They must be proactively released.

B. The District Court Applied the Wrong Legal Standard and Ignored Relevant Facts.

The district court's conclusion that complaint resolutions do not result in final orders or opinions was based on several mistaken grounds. First, the district court emphasized that EOIR "voluntarily implemented" the immigration judge complaint procedure "and its resolutions therefore are not the product of a statutorily mandated process," and the court relied on *Rockwell International Corp. v. DOJ*, 235 F.3d 598 (D.C. Cir. 2001), and *Common Cause v. IRS*, 646 F.2d 656 (D.C. Cir. 1981). JA578-79 (internal quotation marks omitted). *Rockwell* held that an internal DOJ report defending the agency's prosecution of a company for alleged environmental crimes did not constitute a final opinion under § 552(a)(2). 235 F.3d at 603. It rested on the fact that the report was the product of a "voluntarily undertaken internal agency investigation" that "rejected as a factual matter . . . Congressional charges of prosecutorial misconduct." *Id.* The report did not "contemplate[], evaluate[], or reject[] specific disciplinary action against any [DOJ] employee." *Id.* Accordingly, the report "was the subject of neither a 'case' nor an 'adjudication.'" *Id.*

Likewise, *Common Cause* held that internal memoranda discussing an agency proposal to release the names of officials who contacted the agency did not

constitute final opinions under § 552(a)(2)(A) (and that the documents were exempt from disclosure as deliberative material under Exemption 5). 646 F.2d at 659-60. As in *Rockwell*, *Common Cause* involved the "voluntary suggestion, evaluation, and rejection of a proposed policy by an agency." *Id.* at 659.

The complaint resolutions here are wholly unlike the records produced by voluntary agency initiatives in *Rockwell* and *Common Cause*. Indeed, DOJ regulations state that the duties of EOIR's director include "[i]mplement[ing] a process for receiving, evaluating, and responding to complaints of inappropriate conduct by EOIR adjudicators." 8 C.F.R. § 1003.0(b)(1)(viii). Actions taken pursuant to regulatory mandate are not voluntary in any sense of the word. The district court thus erred in suggesting that EOIR's complaint process is not required by law. Separate from its regulations, EOIR has also stated publicly its commitment "to ensuring that any allegations are investigated and resolved." JA128.

Second, the district court concluded that the complaint resolutions do not constitute final opinions and orders because they are not the product of an adversarial process. JA569, 579. The district court's conclusion in this regard rests on a misstatement of the legal standard and is factually wrong. Section 552(a)(2)'s express language is not limited to orders resulting from an adversarial process. Nor does the district court's conclusion find support in the broad definition of "order"

supplied by the APA, 5 U.S.C. § 551(6) (defining "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing"), which the Supreme Court and this Court have relied on in interpreting § 552(a)(2)(A). *See Sears*, 421 U.S. at 158; *Bristol-Meyers Co.*, 598 F.2d at 25.

In any event, resolutions of complaints *are* the product of an adversarial process. Complaints are generally filed by a third party—including the immigrant or his attorney—about the conduct of an immigration judge. In its public statements regarding the complaint process, EOIR has committed to keeping the complainant apprised of whether action has been taken on his complaint, and it has noted that it may contact the complainant in its investigation. JA154, 156. Thus, to say that the process is non-adversarial vis-à-vis a complainant ignores the critical role that complainants play.

Moreover, when EOIR resolves a complaint, it necessarily determines whether to dismiss the complaint or take corrective or disciplinary action against an immigration judge, so the process vis-à-vis judges is likewise adversarial. The files released to AILA include examples of responses to complaints by immigration judges defending their behavior. *See*, *e.g.*, JA341, ¶ 11; JA363-72. And as EOIR's own declarant recognizes, "[a]n immigration judge may challenge

a disciplinary action by either filing a grievance under the negotiated grievance procedure or by pursuing applicable statutory remedies." JA146-47, ¶ 28.

The district court pointed to the absence of "typical features of an adversarial proceeding like a hearing, examination of witnesses or taking of evidence" as support for its conclusion that the complaint process is not adversarial. JA579 (internal quotation marks omitted). But the court cited no legal authority for concluding that such features are required. Indeed, as AILA argued in the district court, although the procedures identified by the government might be necessary to conduct a formal adjudication on the record under the APA, *see* 5 U.S.C. §§ 554, 556, it is well-established that agencies may perform various acts through informal adjudications, *see*, *e.g.*, *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990). And agencies render orders—and when accompanied by a statement of reasons, final opinions—after both formal and informal adjudications. *See* 5 U.S.C. § 551(6).

Third, the district court concluded that the resolutions are not final orders or opinions because they are not precedential under § 552(a)(2)(A). That conclusion has no basis in law and does not help the government given the facts in this case. The district court relied on *Sears* for this portion of its holding, but *Sears*' discussion of whether documents had the force of law was descriptive in nature. It did not suggest that this factor is a prerequisite under § 552(a)(2). *See Sears*, 421

U.S. at 158 (noting in its Exemption 5 discussion that the General Counsel produced the Advice Memoranda after considering "prior advice determinations in similar or related cases" and that the memoranda "contain[ed] instructions for the final processing of the case" (internal quotation marks omitted)).

Other cases similarly have not required that a document be precedential to constitute an order or opinion. *See Leeds v. Comm'r of Patents & Trademarks*, 955 F.2d 757, 762-63 (D.C. Cir. 1992) (concluding that patent approval files were subject to § 552(a)(2) but not discussing whether they were precedential); *Bristol-Meyers Co.*, 598 F.2d at 27-28 (remanding for a district court to consider whether minutes constituted a "final opinion" under § 552(a)(2)(A) without any discussion as to whether document was precedential); *Niemeier v. Watergate Special Prosecution Force*, 565 F.2d 967, 971-72 (7th Cir. 1977) (determining that a report deciding not to seek the indictment of President Nixon was a final disposition subject to § 552(a)(2)(A) without discussing whether the decision was precedential).

The district court's reading of § 552(a)(2)(A) as requiring that documents carry the force of law is also at variance with FOIA's structure. Section 552(a)(2) requires affirmative publication not only of orders and final opinions made in the adjudication of cases, § 552(a)(2)(A), but also of "statements of policy and interpretations" adopted by the agency, *id.* § 552(a)(2)(B). If § 552(a)(2)(A)

implicitly requires that agency actions be precedential to be covered, statements of policy would presumably have to carry the force of law to be subject to FOIA's affirmative disclosure requirement as well. They are not. *See, e.g.*, *Panhandle E. Pipe Line Co. v. FERC*, 198 F.3d 266, 269 (D.C. Cir. 1999) (explaining that a "policy statement" is not "a precedent"); *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987) (explaining that "agency cannot apply or rely upon a general statement of policy as law" (internal quotation marks omitted)). The court's reasoning thus makes § 552(a)(2)(B) a nullity.

Moreover, as EOIR's declarant acknowledges, resolutions *are* precedential when the agency considers "progressive discipline for an immigration judge who has failed to correct his or her conduct." JA147, ¶ 30; *see also* JA153 (EOIR document stating that "[w]hen imposing discipline, the deciding official . . . will consider factors" such as "the consistency of the penalty with similar instances of misconduct" (citing *Douglas v. Veteran's Admin.*, 5 M.S.P.B. 313 (M.S.P.B. 1981))); *Douglas*, 5 M.S.P.B. at 332 (identifying the "consistency of the penalty with those imposed upon other employees for the same or similar offenses" as one consideration). Thus, resolutions of prior complaints are used to determine whether, and to what extent, immigration judges will be sanctioned. The district court's conclusion that the resolutions are relevant only in assessing progressive

discipline for subsequent complaints against the *same* judge, and that they have no "binding effect on . . . other EOIR officials," JA579, is mistaken.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order granting partial summary judgment to the government and denying partial summary judgment to AILA and order that the withheld records be disclosed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) as follows: The type face is fourteen-point Times New Roman font, and the word count is 13,641.

/s/ Julie A. Murray
Julie A. Murray

CERTIFICATE OF SERVICE

I certify that on October 15, 2015, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in this case.

/s/ Julie A. Murray
Julie A. Murray