ARGUMENT SCHEDULED FEBRUARY 16, 2016

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 REPLY BRIEF

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December 17, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

** Authorities on which we chiefly rely are marked with asterisks.*

STATUTES

REGULATIONS AND RULES

OTHER AUTHORITIES

GLOSSARY

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

SUMMARY OF ARGUMENT

Defendants-appellees Executive Office for Immigration Review (EOIR), et al., have not demonstrated that immigration judges' names and identifying information are covered by Freedom of Information Act (FOIA) Exemption 6, 5 U.S.C. § 552(b)(6). Although EOIR contends no cognizable public interest supports holding individual judges accountable, the case law and evidence say otherwise. EOIR largely ignores the value of immigration judges' names in assessing the complaint-resolution process, and it wrongly devalues the role of disclosure in encouraging reports of misconduct. EOIR also vastly overstates the privacy interest, resting on considerations not cognizable under Exemption 6 and not supported by the evidence. Unsurprisingly, EOIR's Exemption 6 balancing does not adequately account for the public interest in disclosure, particularly given the seriousness of alleged misconduct and the considerable doubt that EOIR's corrective action is sufficient to address misconduct.

EOIR's case for withholding non-exempt information marked as "non-responsive" is at odds with FOIA. The question is not whether each redaction relates to EOIR's view of AILA's purpose in seeking the records, but whether the redacted information falls within the scope of AILA's FOIA request. EOIR is wrong that a "record" under FOIA refers only to pieces of information, not whole documents, where the documents are responsive to a request. In addition, EOIR's

response to the serious policy considerations highlighted by AILA—including the evidence in this case demonstrating that redactions marked "non-responsive" are abused—is unconvincing. A holding for EOIR on this issue will bog down federal courts for no good reason, delay FOIA processing, and benefit agencies bent on avoiding FOIA's mandate.

Finally, proactive disclosure of complaint resolutions is required by FOIA, 5 U.S.C. § 552(a)(2)(A). This conclusion follows directly from the nature of EOIR's complaint process; a holding in AILA's favor would not require proactive disclosure of all personnel decisions. In addition, EOIR's suggestion that it voluntarily implements the complaint process is at odds with the Department of Justice's (DOJ) interpretation of 8 C.F.R. § 1003.0(b)(1)(viii). The other factors on which EOIR relies—whether the complaint process is adversarial and whether the complaint resolutions are precedential—are not required for section 552(a)(2) to apply. In any event, even under EOIR's view of the legal standard, the complaint resolutions constitute final orders and opinions under section 552(a)(2).

ARGUMENT

I. Exemption 6 Does Not Permit Withholding Immigration Judges' Names and Identifying Information.

A. The Public's Interest in Disclosure Is Strong.

AILA has demonstrated that disclosure of immigration judges' names would advance the public interest in three ways, each of which sheds light on the

government's activities: (1) by helping to hold individual judges accountable; (2) by encouraging additional complaint reporting, which would in turn further inform EOIR and the public about immigration judges' actions; and (3) by helping the public effectively evaluate EOIR's handling of complaints. EOIR's contention that additional disclosure would serve no public interest is wrong.

1. Although EOIR recognizes that the "relevant public interest" under Exemption 6 is whether disclosure would "let citizens know what their government is up to," it urges this Court to limit the question in this case to whether disclosure will further the specific interest that AILA identified in its FOIA request to justify a public interest fee waiver. Appellees' Br. 27 (internal quotation marks omitted). Specifically, EOIR suggests that the Court consider only whether "disclosure of the immigration judges' identities would further the public's ability to 'assess whether EOIR appropriately disposes of complaints against immigration judges, takes disciplinary action where warranted … [and] conducts sufficiently thorough investigations." *Id.* (quoting JA123, JA125 (FOIA Request)); *see also id.* at 31 n.6.

EOIR's sleight of hand should be rejected. EOIR cites no case law, and AILA is aware of none, limiting the scope of the public interest under Exemption 6 to the interest that the requester used to justify a fee waiver during the administrative process. Moreover, at the time of its FOIA request, AILA had no

reason to focus on the specific value of releasing immigration judges' names because the complaints it sought were secret in their entirety.

2. Disclosure of immigration judges' names with respect to complaints is likely to encourage greater voluntary compliance with ethics standards, standards of judicial conduct, and other government policies. In addition, disclosure will allow members of the public, some of whom are already involved in monitoring immigration-court dockets, to focus their efforts on courts with a history of complaints. *See* Appellant's Br. 23-26.

EOIR disputes that Exemption 6 case law recognizes a public interest in holding *individual* government officials, as opposed to an agency as a whole, accountable. In its view, this interest is "simply stigmatization by another name" and "has nothing to do with EOIR's conduct as an agency." Appellees' Br. 31. EOIR's legal position is contrary to, among other decisions, *Prison Legal News v. Samuels*, 787 F.3d 1142, 1151 (D.C. Cir. 2015), and *Stern v. FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984), which recognized a public interest in identifying particular government officials alleged to have engaged in misconduct. *See* Appellant's Br. 22-23. EOIR argues that "[t]o the extent *Prison Legal News* recognized a public interest in individual employee conduct, it was in the context of the public fisc, where the agency had paid money to settle lawsuits and claims filed against it." Appellees' Br. 31 n.6. The impact of disclosure on the public fisc, however, was

secondary to this Court's analysis, which merely recognized that disclosure "may," in addition to other benefits, "help root out the misuse of public funds." *Prison Legal News*, 787 F.3d at 1151.

EOIR suggests that *Stern* is no longer good law because it predates *DOJ v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), which held that the relevant public interest under Exemption 6 is whether disclosure sheds light on the government's operations or activities. *Id.* at 772-73. Although this Court in *Beck v. DOJ*, 997 F.2d 1489 (D.C. Cir. 1993), questioned whether *Reporters Committee* affected *Stern*'s analysis, it did not so hold. *Id.* at 1493-94. And *Dunkelberger v. DOJ*, 906 F.2d 779 (D.C. Cir. 1990), described *Stern*'s analysis as being "in conformity with" the public interest standard identified in *Reporters Committee*. *Id.* at 781. More recently, in *Prison Legal News*, this Court relied on *Reporters Committee* to determine—consistent with *Stern*—that "[i]dentifying employees who repeatedly engage in tortious or discriminatory conduct will shed light on an agency's performance of its statutory duties." 787 F.3d at 1151 (internal quotation marks and alterations omitted).

3. EOIR contends that whether disclosure will encourage attorneys to file complaints is speculative, and it questions the reasonableness of attorneys' fears of retaliation. Appellees' Br. 32-33. AILA submitted into evidence, however, two uncontroverted declarations attesting to fears regarding the submission of

individual complaints and stating that attorneys would be more likely to file complaints if the names of immigration judges subject to complaints were public. *See* JA464-65, ¶ 12; JA468-69, ¶ 8; JA 471, ¶ 14. Contrary to EOIR's contention, these declarants provided specific examples justifying attorneys' fears, including one involving an attorney who himself faced a complaint for filing a motion to reopen removal proceedings in which he alleged immigration judge misconduct. *See* JA468-69, ¶ 8. That "attorneys and aliens account for over half of the complaints filed against immigration judges," as EOIR emphasizes, Appellees' Br. 33, says nothing about whether withholding judges' names dampens reports of misconduct.

EOIR also contends that any interest in encouraging complaints is "adequately served" by EOIR's practice of permitting anonymous or group complaints. *Id.* However, Exemption 6 considers disclosure's incremental value, and anonymity may not be practicable in many cases, such as when few people are present at the time of misconduct. *See also, e.g.*, AILA Receives Records Relating to EOIR Misconduct in FOIA Lawsuit (hereinafter, AILA Records Archive), March 2015 Disclosure (March 2 re-release of Bates 5672-73) (corresponding to Complaint 27), *available at* http://www.aila.org/infonet/eoir-records-relating-misconduct (revealing that an Assistant Chief Immigration Judge provided an

immigration judge with the name of an attorney who had asked how to file a complaint against the judge).

4. Release of immigration judges' names would allow the public to track EOIR's response to complaints against a judge over time. Appellant's Br. 28. EOIR attempts to address this point by stating that for future requests of complaints against immigration judges, it will produce a key linking the complaints to judges through unique identifiers. Appellees' Br. 29. This statement is not enforceable by AILA or any other FOIA requester, and it should not be credited. EOIR cites no authority for discounting a public interest in disclosure of currently-withheld information based on the government's non-binding proposal to disclose something else in the future.

Release of immigration judges' names would also allow researchers to identify other public biographical data about judges—such as gender or experience—that may impact the agency's resolution of complaints. Appellant's Br. 27. EOIR does not respond except by stating that its "complaint process can be readily evaluated with the information that has been disclosed." Appellees' Br. 33. However, "[t]he fact that the public already has some information does not mean that more will not advance the public interest." *Am. Civil Liberties Union v. DOJ*, 655 F.3d 1, 15 (D.C. Cir. 2011).

B. EOIR Overstates the Privacy Interest at Stake.

EOIR raises several arguments with respect to immigration judges' privacy interests. None justifies withholding.[1]

First, EOIR contends that "immigration judges would be stigmatized if their names were released," a result that would in turn reduce judges' ability to command respect and deter judges' cooperation in complaint investigations. Appellees' Br. 23-24. However, the evidence on which EOIR relies is too equivocal to meet EOIR's burden. EOIR's declarant states that disclosure "*could* cause immigration judges to lose the ability to command respect from the parties appearing before them," "*could* cause public embarrassment and humiliation," and "*could* cause immigration judges to be less willing to cooperate" in complaint investigations. JA46 ¶ 60 & n.14 (emphasis added). Exemption 6 requires the government to show that disclosure "*would* constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (emphasis added); *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 35 (D.C. Cir. 2002) (holding that evidence must show that an invasion of privacy is likely).

[1] EOIR contends that AILA's opening brief acknowledges for the first time that immigration judges "have more than a *de minimis* privacy interest" here. Appellees' Br. 20. EOIR mischaracterizes AILA's position below, which was that judges' privacy interest "is minimal and, in some cases," where media reports and court decisions have revealed alleged misconduct, "*de minimis* or nonexistent." Dist. Ct. Doc. 20, Summ. J. Memo. 16.

In addition, an immigration judge's willingness to cooperate with EOIR in investigations is irrelevant to assessing the judge's privacy interest. *See Wash. Post Co. v. HHS*, 690 F.2d 252, 259 (D.C. Cir. 1982) (stating that whether "disclosure might impair the government's ability to acquire similar information in the future" is a "factor [that] carries no weight under Exemption 6"). EOIR errs in relying on *Ripskis v. Department of Housing & Urban Development*, 746 F.2d 1 (D.C. Cir. 1984), for the opposite proposition. Appellees' Br. 24. *Ripskis* does not contain any of the language attributed to it by EOIR, nor does it address witnesses.[2] Although *Ripskis* considered whether disclosure of employee information could impair the government's evaluation process, it did so to discount the strength of the public interest under Exemption 6, not to establish a privacy interest, as EOIR attempts to do here. 746 F.2d at 3. In addition, *Ripskis* predated *Reporters Committee*, 489 U.S. 749, which—as EOIR concedes (at 31 n.6)—clarified the public interest inquiry by holding that the only relevant interest under Exemption 6 is whether disclosure will shed light on the government's operations or activities.

[2] The language quoted by EOIR instead appears as dicta in *Perlman v. DOJ*, 312 F.3d 100, 106 (2d Cir. 2002), *vacated*, 541 U.S. 970 (2004), *reaffirmed*, 380 F.3d 110 (2d Cir. 2004) (per curiam). *Perlman* cited no authority for the proposition for which EOIR cites the case, and the court determined, irrespective of witnesses' willingness to participate in investigations, that the public interest in disclosure of witnesses' identities was "minimal" and the privacy interests "strong." In contrast, *Perlman* ordered the government to release a report of investigation regarding wrongdoing by an agency's General Counsel. *Id.* at 106-09.

Second, EOIR contends that disclosure of immigration judges' names would result in harassment or threats. Appellees' Br. 25. However, its evidence does not show this outcome to be likely. *See Nat'l Ass'n of Home Builders*, 309 F.3d at 35. EOIR's declarant contended only that immigration judges had been subject to unspecified threats and harassment in the past. JA474 ¶ 6. She did not refer to any evidence showing that such problems would be likely to arise from disclosure of immigration judges' names in the complaint records. That EOIR's declarant offers no specific evidence is striking given that immigration judges have already been the subject of repeated criticism in the media and in court decisions. Appellant's Br. 5-8. In addition, immigration judges are already associated by name with information reflecting how they carry out their duties. For example, one organization makes available an interactive website that allows the public to view asylum denial rates by immigration judge. *See* Transactional Records Access Clearinghouse, Immigration Judge Reports – Asylum, http://trac.syr.edu/immigration/reports/judgereports. Moreover, the names of immigration judges subject to complaints and the dispositions of complaints are already known by complainants, as is clear from Complaint 407, the single complaint on which EOIR's brief relies to predict that disclosure will lead to harassment. JA154; JA539. In sum, EOIR has not established any likelihood that harassment will occur as a result of disclosure. If anything, greater transparency in the complaint process

may help complainants and the public accept the outcomes of the process as justified.

In a twist on its harassment theory, EOIR raises for the first time on appeal the possibility that identity thieves will target immigration judges named in complaints. Appellees' Br. 25-26. EOIR has produced no evidence to support this speculation. In addition, AILA has disclaimed seeking, among other information, immigration judges' birth dates, home and e-mail addresses, phone numbers, and medical and financial information. Dist. Ct. Doc. 20, Summ. J. Memo. 14-15.

C. The Exemption 6 Balancing Inquiry Supports Release of the Withheld Information.

1. In cases involving records of alleged misconduct, a court has an obligation to consider in any balancing the role of the employees, the seriousness of the misconduct alleged, and, in the appropriate case, the strength of the evidence of wrongdoing. *See Kimberlin v. DOJ*, 139 F.3d 944, 949 (D.C. Cir. 1998); *Beck*, 997 F.2d at 1494; *Prison Legal News*, 787 F.3d at 1150-51. The district court here erred in considering only one factor (the responsibilities of immigration judges). *See* Appellant's Br. 29, 35-41. It thus approved withholding using an overbroad categorical justification. *See Prison Legal News*, 787 F.3d at 1150.

EOIR does not contest the legal standard governing disclosure of records that involve officials' alleged misconduct, but it contends that AILA waived any objection to use of a categorical approach. Contrary to EOIR's assertion, however,

AILA did not take "an all or nothing position" in the district court. Appellees' Br. 36. AILA did not concede that if Exemption 6 applied to some judges' names, it applied to all. Rather, it argued that whether a complaint had been substantiated, whether multiple complaints against a judge had been filed, and whether complaint allegations were serious were relevant considerations. *See*, *e.g.*, Dist. Ct. Doc. 20, Summ. J. Memo. 20-22; Dist. Ct. Doc. 28, Summ. J. Reply 6-7. In any event, AILA's objection to the district court's approval of an overbroad categorical approach is justified by the intervening decision in *Prison Legal News*, which clarified the use of a categorical approach with respect to documents involving allegations of officials' wrongdoing.

2. Under the legal standard that EOIR concedes is applicable to disclosure of information regarding employee misconduct, EOIR contends that the complaints do not generally allege behavior that constitutes "misconduct." Appellees' Br. 31. It appears to argue that "intemperate remarks" and "legal and procedural errors" are not grounds for discipline. *Id.* EOIR's attempt to downplay complaints' seriousness should be rejected. EOIR maintains a "binding" Ethics and Professionalism Guide for Immigration Judges, which provides that EOIR may take "disciplinary or other employment action" for violations of the guide's standards. Ethics and Professionalism Guide for Immigration Judges 1, 16 (2011), *available at* http://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/

EthicsandProfessionalismGuideforIJs.pdf. That guide makes clear that abusive statements to litigants and certain legal or procedural errors may constitute misconduct. *See id.* at 3 (providing that an immigration judge "should not, in the performance of official duties, by words or conduct, manifest improper bias or prejudice"); *id.* at 2 (requiring that immigration judges maintain professional competence, act impartially, and avoid the appearance that they are "violating the law or applicable ethical standards"); *see also*, *e.g.*, 5 C.F.R. § 2635.101(b)(8), (b)(14) (ethics regulations requiring government employees to avoid the appearance of impropriety and to act impartially). The Board of Immigration Appeals, which is part of EOIR, has likewise recognized that an immigration judge's "bullying or hostile" conduct creates the appearance that the judge "has abandoned his or her role as a neutral fact-finder and raises a question whether the respondent was given a full and fair hearing of his claims." *Matter of Y-S-L-C-*, 26 I. & N. Dec. 688, 690-91 (BIA 2015) (internal quotation marks omitted); *see also*, *e.g.*, *Cham v. Att'y Gen.*, 445 F.3d 683, 691 (3d Cir. 2006).

Against this backdrop, EOIR is wrong to suggest that intemperate remarks and certain errors identified in the complaints are insufficient to constitute misconduct. For example, some of the complaints involve "negative stereotyping," "threatening, intimidating, or hostile acts," and "irrelevant reference to personal characteristics"—precisely the type of behavior that EOIR's guide identifies as

manifesting improper bias or prejudice. Ethics and Professionalism Guide 3; *see* Appellant's Br. 23-25 (providing examples). In one complaint involving a judge whom EOIR characterizes (at 32) as having only a "short temper," the complainant describes the judge's "hostility, sarcasm, and intimidation" toward detained immigrant children and voices concern that the judge's behavior was re-traumatizing victims of severe abuse. *See* AILA Records Archive, Complaint 41 (Bates 009957).

The complaint files likewise confirm that EOIR has disciplined some judges for abusive statements to litigants, further establishing that such behavior constitutes misconduct. For example, in responding to a complaint that EOIR characterizes as one based on alleged bias, a due process violation, and in-court conduct, the supervisor's disciplinary letter stated that the immigration judge's behavior toward litigants was "rude, condescending, impatient, and wholly inconsistent with the directives of the Chief Immigration Judge and the Attorney General." *Id.*, Complaint 699 (re-released file) (Bates 016312). The complaint came from an EOIR staff person who stated that he or she was "embarrassed for the [(b)(6)] Court" and that "[i]t's ridiculous that EOIR has someone on the bench who has such inappropriate demeanor, which can be perceived as biased." *Id.* (Bates 016302).

Similarly, in imposing a 14-day suspension against a judge, EOIR issued a disciplinary letter that recounted twenty-two separate incidents over a two-year period of "repeated outbursts and intemperate behavior," including "verbal attacks on *pro se* respondents" that may have resulted in the respondents spending "additional time in detention." *Id.*, Complaint 25 (revised release file) (Bates 000864-3 to 000864-6).

EOIR also emphasizes that it finds many complaints to be unfounded. Appellees' Br. 31. However, AILA introduced evidence casting significant doubt on the effectiveness of EOIR's complaint process as a mechanism for rooting out misconduct. Appellant's Br. 11-12, 24-26. Accordingly, while EOIR's imposition of discipline or corrective action is indicative of misconduct, EOIR's findings likely do not represent the universe of wrongdoing. This case is thus far different from *National Archives & Records Administration v. Favish*, 541 U.S. 157 (2004), on which EOIR relies. *See* Appellees' Br. 35. *Favish* rejected an interpretation of Exemption 7(c), a law enforcement-related counterpart to Exemption 6 that is more protective of personal information, that would have required "courts to engage in a state of suspended disbelief with regard to even the most incredible allegations" of government wrongdoing. *Id.* at 173-74. The requester there had "not produced any evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Id.* at 175.

3. EOIR fails meaningfully to distinguish cases cited by AILA to support disclosure under Exemption 6 balancing. EOIR contends that *Prison Legal News* is inapposite because in that case the government did not adequately justify the privacy interests at stake or consistently withhold the federal employees' names, whereas EOIR has done so here. Appellees' Br. 36-37. Yet here, as was true in *Prison Legal News*, 787 F.3d at 1149, EOIR relies on generally applicable privacy interests, irrespective of findings of misconduct, the cumulative nature of any complaints, and the seriousness of the alleged misconduct. Thus, EOIR has failed to meet its burden of putting forward a privacy interest that justifies withholding, much less categorical withholding. In addition, EOIR does not address *Bast v. DOJ*, 665 F.2d 1251 (D.C. Cir. 1981), other than to say that it is a "far cry" from this case. Appellees' Br. 34. *Bast* held that Exemption 7(c) did not cover material in which an investigating agent "attribute[d] to [an Article III judge] remarks which could be interpreted to indicate that the judge was biased in favor of the government." 665 F.2d at 1255.

EOIR resists AILA's analogy to the treatment of complaints against Article III judges or immigration attorneys, stating that disclosure of those complaints is "required or authorized by statute and regulation." Appellees' Br. 38-39. EOIR misses the point. These examples indicate a strong public interest in information comparable to that sought by AILA. And the cloud of doubt over EOIR's

complaint process only increases the public interest in disclosure, regardless of EOIR's findings. That EOIR has adopted "[n]o comparable provision[]" for disclosure, *id.* at 39, is neither surprising—in light of the agency's interest in protecting its own—nor relevant. Were it otherwise, the government could receive additional protection from disclosure by resting on a history of secrecy.

EOIR does not address AILA's point that immigration judges are required to exercise independent judgment to serve a judicial function and, therefore, are unlike the law enforcement investigators, assistant U.S. attorneys, and other federal employees at issue in cases on which EOIR relies. *See* Appellees' Br. 30, 34-35. Nor does EOIR dispute that immigration judges frequently have the last say on the fate of immigrants appearing before them, further distinguishing the judges from low-ranking federal employees.

The facts of the cases cited by EOIR confirm that the cases pose no barrier to release here. Some of the cases did not involve release of identifying information about government employees alleged to have engaged in misconduct. In *Carter v. Department of Commerce*, 830 F.2d 388 (D.C. Cir. 1987), for example, the "individuals investigated" were "private citizens," and the Court distinguished the case from one in which there is a "strong public interest in the disclosure of wrongdoing by public officials acting in their official capacities." *Id.* at 390 n.8. *McCutchen v. HHS*, 30 F.3d 183 (D.C. Cir. 1994), involved the

application of Exemption 7(c) to information regarding investigations of government grant recipients whom the agency had found did not engage in misconduct in the course of their research. *Id.* at 187-88. The government *did* release the names of researchers who had "been found guilty of wrongdoing," such as plagiarism or falsification of evidence. *Id.* at 185-86, 187. In *Wood v. FBI*, 432 F.3d 78 (2d Cir. 2005), the government had redacted from administrative investigation files the names of government investigators, not the individual investigated. *Id.* at 87-89.

The remaining cases are inapposite because they involved allegations of wrongdoing by lower-level employees or were decided under Exemption 7(c), which is more protective of privacy interests than Exemption 6. *See Jefferson v. DOJ*, 284 F.3d 172, 174 (D.C. Cir. 2002) (Exemption 7(c) case involving assistant U.S. attorney); *Kimberlin*, 139 F.3d at 946 (Exemption 7(c) case involving assistant U.S. attorney); *Beck*, 997 F.2d at 1490 (drug enforcement agents); *Dunkelberger*, 906 F.2d at 780-81 (Exemption 7(c) case involving Federal Bureau of Investigation agent); *Lesar v. DOJ*, 636 F.2d 472, 486-87 (D.C. Cir. 1980) (Exemption 7(c) case involving "lower-level" Federal Bureau of Investigation personnel); *Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1026, 1028 (9th Cir. 2008) ("low and mid-level employees"); *Office of Capital Collateral Counsel v. DOJ*, 331 F.3d 799, 802-04 (11th Cir. 2003)

(assistant U.S. attorney); *Chamberlain v. Kurtz*, 589 F.2d 827, 841-42 (5th Cir. 1979) (Internal Revenue Service agents). In addition, in a number of these cases, the courts made fact-specific determinations that *no* public interest supported additional disclosure. *See, e.g.*, *Office of Capital Collateral Counsel*, 331 F.3d at 804; *Chamberlain*, 589 F.2d at 842. That determination is not warranted here. Moreover, in *Office of Capital Collateral Counsel*, the government actually released more than 1,000 pages of records relating to the disciplinary proceedings for a named assistant U.S. attorney; the court approved the withholding only of her "personal reflections" on the misconduct and "its effects on her life." 331 F.3d at 802, 804.

II. EOIR May Not Withhold from Responsive Records Information It Deems "Non-Responsive."

AILA's FOIA request sought "complaints," "records that reflect" resolutions of complaints and the reasons for or findings underlying those resolutions, and "records incorporated by reference" in resolutions. JA121. Both FOIA and the language of AILA's request entitle AILA to all non-exempt information in responsive documents. *See* Appellant's Br. 41-50.

A. For the contrary position, EOIR asserts that under FOIA, "record" means "information," not whole documents. Appellees' Br. 39-40. *Mead Data Central, Inc. v. Department of Air Force*, 566 F.2d 242 (D.C. Cir. 1977), on which EOIR relies (at 39), does not support EOIR's position. *Mead* emphasizes that

FOIA focuses on information, not documents, in holding that "an agency cannot justify *withholding* an entire document simply by showing that it contains some exempt material." *Id.* at 260 (emphasis added); *see also* 5 U.S.C. § 552(b) (requiring disclosure of any non-exempt, "reasonably segregable portion of a record"). EOIR's use of *Mead* to justify slicing and dicing responsive records and withholding purportedly "non-responsive" chunks turns *Mead*'s holding on its head.

EOIR also misreads 5 U.S.C. § 552(f)(2). That subsection states that "'record' and any other term used in [FOIA] in reference to information includes," but is not limited to, information maintained in an electronic format and certain information maintained by government contractors. 5 U.S.C. § 552(f)(2). Section 552(f)(2) was intended to provide a broad definition of a "record" under FOIA.

Aside from these inapposite authorities, EOIR relies on district court cases. Appellees' Br. 40-41. Some of these cases are not on point, but to the extent that they are, they underscore why this Court must put a stop to EOIR's unlawful practice. *See* Appellant's Br. 44-45. Notably, all but one of the cases cited by EOIR were decided in the last five years, suggesting that the practice of redacting information as "non-responsive" from responsive records is a growing one, and, if permitted, will entangle federal courts in disputes over information that could be disclosed without harming an interest protected by FOIA.

B. EOIR resists the FOIA request's clear language in two ways. First, it makes the irrelevant statement that the "redacted information is contained mostly in email communications." Appellees' Br. 42. However, FOIA covers communications in electronic format, 5 U.S.C. § 552(f)(2)(A), and EOIR has not contested that e-mails are "records" under FOIA. Indeed, EOIR produced many e-mails in response to AILA's request.

Second, EOIR contends that the information it redacted as "non-responsive" is extraneous to AILA's interests and therefore not within the request's scope. Appellees' Br. 42. However, the FOIA request sought "complaints" and "records" concerning specified topics; thus, the entirety of any responsive record is responsive to the request.

Moreover, even under EOIR's parsimonious view of AILA's request, the redactions do not concern only topics such as employees' "vacation plans." *Id.* at 41. The *Vaughn* index for redactions marked "non-responsive" (JA594-609) demonstrates that EOIR withheld, for example, an "e-mail to all [Assistant Chief Immigration Judges] regarding complaint reports that will be sent to them," JA597 (Complaint 418, Bates 6434-37), and instructions to an immigration judge "about what to review in preparation for [a] performance review," JA595 (Complaint 104, Bates 4162).

The records also refute EOIR's description of the withheld information as "non-responsive." For example, the *Vaughn* index states that EOIR withheld from one complaint material concerning an Assistant Chief Immigration Judge who "not[ed] [a] conversation with [an immigration judge] about reassignment to another court." JA604 (Complaint 664). The redacted pages contain a chart on which EOIR tracked the date and nature of "action" taken in response to the complaint. AILA Records Archive, Complaint 664 (Bates 12089-90). EOIR redacted one entire row and a portion of another as "non-responsive." *Id.* The *Vaughn* index also states that EOIR redacted "non-responsive" information from another complaint concerning a "[d]iscussion about [the] format" of performance reviews with immigration judges. JA597 (Complaint 27). The "non-responsive" redaction appears in the middle of an e-mail between two Assistant Chief Immigration Judges, which provides "a status report" regarding the immigration judge and discusses a performance review with the judge. AILA Records Archive, March 2015 Disclosure (March 2 re-release of Bates 5672); *see also id.*, Complaint 27 (initial release of Bates 5672).[3]

[3] After the district court's summary judgment order, EOIR re-released this page with the inclusion of some, but not all, information initially redacted as "non-responsive." The citation above includes the locations of each version of the page, and the discussion refers to information that remains redacted.

Further, release of withheld information that *does* concern matters such as vacations would harm no interest protected by FOIA. Exemption 6 offers a way to redact personal information where the public interest does not outweigh the privacy interest. Although EOIR has asserted Exemption 6 with regard to numerous redactions, it has not done so with respect to the remaining redactions marked "non-responsive." Non-exempt information must be released.

C. EOIR's brief effectively disavows defendant DOJ's guidance on FOIA processing, which makes clear that EOIR's redactions are improper. EOIR contends that the guidance does not account for the advent of e-mail, which may address multiple subjects at once. Appellees' Br. 43. However, the purpose of the guidance was to provide principles for determining the responsiveness of documents, like "diplomatic communications" or "records of law enforcement investigations," that address several subjects unconnected but for the fact that "the agency chose as a matter of administrative convenience to combine them." 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. Therefore, the guidance applies to e-mail with ease.

D. EOIR contends that cases involving redactions marked as "non-responsive" in discovery are distinguishable. However, EOIR's citation to a

smattering of district court cases does not refute AILA's contention that "'[t]he weight of authority'" in the discovery "context holds that such redactions are improper." Appellant's Br. 49 (quoting *Sexual Minorities of Uganda v. Lively*, No. 12-30051, 2015 WL 4750931, at *4 (D. Mass. Aug. 18, 2015)). Moreover, the D.C. Circuit cases cited by EOIR to demonstrate that "discovery is a poor analog to the FOIA process," Appellees' Br. 45, have nothing to do with the issue here. *North v. Walsh*, 881 F.2d 1088, 1095 (D.C. Cir. 1989), held that a FOIA requester's claim was not precluded where the requester could not "have asserted his FOIA rights in [a previous] grand jury proceeding." *Stonehill v. IRS*, 558 F.3d 534, 536 (D.C. Cir. 2009), concerned "whether an agency may withhold documents under [FOIA] Exemption 5" where "it did not invoke the same underlying privilege claims … in a different, non-FOIA case." And *Washington Post Co.*, 690 F.2d at 255, held that information pertaining to scientific consultants was not exempt under Exemption 6, even though "essentially identical information was privileged from discovery." As these descriptions demonstrate, the cases are far afield.

EOIR also argues that case law regarding discovery is not comparable because protective orders are available in discovery. Appellees' Br. 46. Under Federal Rule of Civil Procedure 26(c)(1), protective orders are appropriate only where "good cause" exists to protect parties from "annoyance, embarrassment,

oppression, or undue burden or expense." A protective order would not appropriately apply to many redactions marked as non-responsive here. *See*, *e.g.*, *United States v. McGraw-Hill Cos., Inc.*, No. 13-0779, 2014 WL 8662657, at *4 (C.D. Cal. Sept. 25, 2014) (stating in a discovery-related decision that "[t]he harm in disclosing non-responsive materials—such as whether an attorney is enjoying the weather in California—is trivial, and such nitpicking cannot justify unilateral redactions"). Regardless, by enacting FOIA, including Exemption 6, Congress has already struck the balance with respect to whether disclosure of potentially embarrassing or otherwise sensitive information is required.

E. EOIR's approach to redactions marked "non-responsive" creates inefficiencies and incentives for abuse. EOIR is silent in response to AILA's contention that EOIR's position would mire federal courts in disputes over purportedly non-responsive information, the disclosure of which threatens no cognizable harm under FOIA. Although EOIR attempts to allay concerns that its approach would lead to serial FOIA requests and further delay, its defense is unconvincing. Those consequences, EOIR says, are "purely a function of the terms and scope of the FOIA request." Appellees' Br. 45. But if EOIR interpreted FOIA requests according to their terms, AILA would have no need to file another request. EOIR also asserts that serial requests can be avoided by an "interactive process" between the agency and a requester to determine a request's scope.

Appellees' Br. 45. It oddly cites its interactions with AILA as a case in point, but EOIR made *no* attempt to discuss the FOIA request with AILA during administrative proceedings. *See* JA25-26 ¶¶ 6-10. In addition, even after AILA sued and objected to redactions marked non-responsive, JA556 ¶ 10, EOIR continued to make them.

EOIR's response regarding the likelihood of abuse created by its approach is similarly unavailing. EOIR emphasizes that it produced a *Vaughn* index of "non-responsive" redactions and made additional releases of information once withheld as "non-responsive." Appellees' Br. 43-44. As EOIR concedes (at 44), however, FOIA does not require a *Vaughn* index of non-responsive redactions. Accordingly, the availability of one here is cold comfort for other FOIA requesters and for this Court as it aims to fashion a generally-applicable rule. Moreover, EOIR produced the *Vaughn* index of redactions marked "non-responsive" only *after* the district court's summary judgment order and *after* AILA's demand letter indicating that AILA would move to enforce the order if EOIR did not release all information marked "non-responsive." *See* JA 582-83 ¶¶ 4-6; JA585-88 (Demand Letter). EOIR's additional releases of information initially withheld as "non-responsive" likewise came on the heels of the summary judgment order and AILA's subsequent demand letter. JA583 ¶ 5.

The information once withheld by EOIR as "non-responsive" but later released confirms the potential for abuse. EOIR has no serious defense to the examples of blatantly wrongful withholding that AILA has presented, stating only that some redactions were "mislabeled" during EOIR's "expedited review." Appellees' Br. 44. Of course, such "mislabeling" could not happen if all non-exempt, responsive material were released. In addition, many of the initial redactions cannot be explained away as careless mistakes. *See* Appellant's Br. 46-47.

Finally, EOIR attempts to downplay the policy concerns by contending that the redacted information does not matter. To the contrary, as discussed above (at pp. 21-22), the withheld information goes far beyond vacation plans to official matters. In addition, although EOIR argues that it made only a small number of redactions for "non-responsive" information, Appellees' Br. 39, FOIA has no exception for redactions deemed by an agency to be small. Redactions of non-exempt information on more than 60 pages of records are, in any event, significant.

III. EOIR Must Proactively Disclose Complaint Resolutions.

Resolutions of complaints against immigration judges constitute final orders and, when accompanied by a statement of reasons, opinions made in the adjudication of cases. *See* Appellant's Br. 51-54. Accordingly, under FOIA's

affirmative disclosure provision, 5 U.S.C. § 552(a)(2)(A), EOIR must release these documents proactively, even in the absence of a FOIA request.

EOIR pays little attention to section 552(a)(2)(A)'s language and the Administrative Procedure Act's definition of "order." *See* 5 U.S.C. § 551(6). Instead, it states that if AILA is correct that resolutions of complaints against immigration judges are "orders," "then every employee disciplinary action in every federal agency would be subject to publication." Appellees' Br. 47. EOIR misconstrues AILA's position, which is based on the nature of EOIR's complaint process. When EOIR resolves a complaint, that resolution is *not* the culmination of a "strictly internal function" for evaluating and disciplining employees. *Id.* at 48. It is not a mere "personnel action[]." *Id.* Rather, the resolution ends a formal process, set forth by regulation, "for receiving, evaluating, and responding to complaints of inappropriate conduct by EOIR adjudicators." 8 C.F.R. § 1003.0(b)(1)(viii). Accordingly, a holding in AILA's favor would have no bearing on release of disciplinary decisions that stem solely from an agency's internal supervisory discretion, as opposed to a complaint process based on public input.[4]

[4] EOIR incorrectly suggests that the withheld information comes from an employee's file. Appellees' Br. 21. Although each record pertains to an immigration judge, the records were not kept in a single file (for an employee or otherwise). *See, e.g.*, JA161 ¶¶ 13-14.

EOIR focuses on several factors that it deems relevant to the proactive publication inquiry. None justifies EOIR's failure to comply with section 552(a)(2)(A). First, EOIR maintains that the resolutions are not covered by section 552(a)(2)(A) because the complaint process is voluntary. Appellees' Br. 49. It takes issue with AILA's reliance on 8 C.F.R. § 1003.0(b)(1)(viii), which EOIR portrays as authorizing, but not requiring, EOIR to implement a complaint process. Appellees' Br. 50-51. The problem for EOIR is that DOJ—of which EOIR is a part—interprets the regulation in a manner contrary to EOIR's position. In the preamble to the rule adopting 8 C.F.R. § 1003.0(b)(1)(viii), DOJ states that the provision adds the implementation of a complaint process to the EOIR director's "duties." DOJ, Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge, 72 Fed. Reg. 53,673, 53,675 (Sept. 20, 2007). DOJ also states that, although certain changes, including the complaint process, were "being implemented through internal management changes within EOIR," the final rule was "revised to include a brief summary of these key initiatives as being among the Director's specific responsibilities, *as a permanent reflection of these changes which will continue to be implemented over time*." *Id.* (emphasis added). The preamble thus establishes that, under 8 C.F.R.

§ 1003.0(b)(1)(viii), the complaint process is not voluntary and EOIR cannot discontinue it at will.[5]

Second, EOIR contends that the complaint resolutions are not covered by section 552(a)(2)(A) because they are not the product of an adversarial proceeding. Appellees' Br. 51. But section 552(a)(2)(A) is not limited to orders resulting from an adversarial dispute. *See* Appellant's Br. 55-56. As EOIR concedes, *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), "not[ed]" that agency decisions held not to be subject to FOIA's affirmative disclosure requirement "were made outside the context of an adversarial dispute with another party." Appellees' Br. 50. They did not hold that an adversarial dispute was necessary for section 552(a)(2)(A) to apply.

Even if section 552(a)(2)(A) were limited to orders resulting from an adversarial process, the complaint process fits that bill. *See* Appellant's Br. 56. EOIR, like the district court, focuses on the absence of an opportunity to introduce evidence or to provide testimony as indicia of the non-adversarial nature of the complaint process. *See* Appellees' Br. 51; JA579. These features are characteristics of *formal* adjudication on the record under the Administrative Procedure Act, *see* 5

[5] This Court "regularly rel[ies] upon the preamble in interpreting an agency rule." *Pub. Citizen v. Carlin*, 184 F.3d 900, 911 (D.C. Cir. 1999). "The purpose of the preamble, after all, is to explain what follows." *Id.*

U.S.C. §§ 554, 556, but it is well-settled that agencies may issue orders after both formal and informal adjudications, *id.* § 551(6). *See* Appellant's Br. 57.

Third, EOIR asserts that the complaint resolutions are outside the scope of section 552(a)(2)(A) because they are not precedential. EOIR concedes, however, that the resolutions are a "factor in considering whether progressive discipline is appropriate." Appellees' Br. 52. In addition, EOIR does not address the cases showing that courts have not required that a document be precedential to be covered by section 552(a)(2). *See* Appellant's Br. 57-58. Although EOIR cites *Smith v. National Transportation Safety Board*, 981 F.2d 1326 (D.C. Cir. 1993), to support its position, that case held that an agency is required to make affirmatively available "'administrative staff manuals and instructions to staff that affect a member of the public'"; otherwise, the agency cannot rely on such documents in an enforcement action. *Id.* at 1327-28 (quoting 5 U.S.C. § 552(a)(2)(C)). This Court noted in passing that FOIA's legislative history made clear that Congress "meant for the agency to disclose all … documents having precedential significance," and concluded that such documents "certainly include[] a manual setting out the [agency's] sanctions policy." *Id.* at 1328 (internal quotation marks omitted). As is clear from this context, *Smith* does not stand for the proposition that section 552(a)(2)(A)'s coverage hinges on whether documents are precedential.

CONCLUSION

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

Dated: December 17, 2015

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 6,985.

/s/ Julie A. Murray
Julie A. Murray

CERTIFICATE OF SERVICE

I certify that on December 17, 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