

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

_____	)	
AMERICAN IMMIGRATION	)	
LAWYERS ASSOCIATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 13-cv-00840
	)	Judge Christopher R. Cooper
EXECUTIVE OFFICE FOR	)	
IMMIGRATION REVIEW,	)	
U.S. DEPARTMENT OF JUSTICE,	)	
<i>et al.</i> ,	)	
	)	
Defendants.	)	
_____	)	

**PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiff American Immigration Lawyers Association (AILA) hereby moves for summary judgment in this case brought to remedy violations of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, on the ground that there is no genuine issue of disputed material fact and that plaintiff is entitled to judgment as a matter of law.

Defendants have not demonstrated that information remaining at issue that has been redacted or withheld is exempt from disclosure under 5 U.S.C. § 552(b) or appropriately redacted as “non-responsive.” Moreover, written resolutions of complaints against immigration judges constitute final opinions and orders under 5 U.S.C. § 552(a)(2). Accordingly, judgment should be entered for plaintiff.

In support of this motion and in opposition to defendants’ motion for summary judgment, plaintiff submits the accompanying Memorandum in Support of Plaintiff’s Motion for Summary Judgment and Opposition to Defendants’ Motion for Summary Judgment; Plaintiff’s Statement

of Genuine Issues and Response to Defendants' Statement of Material Facts as to Which There Is No Genuine Issue; Plaintiff's Statement of Material Facts as to Which There Is No Genuine Issue; the Declaration of Julie A. Murray; the Declaration of Robert P. Deasy; the Declaration of Trina Realmuto; and a proposed order.

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## INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff American Immigration Lawyers Association (AILA) filed a Freedom of Information Act (FOIA) request for complaints about federal immigration judges with the Executive Office for Immigration Review (EOIR), a component of the Department of Justice (DOJ) responsible for overseeing the immigration courts. AILA also sought various records reflecting how EOIR resolved those complaints, and it requested that EOIR proactively post online complaint resolutions that constitute final orders and opinions, as required by FOIA, 5 U.S.C. § 552(a)(2)(A). AILA sought public disclosure of the records in light of longstanding public concern that EOIR has failed to adequately investigate complaints against immigration judges and to take disciplinary action where appropriate. AILA's request came amidst steady criticism by the federal courts of appeals regarding immigration judges' repeated misconduct on the bench.

After AILA filed this suit, the government disclosed to AILA large sections of the complaint files. It redacted, however, immigration judges' names and all information that the government believes would identify those judges, including pronouns, cities where immigration judges preside, and circuit court opinions and media articles that identify the judges by name. The government claims that such information is exempt from disclosure under FOIA Exemption 6, which protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 552(b)(6). The government has also redacted large swathes of information from the records disclosed to AILA as "non-responsive" to AILA's FOIA request. And it has refused to post online the resolutions of current or future complaints on the ground that they do not constitute final orders and opinions under FOIA, *id.* § 552(a)(2).

AILA's motion for summary judgment should be granted and the government's denied. First, the information sought by AILA is not protected from disclosure by FOIA Exemption 6. The government has not demonstrated that immigration judges have a substantial privacy interest in all information redacted from the disclosed records. In some cases, the nature of the allegations and immigration judges' names have been reported in the news media or in court of appeals opinions and thus are already public. In any event, under FOIA Exemption 6, this Court must weigh any substantial privacy interest against the public interest in disclosure and may permit withholding only if disclosure would constitute a clearly unwarranted invasion of personal privacy. Here, the public interest in disclosure of names and other identifying information sought by AILA easily outweighs any privacy interest. The public has an obvious interest in knowing how immigration judges—entrusted with enormous responsibility that can mean the difference between life or death for individuals appearing before them—are conducting themselves. Moreover, disclosure will encourage more private attorneys and their clients to report misconduct without fear of retaliation, thus better informing EOIR—and by extension, the public—about the conduct of immigration judges. In addition, revealing the identities of immigration judges will allow the public and researchers to analyze more thoroughly EOIR's complaint process.

Second, the government's attempt to redact large portions of responsive records by deeming those portions "non-responsive" to AILA's FOIA request has no basis in law. AILA asked for complaints against immigration judges and various "records" relating to those complaints. Once the government determined that certain documents were responsive to AILA's request, it had no authority to withhold portions of those records unless the portions fell within

one of FOIA's nine exemptions, which Congress "explicitly made exclusive." *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1262 (2011).

Third, going forward, EOIR's written resolutions of complaints against immigration judges must be affirmatively disclosed to the public, even in the absence of a FOIA request. FOIA requires that agencies proactively make final opinions and orders in the adjudication of cases available to the public. 5 U.S.C. § 552(a)(2). Here, the written resolutions are the final dispositions in complaint cases before EOIR. They conclusively resolve a complainant's right to relief and an immigration judge's culpability for misconduct and any corresponding discipline. Accordingly, under 5 U.S.C. § 552(a)(2), as interpreted by *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), and its progeny, the government must proactively make such resolutions available to the public.

## **BACKGROUND**

### **I. The Role of EOIR and Immigration Judges**

Defendant EOIR, a component of DOJ, is responsible for interpreting and administering federal immigration laws. It carries out that responsibility, in part, by overseeing our nation's 59 immigration courts and more than 260 immigration judges. *See* EOIR, Office of the Chief Immigration Judge, <http://www.justice.gov/eoir/ocijinfo.htm>. The Office of the Chief Immigration Judge (OCIJ), and nine Assistant Chief Immigration Judges (ACIJ), carry out the day-to-day work within EOIR of overseeing the immigration courts. Immigration judges are DOJ employees and are appointed by the Attorney General. 8 U.S.C. § 1101(b)(4); DOJ, Office of Professional Responsibility (OPR) and Office of Inspector General (OIG), *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General 114-15 (2008)*, available at <http://www.justice.gov/oig/special/s0807/final.pdf>

(hereinafter, Politicized Hiring Report) (excerpt attached as Attach. G to Murray Decl.). The judges are also members of a collective bargaining unit represented by the National Association of Immigration Judges.

Immigration judges conduct formal court proceedings to determine whether noncitizens are subject to removal from the United States. They are also responsible for determining whether otherwise removable individuals are entitled to various forms of relief from removal, such as asylum. In carrying out these responsibilities, immigration judges are “required to exercise independent judgment.” DOJ, Politicized Hiring Report at 70.

Immigration judges “exercise very important functions” in their “quasi-judicial roles.” DOJ, Final Rule, Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge, 72 Fed. Reg. 53,673, 53,673 (2007) (hereinafter, DOJ Delegation Rule). The proceedings over which immigration judges preside can have consequences that “implicate all that makes life worth living, or even threaten life itself.” *Oversight Hearing on the Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigration, Citizenship, Border Security, & International Law of the H. Comm. on the Judiciary*, 111th Cong., 2d Sess. (June 17, 2010) (statement of Hon. Dana Leigh Marks, President, National Ass’n of Immigration Judges), *available at* 2010 WL 2441100; *see also Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (recognizing that deportation may result in the loss of life or “of all that makes life worth living”). In some cases, for example, immigration judges must determine whether individuals who appear before them have a well-founded fear of future persecution if returned to their home countries, or are more likely than not to be subjected to torture if returned. In others, immigration judges determine whether to remove individuals from the United States at the expense of family unity.

Immigration judges make these weighty determinations in an environment where more than 40 percent of the noncitizens whose proceedings are completed are *pro se*; many of these individuals are indigent and unable to afford a private attorney. EOIR, FY 2013 – Statistical Year Book (2014), Tab F1, *available at* <http://www.justice.gov/eoir/statspub/fy13syb.pdf> (hereinafter, 2013 Statistical Yearbook) (excerpt attached as Attach. I to Murray Decl.). Accordingly, as EOIR recognizes, immigration judges play a special role in “ensur[ing] that *pro se* individuals understand the nature of the proceedings, as well as their rights and responsibilities.” EOIR, FY 2011 – Statistical Year Book (2012), Tab G1, *available at* <http://www.justice.gov/eoir/statspub/fy11syb.pdf> (excerpt attached as Attach. H to Murray Decl.).

The likely finality of immigration court decisions only underscores the immense responsibility entrusted to immigration judges. Decisions ordering a person removed are final unless they are appealed or certified to the Board of Immigration Appeals (BIA), *see* 8 U.S.C. § 1101(a)(47)(B); 8 C.F.R. § 1003.39, which is also part of EOIR, 8 C.F.R. § 1003.1(a)(1). In Fiscal Year 2013 alone, immigration judges issued more than 143,000 decisions, yet the BIA received just over 16,000 appeals, representing an 11 percent appeal rate. 2013 Statistical Year Book, Tab V1. Thus, in the vast majority of cases, immigration judges have the last word on the fate of individuals seeking to remain in the United States. Moreover, even when noncitizens appeal immigration court decisions, the BIA’s review of immigration judges’ findings of fact is limited to determining whether such findings are clearly erroneous. 8 C.F.R. § 1003.1(d)(3). In addition, the BIA affirms some cases by a single member decision and without a written opinion. *Id.* § 1003.1(e)(4), (e)(5).

## II. Public Concern Regarding the Conduct of Immigration Judges and EOIR's Complaint Process

The conduct of immigration judges, particularly on the bench, has been a topic of considerable public concern in recent years. Over the past decade, a series of critical court of appeals decisions have called out some immigration judges for bias, abusive treatment of individuals appearing before them, and incompetence. *See, 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” a particular immigration judge’s conduct during hearings and remanding for further proceedings in front of a different immigration judge). Cataloguing some of these examples, the Seventh Circuit observed in 2005 that the “adjudication of [immigration] cases at the administrative level ha[d] fallen below the minimum standards of legal justice.” *Benslimane v. Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005).

News stories, in turn, highlighted this trend among court of appeals cases. *See, e.g.,* Adam Liptak, *Courts Criticize Judges’ Handling of Asylum Cases*, N.Y. Times, Dec. 26, 2005, available at [http://www.nytimes.com/2005/12/26/national/26immigration.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2005/12/26/national/26immigration.html?pagewanted=all&_r=0) (“Federal appeals court judges around the nation have repeatedly excoriated immigration judges this year for what they call a pattern of biased and incoherent decisions in asylum cases.”). They also brought attention to specific incidents in immigration courts that provided cause for concern. *See, e.g.,* Gaiutra Bahadur, *‘Bullying’ Immigration Judge Absent, Replaced*, Phila. Inquirer, June 2, 2006, available at [http://articles.philly.com/2006-06-02/news/25402880\\_1\\_immigration-courts-office-for-immigration-review-asylum-petitions](http://articles.philly.com/2006-06-02/news/25402880_1_immigration-courts-office-for-immigration-review-asylum-petitions); 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://articles.latimes.com/2006/feb/12/nation/na-judges12>.

In response to this widespread criticism, the United States Attorney General initiated a review of the immigration courts in early 2006. *See* Government Accountability Office (GAO), Executive Office for Immigration Review: Caseload Performance Reporting Needs Improvement 29 (2006), *available at* <http://www.gao.gov/new.items/d06771.pdf> (hereinafter GAO, Caseload Report) (excerpt attached as Attach. J to Murray Decl.); DOJ Delegation Rule, 72 Fed. Reg. at 53,675. Based on that review, he directed EOIR to implement a series of steps to improve the immigration courts. Doc. 16-2, Keller Decl. ¶¶ 11-12. As relevant here, the Attorney General directed EOIR to review its “procedures for handling complaints against its adjudicators, and to 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, or OPR], and [DOJ’s Office of Inspector General, or OIG] in the handling of any particular complaint; and (iii) ensure a timely and proportionate response.” Memorandum 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), *available at* <http://www.justice.gov/ag/readingroom/ag-080906.pdf> (attached as Attach. K to Murray Decl.).

Although EOIR had formally monitored complaints against immigration judges since 2003, *see* GAO, Caseload Report at 27, its process for tracking and resolving those complaints became more structured in light of the Attorney General’s mandate. *See, e.g., Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigration, Citizenship, Border Security, & International Law of the H. Comm. on the Judiciary*, 110th Cong., 2d Sess. (Sept. 23, 2008) (testimony of Kevin Ohlson, Director, Executive Office for Immigration Review), *available at* <http://www.gpo.gov/fdsys/pkg/CHRG-110hrg44611/html/CHRG-110hrg44611.htm> (excerpt attached as Attach. L to Murray Decl.) (assuring Congress that EOIR had

“implemented new, rigorous procedures for reporting and investigating allegations of judicial misconduct”). 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.” DOJ Delegation Rule, 72 Fed. Reg. at 53,675; *see also* 8 C.F.R. § 1003.0. In turn, EOIR began encouraging the public—including AILA’s members—to rely more heavily on its complaint process, and it created a link on its website to facilitate such public complaints, *See, e.g.*, GAO, Caseload Report at 27-29; EOIR, Fact Sheet: Asylum Variations in Immigration Court, Nov. 5, 2007, *available at* <http://www.justice.gov/eoir/press/07/AsylumVariationsNov07.htm>. EOIR also created the position of Assistant Chief Immigration Judge for Conduct and Professionalism, currently filled by Ms. Mary Beth Keller, to be “responsible for reviewing and monitoring all complaints against immigration judges.” Memorandum from Kevin D. Rooney, EOIR Director, to All EOIR Employees: The Attorney General’s Directives 4, *available at* <http://trac.syr.edu/immigration/reports/194/include/RooneyMemoMarch2007.pdf> (attached as Attach. M to Murray Decl.). That position was also charged with “working with the Chief Immigration Judge, OPR, and OIG 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.*

Over the course of the next several years, EOIR also created an electronic database to track immigration judge complaints, and it released to the public additional information about how the agency resolves those complaints. *See* Keller Decl. ¶¶ 17-19 & Ex. A, B. In announcing the provision of new information about the complaint process and instructions for filing a complaint, the Chief Immigration Judge “committed to ensuring that any allegations against our immigration judges are investigated and resolved in a fair and expeditious manner.” Press

Release, EOIR, The Executive Office for Immigration Review Announces New Process for Filing Immigration Judge Complaints (May 20, 2010), *available at* <http://www.justice.gov/eoir/press/2010/IJConductProfComplaints05192010.pdf> (attached as Attach. N to Murray Decl.).

Under the current process, EOIR receives complaints based on reports from a variety of sources, including noncitizens appearing in immigration court, their attorneys, the BIA and courts of appeals, the news media, and government employees. Keller Decl. ¶ 25. EOIR logs those complaints into its electronic complaint database and tracks their development. Supervisory ACIJs investigate and resolve the complaints. Where a complaint falls within the jurisdiction of EOIR's OPR or OIG, EOIR states that its ACIJs forward the complaints to those entities for separate review.<sup>1</sup> EOIR can resolve complaints by taking various actions, including the imposition of disciplinary action (termination, suspension, or reprimand); corrective action, such as training or oral counseling; dismissal of the complaint, for example, where a complainant fails to state a claim; or conclusion of a complaint where an intervening development—such as a judge's retirement—renders the complaint moot. *Id.*, Ex. A at 2-3, Ex. B. 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.” *Id.* ¶ 28; *see also, e.g., Levinsky v. DOJ*, 99 M.S.P.R. 574, 2005 WL 2320078 (M.S.P.B. Sept. 9, 2005) (Merits Systems Protection Board review of an immigration judge's removal), *aff'd*, 208 F. App'x 925 (Fed. Cir. 2006).

Despite EOIR's procedural changes to reform its complaint process, the public concern over immigration judge misconduct largely continues unabated. The news media continue to

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<sup>1</sup> OPR has jurisdiction over complaints in which “there is an appearance or allegation of professional misconduct,” and OIG has jurisdiction over those complaints containing an “allegation of criminal conduct or serious waste, fraud or abuse.” Keller Decl., Ex. A at 1 n.2.

document misconduct by immigration judges and weaknesses in the integrity of our nation's immigration courts.<sup>2</sup> Numerous scholars likewise continue to discuss problems with immigration judges' behavior on the bench.<sup>3</sup> Moreover, numerous individuals and groups have suggested that EOIR's complaint process remains inadequate and should be the subject of further reform.<sup>4</sup>

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<sup>2</sup> 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://www.democracynow.org/2010/10/22/lawless\\_courts\\_lack\\_of\\_accountability\\_allows](http://www.democracynow.org/2010/10/22/lawless_courts_lack_of_accountability_allows); Nina Bernstein, *Judge Who Chastised Weeping Asylum Seeker Is Taken Off Case*, N.Y. Times, Sept. 20, 2007, available at [http://www.nytimes.com/2007/09/20/nyregion/20immigrant.html?pagewanted=print&\\_r=0](http://www.nytimes.com/2007/09/20/nyregion/20immigrant.html?pagewanted=print&_r=0).

<sup>3</sup> See, e.g., Jacqueline Stevens, *Lawless Courts*, The Nation, Nov. 8, 2010, available at <http://www.thenation.com/article/155497/lawless-courts>; Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 28 J. Nat'l Ass'n Admin. L. Judiciary 471, 473-74 (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, *Bias on the Bench: Raising the Bar for U.S. Immigration Judges to Ensure Equality for Asylum Seekers*, 49 Wm. & Mary L. Rev. 1011, 1024-26, 1040 (2007) (discussing frequent criticism of immigration judges by courts of appeals and noting that "misconduct by [immigration judges], even one-time offenders, can be shockingly egregious").

<sup>4</sup> See, e.g., Betsy Cavendish & Steven Schulman, *Reimagining the Immigration Court Assembly Line: Transformative Change for the Immigration Justice System* 36 (2012), available at <http://www.appleseednetwork.org/wp-content/uploads/2012/03/Reimagining-the-Immigration-Court-Assembly-Line.pdf> (excerpt attached as Attach. O to Murray Decl.) (stating that, "[t]o the extent consistent with the Privacy Act, EOIR should . . . post on its website public reports on the disciplinary actions taken against Immigration Judges"); Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens As Aliens*, 18 Va. J. Soc. Pol'y & L. 606, 715 (2011) (urging DOJ to investigate the OCIJ staff for alleged failure to "forward evidence of adjudicator and staff misconduct to the OPR and OIG"); American Bar Ass'n, *Reforming the Immigration System* 2-23, 2-24 (2010), available at [http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba\\_complete\\_full\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf) (addressing commentator concerns that "discipline of immigration judges is almost wholly contained within EOIR and DOJ, without external review in most instances," and that "[w]hen coupled with a lack of transparency," the opportunities for misuse and abuse of disciplinary procedures . . . are dramatically increased"); Marcia Coyle, *Bad Behavior by Judge Reverses Asylum Ruling*, National Law Journal, Jan. 25, 2010 (noting that immigration lawyers said that "complaints against immigration judges to [EOIR] seem to go into a 'black hole'"); Benedetto, *Crisis on the Immigration Bench*, 28 J. Nat'l Ass'n Admin. L. Judiciary at 519, 529 (concluding that the current disciplinary structure for immigration judges is "unsatisfactory" and recommending that complaints made to EOIR instead be reviewed by a multi-member Ethics

Federal judges also continue to express dismay regarding immigration judges' behavior on the bench. Some have identified by name immigration judges whose decisions are repeatedly reversed for apparent bias or other reasons and who seem to act with impunity. For example, the Ninth Circuit has described Immigration Judge Anna Ho as "exhibit[ing] 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 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"); *Smolniakova v. Gonzales*, 422 F.3d 1037, 1047 & n.2 (9th Cir. 2005) (citing cases in which the court of appeals had reversed Judge Ho's credibility findings and stating that "we cannot help but question whether this [immigration judge] has, at least in some instances, improper hostility towards asylum applicants who appear before her").

Similarly, the Third Circuit recently criticized Immigration Judge Annie Garcy for becoming "the functional equivalent of counsel for one of the parties" during a hearing, noting that the judge asked 87 questions of a petitioner. *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 cited 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).

Likewise, the Seventh Circuit has repeatedly faulted Immigration Judge Craig Zerbe for "basing his decision[s] on unsupported speculation about an asylum applicant." *Floroiu v.*

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Review Board, bypassing "current evaluators of complaints against immigration judges" in light of "their failure to adequately enforce proper behavior on the immigration bench").

*Gonzales*, 481 F.3d 970, 976 (7th Cir. 2007) (citing *Ko v. Gonzales*, 421 F.3d 453 (7th Cir. 2005)). In a 2007 case, it directed the clerk to send a copy of its opinion to the Attorney General to determine whether disciplinary action was warranted. *Id.* Yet in 2013, Judge Zerbe remained on the bench, and the Seventh Circuit again felt “compelled to note” his conduct, which the Court described as “inappropriate,” during a hearing. *Singh v. Holder*, 720 F.3d 635, 643-44 (7th Cir. 2013). The court remarked that the judge “seemed only interested in answers that parroted back the exact language of [a] Wikipedia entry” on which the judge relied to gather information about the petitioner’s religion. *Id.*

Notably, Judges Zerbe, Garcy, and Ho all remain sitting immigration judges. *See* EOIR, EOIR Immigration Court Listing, <http://www.justice.gov/eoir/sibpages/ICadr.htm>.

### **III. AILA’s FOIA Request and This Litigation**

Plaintiff AILA is a national association of more than 13,000 attorneys and law professors who practice and teach immigration law. Deasy Decl. ¶ 3. AILA was established 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. *Id.* AILA and its members act as a frequent resource on issues relating to the immigration courts and justice in immigration proceedings. *Id.* ¶ 5.

Disturbed by the scarcity of publicly-available information about how EOIR investigates and resolves 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 [DOJ's OPR or the 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).

Doc. 16-1, Rodrigues Decl., Ex. A (FOIA Request), at 1. AILA's FOIA request initially covered complaints resolved on or after January 1, 2007. *Id.* at 2. Pursuant to FOIA, 5 U.S.C. § 552(a)(2), 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." Rodrigues Decl., Ex. A at 2. AILA sought a public interest fee waiver. *Id.*

In December 2012, EOIR denied AILA's public interest fee waiver, and AILA filed an administrative appeal. *Id.* ¶¶ 8-9. More than five months later, after receiving no response to its administrative appeal and no records in response to its FOIA request, AILA filed this lawsuit. *See id.* ¶ 10. AILA asserted FOIA claims against EOIR and DOJ seeking the requested records and a waiver or reduction in fees associated with the processing of AILA's request. *See* Doc. 1, Compl. ¶¶ 31-40. AILA also asserted that defendants had an obligation under FOIA, 5 U.S.C. § 552(a)(2), to make available by electronic means all requested records that constitute final opinions and orders made in the adjudication of complaints against immigration judges. Compl. ¶¶ 41-45. Based on this violation, AILA pleaded a FOIA claim and sought, in the alternative, relief under the Administrative Procedure Act, 5 U.S.C. § 706, and mandamus relief. Compl. ¶¶ 41-54.

After litigation commenced, EOIR began producing records in response to AILA's request without charge, thus mooting AILA's fee-related claims. AILA agreed to narrow the timeframe of its request to all complaints against immigration judges that were closed on or after October 1, 2009, based on representations from government counsel that EOIR's complaint database was established on October 1, 2009, and included complaints pending on or after October 2009. Murray Decl. ¶¶ 3-4.<sup>5</sup> EOIR ultimately granted AILA's FOIA request in part by producing redacted records for 767 closed complaints against immigration judges reflected in EOIR's electronic database. In the course of production, EOIR also sent some records to other DOJ components, or non-DOJ agencies, for consultation or review. These records subject to referral or consultation were released to AILA with redactions on May 22 and June 11, 2014, and are not covered by the motions for summary judgment. *Id.* ¶ 8.

#### **IV. The Scope of Information Sought by AILA in Litigation and the Government's Remaining Grounds for Withholding**

The government based the majority of withholdings from the requested records on Exemption 6. AILA does not directly seek in litigation certain categories of records withheld under this exemption: (1) noncitizens' names; (2) alien registration number; (3) noncitizens' address/telephone numbers, and e-mail addresses; (4) dates of birth and street addresses for any individual; (5) names of noncitizen relatives or third parties related to the noncitizens; (6) DOJ

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<sup>5</sup> In its motion for summary judgment, the government now states that 129 of the 767 complaints in the database were closed *before* October 1, 2009, and that it has released those complaint files, although "outside the scope of the narrowed FOIA request," as a matter of discretion. *See* Doc. 16, Defs.' S.J. Mem. at 6 n.3; Doc. 16-2, Curry Decl. ¶ 16. To the extent that any of the government's arguments in support of withholding could be deemed to turn on this distinction, AILA contests the distinction on the ground that AILA's agreement to narrow its request hinged on inaccurate information supplied by the government. *See* Murray Decl. ¶ 4 & Attach. A (informing government counsel that AILA would narrow the timeframe of its request to those complaints closed on or after October 1, 2009, because that was the date on which the government represented the complaint database had come online).

and Department of Homeland Security (DHS) employee telephone numbers and e-mail addresses (except the domain name portions of those addresses); (7) judges' medical or financial information; (8) judges' personal telephone numbers, home addresses, or personal e-mail addresses; (9) EOIR court employee names beyond immigration judges; (10) noncitizens' attorney names; (11) DHS employee names; (12) names, addresses, and contact information of third parties related to immigration judges; and (13) complainants' names. *See* Docs. 16-3, 16-4 (*Vaughn* indices identifying these categories of information among those withheld).<sup>6</sup> AILA also does not pursue those records at issue in this motion for summary judgment and redacted by the government under FOIA Exemption 5.

AILA does, however, maintain its request for various other types of information relating to immigration judges and withheld under Exemption 6, including all locational information beyond street addresses; immigration judge names and signatures, pronouns used for immigration judges; judges' entry on duty, termination, retirement dates, or years of service; circuit court cases, quotations, and citations; and media articles.

Although the government relied on Exemption 7(c) in withheld records, it has abandoned that exemption by failing to raise it in the government's summary judgment brief. Accordingly, to the extent that any redactions from responsive records are based on Exemption 7(c) alone and those records remain at issue, the corresponding information must be released to AILA.

### **STANDARD OF REVIEW**

Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. FOIA's "strong

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<sup>6</sup> However, to the extent that EOIR will argue that disclosure of information AILA continues to seek would reveal information no longer sought by AILA in this litigation, AILA reserves all rights to dispute the rationale for withholding the underlying information, notwithstanding AILA's narrowing of the issues.

presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents.” *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991). If the government cannot “carry its burden of convincing the court that one of the statutory exemptions appl[ies],” the requested records must be released to the plaintiff. *Goldberg v. Dep’t of State*, 818 F.2d 71, 76 (D.C. Cir. 1987).

## ARGUMENT

### I. The Requested Records Are Not Exempt from Disclosure Under 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 “personnel and medical and similar files.” Thus, this Court need only address (1) whether a substantial, that is, more than *de minimis*, privacy interest is at stake and (2) if such a privacy interest is at stake, whether it is outweighed by the public interest in disclosure. *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 conducting the analysis, 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. Judges’ Privacy Interest in the Withheld Information Is Minimal and, In Some Cases, *De Minimis* or Nonexistent.

Immigration judges’ privacy interest in the withheld information is minimal and, in some cases, *de minimis* or nonexistent. First, as detailed above in Part II of the Background, many allegations of immigration judge misconduct have appeared in media reports and court of appeals decisions in recent years. EOIR concedes that some of the complaints that it investigates come to its attention precisely as a result of these reports. Keller Decl. ¶ 25. Under these

circumstances, disclosure of judges' names and other identifying information in the documents, which merely address allegations already part of the public record, would not implicate the judges' privacy interests at all. *See Trentadue v. Integrity Committee*, 501 F.3d 1215, 1234 (10th Cir. 2007) (holding that where accusations against named government employees were already public, disclosure of the individuals' names in an agency's response to those accusations "would not invade the accused's privacy at all, much less constitute a clearly unwarranted invasion of personal privacy" under Exemption 6 (internal quotation marks omitted)). Indeed, disclosure of immigration judges' names under these circumstances might even vindicate immigration judges if they have been unfairly maligned by the press or the federal courts.

Second, although the government predicts several harms to immigration judges resulting from disclosure, its predictions are not supported by the evidence. The government contends that disclosure could result in "threats, harassment or retaliatory acts that may result from being publicly identified as the subject of complaints on a topic as controversial and contentious as immigration." Defs.' S.J. Memo. at 17-18. The government has failed, however, to demonstrate that immigration judges have been subject to threats and harassment in the past, even though—as AILA demonstrated above (at pp. 10-12)—some immigration judges have been the subject of repeated criticism in the media and by courts of appeals. In addition, immigration judges are already associated by name with other types of information reflecting how they carry out their duties on the bench. For example, the Transactional Records Access Clearinghouse (TRAC) makes available an interactive website that allows the public to see asylum denial rates by immigration judge name. *See* TRAC, Immigration Judge Reports – Asylum, <http://trac.syr.edu/immigration/reports/judgereports>. The government has produced no evidence of threats or harassment as a result of that information's disclosure. Accordingly, the government has not

established any likelihood that threats, harassment, or retaliatory acts will occur, as required to establish this privacy interest under Exemption 6. *See Nat'l Ass'n of Home Builders*, 309 F.3d at 35 (rejecting privacy interest based on possibility that landowners would be subject to unlawful trespass where the agency failed to demonstrate a “likelihood” of such activities).

The government also predicts 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 with EOIR management” in the investigation of complaints. Rodrigues Decl. ¶ 60 & n.14 (cited at Defs.’ S.J. Memo. at 18-19). Again, the government’s predictions in this regard speak in terms of what “could” happen, whereas, for Exemption 6 to apply, the government must show that disclosure “*would* constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6) (emphasis added). *Compare id.* § 552(b)(7)(C) (describing FOIA Exemption 7(c), which protects records compiled for law enforcement purposes to the extent that production “*could reasonably be expected to* constitute an unwarranted invasion of personal privacy” (emphasis added)). In addition, the government’s focus on the immigration judges’ willingness to cooperate with EOIR in investigations is irrelevant to the Exemption 6 inquiry, which focuses on individuals’ privacy interests, not the government’s interest in obtaining information. In these respects, the government’s privacy arguments fall short.

**B. The Public Interest in Disclosure of the Withheld Information Is Strong.**

Even if immigration judges have a privacy interest in their names and other identifying information appearing in complaint records, the public has a strong interest in disclosure of the withheld records. Under Exemption 6, the public interest to be weighed is “the extent to which disclosure would serve the core purposes of the FOIA 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).

***1. Disclosure would shed light on particular immigration judges’ conduct, in which there is an obvious public interest.***

Release of the withheld information would serve the public interest relevant to Exemption 6 in several ways. As an initial matter, it would shed light on the conduct of particular immigration judges, in which the public has an obvious interest. For example, the public has an interest in knowing the identity of an immigration judge who yelled at an employee to such an extent that others considered calling security personnel and who then sought to have those staff admonished for reporting the conduct and considering a call for help. *See* Murray Decl. ¶ 18 (describing complaint 619, which resulted in a one-day suspension); *id.*, Attach. D. The public has an interest in knowing the identity of a judge who referred to a noncitizen’s child with autism as a “wild animal posing as a child,” *id.* ¶ 19 (describing complaint 656, which resulted in a one-day suspension); *id.* Attach. E, especially where other complaints about the judge indicate that EOIR employees recognized this judge as a repeat offender and a government employee expressed the opinion that the judge should not be on the bench, *id.* ¶ 20 & Attach. F. And the public has an interest in knowing more about a judge who repeatedly engaged in unfounded speculation in credibility findings, inappropriately calling a respondent “simple” and commenting on her illness and mastectomy; stating that he or she could not imagine a female noncitizen supervising crews on a construction site because she was “exceedingly mousy”; and stating 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. *Id.* ¶ 15.

Disclosing the identities of judges in these and similar cases is likely to have a positive deterrent effect on judges. Deasy Decl. ¶ 11; Realmuto Decl. ¶ 12. “Greater public scrutiny is likely to encourage greater voluntary compliance with ethics standards, standards of judicial conduct, and DOJ policies than the current system, in which immigration judges have not been identified by EOIR as the particular subjects of complaints.” Deasy Decl. ¶ 11; Realmuto Decl. ¶ 12. Moreover, release of the withheld information “would facilitate existing court monitoring efforts and promote new court monitoring projects by allowing the public greater access to information that would suggest or confirm a pattern of misconduct or abusive behavior by particular judges.” Realmuto Decl. ¶ 13.

The public’s interest in knowing what immigration judges are up to, including their identities, extends beyond those complaints for which EOIR has substantiated a claim and taken disciplinary action. EOIR rarely takes disciplinary action against immigration judges, *see* Murray Decl. ¶ 12, and there are compelling reasons to doubt that the rarity of discipline simply reflects the rarity of immigration judge conduct warranting it. For example, ACIJ Keller has “cautioned that the resolutions reflected in [online aggregate] statistics [published by EOIR about its complaint process] may under-report EOIR’s efforts to address unprofessional conduct, as the data do not include the number of judges who do not meet professionalism or other standards and are urged to retire or resign without any formal disciplinary proceeding.” Cavendish & Schulman, *Reimagining the Immigration Court Assembly Line* at 35 (excerpt attached as Attach. O to Murray Decl.); *see also* Keller Decl. ¶ 29 (stating that complaints may be concluded without action because of an intervening event, such as a judge’s retirement or resignation). And observers have questioned the ability of the complaint process to root out misconduct where complaints are not resolved by separate and neutral arbiters. *See, e.g.*, Realmuto Decl. ¶ 6

(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* citations, *supra*, n.4.

Indeed, preliminary analysis of the records released to AILA underscores the public's interest in the names of immigration judges in all complaints, not just those resulting in discipline. The data reveal, for example, that 7 judges were the subject of 20 or more complaints each during the time period covered by the records and were responsible for 186 complaints, or nearly a quarter of all complaints, in the release. Murray Decl. ¶ 13. Of those 7 judges, 5 were never subjected to disciplinary action of any kind, despite these judges' disproportionate representation among judges subject to complaints. *Id.*

In addition, some judges drew a slew of 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, subjected to "oral counseling" as a result of those complaints. *Id.* ¶ 14. EOIR resolved 24 of the complaints by concluding that no further action was needed when the judge retired. *Id.*

Similarly, files on other judges who drew repeated complaints also suggest that those judges rarely, if ever, faced any disciplinary action, despite the disturbing nature of those complaints. For example, Judge "OPU" was the subject of 29 complaints in the sample, 24 of which were resolved by "oral counseling" and an additional 1 by "training." *Id.* ¶ 16. This judge was the subject of repeated 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.*; *see also id.* ¶ 17 (stating that Judge “PBZ” was the subject of 32 complaints in the sample and at most received “written counseling” as a result of those complaints).

The startling patterns evidenced by the complaint records received by AILA underscore the public’s right to know about the identities of these immigration judges, who are charged with doing justice in our nation’s immigration courts.

**2. *Disclosure would encourage reporting of complaints, thereby informing EOIR and the public more fully.***

“Without 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.” Deasy Decl. ¶ 12; *see also* Realmuto Decl. ¶ 8 (describing an instance in which a private immigration attorney was subject to retaliation for questioning an immigration judge’s conduct and identifying attorneys’ fears related to making complaints). “Although retaliation is always a concern, private attorneys are likely to feel more secure in reporting a complaint if they know that others have spoken up about the same types of conduct with a particular judge.” Deasy Decl. ¶ 12; Realmuto Decl. ¶ 14 (noting that there would be “strength in numbers” if the public knew which judges had been subject to complaints and stating that “[i]f members could be assured that they are not alone in complaining about a particular judge for a particular type of misconduct, it would significantly reduce their fears of retaliatory harassment, intimidation and negative decision-making against existing and future clients”). Release of the withheld information is thus “likely to encourage the private immigration bar, including AILA members, to report instances of judicial misconduct to EOIR,” Deasy Decl. ¶ 12, thereby creating a feedback loop that informs the public more fully about the conduct of immigration judges.

3. ***Release of the withheld information would facilitate more detailed evaluation of EOIR's processing and resolution of complaints.***

Although researchers and the public can draw some conclusions from the anonymized records released by EOIR thus far, their ability in this regard does not negate the public interest in the more detailed analysis that 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, release of the identities of immigration judges would allow researchers to find other public biographical information about the judges, perhaps not reflected in the requested records themselves, that could then be considered in assessing how EOIR resolves immigration judge complaints. *See* GAO, U.S. Asylum System: Significant Variation Existed in Asylum Outcomes Across Immigration Courts 66-67, Appendix I (2008), *available at* <http://www.gao.gov/assets/290/281794.pdf> (hereinafter, GAO, Asylum System Report) (excerpt attached as Attach. P to Murray Decl.) (discussing how GAO used the names of individual judges to find additional biographical data about them that was useful in assessing which characteristics of an immigration judge are predictive of the judge's willingness to grant asylum). In this way, the public could do a more comprehensive review of the government's decisionmaking process on complaints and analyze whether the characteristics of judges affect either the likelihood of a complaint being filed against a judge or the agency's resolution of complaints. *Am. Civil Liberties Union*, 655 F.3d at 15 (recognizing that the public interest under Exemption 6 can include derivative uses of information in requested records).

In addition, without disclosure of the names in future releases, the public will have no way of determining whether EOIR actually engages in progressive discipline with each successive substantiated complaint and whether certain judges are likely to have a practice of

engaging in certain conduct likely to draw complaints. The immigration judge key created and produced by EOIR in this litigation, Rodrigues Decl. ¶ 16, which allows the public to link a series of complaints as belonging to a single judge, is central to the usefulness of records thus far released by EOIR. However, FOIA does not require the creation of records, so EOIR would not be bound to use this key or to create similar keys for future proactive releases sought by AILA pursuant to 5 U.S.C. § 552(a)(2).

**C. Exemption 6's Balancing Test Requires Disclosure.**

Immigration judges' critical role in our nation's immigration system, the relevant case law, and the treatment of similar types of complaints by the judiciary and EOIR underscores that the public interest in disclosure of the withheld records outweighs the asserted privacy interest.

First, immigration judges' critical role tilts the balancing test in this case decidedly in favor of disclosure. The records bear on whether immigration judges are engaging in misconduct on and off the bench and are worthy of the trust placed in them. Immigration judges make weighty, life-or-death decisions, they are expected to exercise independent judgment, and they play a special role in ensuring that the many *pro se* individuals appearing before them understand their rights. *See* discussion, *supra*, p.5. Immigration judges' decisions are also typically the final word on the fate of the individuals who come before them, and their factual determinations, to the extent they are subject to review, are not reviewed *de novo*. *Id.* In light of these responsibilities, the government's attempt to portray immigration judges as "lower[-]level employees," Defs.' S.J. Memo. 17, rings hollow. Rather, for Exemption 6 purposes, immigration judges should be treated like high-level officials in assessing whether, and to what extent, the public interest in disclosure outweighs any asserted privacy interest.

Second, disclosure in this case is consistent with numerous cases in which courts have ordered the disclosure of information about government employees who have engaged in or are alleged to have engaged in misconduct. In *Stern v. FBI*, 737 F.2d 84 (D.C. Cir. 1984), for example, a case under Exemption 7(c), which incorporates a stronger privacy exemption than Exemption 6, the D.C. Circuit ordered disclosure of a portion of a censure letter naming an Federal Bureau of Investigation special agent who knowingly took part in a cover-up. *Id.* at 93-94. Moreover, it held with respect to two lower-level employees who were inadvertently involved in improper FBI activities that, although their names need not be disclosed from the censure letters, the issue was a “close one” under Exemption 7(c). *Id.*; *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 under Exemption 6 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 information about disciplinary action taken against a commander of a ship after a publicized collision was permissible under Exemption 6); *see also Trentadue*, 501 F.3d at 1234 (holding that where accusations against named government employees are already public, disclosure of the individuals’ names in an agency’s response to those accusations does not fall within Exemption 6’s scope).

The government points to *Beck v. DOJ*, 997 F.2d 1489 (D.C. Cir. 1993), to contend that disclosure is not appropriate under existing case law. Defs.’ S.J. Memo. at 22 n.16. However, *Beck*’s narrow holding has no application here. *Beck* held that Exemption 6 permitted the withholding of OPR investigatory documents concerning two agents accused of unethical conduct by a criminal defendant. *Id.* at 1491-92. The Court emphasized the speculative nature of the complaint, stating that “there [was] no evidence, let alone any public knowledge, that

wrongdoing ha[d] occurred,” and that the case was not one in which there had been a demonstrated public interest. *Id.* at 1493-94. Here, in contrast, there is a demonstrated public interest in release of the information, and the disclosures made by EOIR so far in this litigation confirm that the agency has in some instances found misconduct. Moreover, unlike in *Beck*, AILA has submitted evidence that calls into question the fairness of the complaint process itself.

Third, disclosure of immigration judges’ names and identifying information finds support in the practices of the judiciary and EOIR itself. For example, written orders, including any supporting memoranda and dissents, regarding meritorious complaints 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 United States, Judicial-Conduct and Judicial-Disability Proceedings Rule 24(a)(4) (2008), *available at* [http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/Misconduct/jud\\_conduct\\_and\\_disability\\_308\\_app\\_B\\_rev.pdf](http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/Misconduct/jud_conduct_and_disability_308_app_B_rev.pdf); *see also, e.g., In re Complaint of Judicial Misconduct*, C.C.D. No. 13-01, 2013 WL 8149446, at \*5 (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 intervening events (such as the judge’s resignation), the judicial council investigating a complaint 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 any subsequent proceedings except private censures become public, and any disciplinary hearing is 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 all currently suspended immigration attorneys and a list of all previously disciplined attorneys who have since been reinstated. *See* EOIR, List of Currently Disciplined Practitioners, <http://www.justice.gov/eoir/discipline.htm>; EOIR, List of Previously Disciplined Practitioners, <http://www.justice.gov/eoir/prev-discipline-english.htm>. Likewise, comparable information about the decisionmakers in immigration proceedings should be publicly available.

In sum, in light of these factors, and given the strong public interest in disclosure, the balancing test under Exemption 6 tilts decidedly in favor of disclosure.

**D. Information That Does Not Identify an Immigration Judge Should Be Disclosed Irrespective of the Disclosure of Names.**

Even if information that would identify individual judges were exempt from disclosure, the government has not demonstrated that all withheld information would, if released, identify individual judges. *See* Defs.’ S.J. Memo. at 19. Where information is anonymous, an individual has at most a *de minimis* privacy interest. *See Dep’t of State v. Ray*, 502 U.S. 164, 175-76 (1991) (stating that even disclosure of migrants’ “highly personal information regarding marital and employment status, children, living conditions and attempts to enter the United States” would constitute “only a *de minimis* invasion of privacy when the identities of the [individuals] are unknown”).

First, the government asserts that if gender pronouns *and* court locations were released, the public could identify the immigration judge implicated in the complaint. Defs.’ S.J. Memo. at 20. But assuming that the government did not release the base city of a complaint, the pronoun

would not by itself identify a specific judge. The gender of a judge may be useful for researchers examining the complaint system and how EOIR responds to complaints. *See, e.g.*, GAO, Asylum System Report at 7 (determining that an immigration judge’s gender was statistically significant in predicting the likelihood that a judge would grant asylum). Pronouns should therefore be released.

Second, although AILA does not seek street addresses, it does contest the government’s blanket and open-ended withholding of other locational information. The government has not demonstrated that—as a categorical matter—all locational information, including cities, states, and countries, will lead to the identification of an immigration judge or other individuals identified in the records.

## **II. Defendants Improperly Redacted Information as “Non-Responsive” from Otherwise Responsive Records.**

EOIR made copious redactions from records released to AILA for information that EOIR deemed “non-responsive” to AILA’s FOIA request. These redactions are extensive, accounting for whole paragraphs and pages of records. *See, e.g.*, Murray Decl. ¶ 10 & Attach. B. Although the *Vaughn* indices identify some instances in which EOIR made such redactions, *see, e.g.*, Doc. 16-4, *Vaughn* index (Feb. 28, 2014 release), at 30, 32, the indices do not address most of them, Murray Decl. ¶ 10.

The government’s withholding of purportedly “non-responsive” information from otherwise responsive records is contrary to FOIA. The government does not even attempt to justify in its summary judgment papers these widespread redactions. Nor are the redactions justifiable in light of AILA’s FOIA request, which sought “complaints” against immigration judges and a variety of “records” relating to those complaints. Under the plain language of its FOIA request, AILA is entitled to responsive documents in their entirety, even if those

documents contain portions of unresponsive material, unless portions of those records fall within one of FOIA's nine exclusive exemptions. *See Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Where the government has not claimed an exemption, the redacted material must be released.

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

Although FOIA is more typically invoked when an agency fails to disclose records in response to a FOIA request from a member of the public, *see* 5 U.S.C. § 552(a)(3), FOIA also requires agencies to proactively 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,” and to create an index of those records, *id.* § 552(a)(2). 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.* In practice, agencies often meet this requirement by posting records online in their FOIA “reading rooms.” *See, e.g.*, EOIR, FOIA Library, <http://www.justice.gov/eoir/foia-lib.html>.

Here, resolutions of complaints against immigration judges constitute “orders” and, where accompanied by a statement of the agency's reasons, “final opinions,” as FOIA, § 552(a)(2)(A), uses those terms. Accordingly, going forward, EOIR must proactively release the resolutions by sharing them with the public online.

#### **A. Resolutions of Complaints Are “Final Opinions” and “Orders” Under *Sears* and Its Progeny.**

The test for whether a document constitutes a “final opinion” or “order” that is “made in the adjudication of [a] case[],” 5 U.S.C. § 552(a)(2)(A), is a functional one informed by the broad definitional section of the Administrative Procedure Act (APA), of which FOIA is a part. *See 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); *Niemeier v. Watergate Special Prosecution Force*, 565 F.2d 967, 972 (7th Cir. 1977). In *NLRB v. Sears, Roebuck*, for example, the Supreme Court held that the National Labor Relations Board (NLRB) had to disclose publicly certain “Advice Memoranda” and “Appeals Memoranda” because they constituted final opinions made in the adjudication of cases. 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” with the NLRB alleging unfair labor practices, which the NLRB’s General Counsel evaluated. Where warranted, the General Counsel brought a “complaint” against the party subject to the charge, leading to the adjudication of the case by the NLRB. 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).

*Id.* at 158-59 (footnoted omitted).

In *Bristol-Meyers Co.*, 598 F.2d 18, the D.C. Circuit explained even more simply the test for determining whether a document constitutes a final opinion or order under 5 U.S.C. § 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 5 U.S.C. § 552(a)(2). *Id.* at 25-26.

EOIR's decision to dismiss or act on a complaint results in closure of the complaint file and constitutes an "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). Accordingly, under the test set forth in *Sears* and its progeny, resolutions of complaints against immigration judges constitute final opinions and orders and must be released.

The government raises three objections to treating the complaint resolutions as final opinions and orders. First, the government contends that the resolutions address "internal employee disciplinary matters," not "EOIR's performance of its statutory duty to administratively adjudicate immigration cases," and are therefore not covered by 5 U.S.C. § 552(a)(2). Defs.' S.J. Mem. at 24. However, even assuming that the complaint process were entirely related to internal employee disciplinary matters—as opposed to a formal process in which EOIR has actively sought public participation—the problem with the government's position is that it draws a factual distinction without legal significance. Contrary to the government's argument, *Sears* does not stand for the proposition that final opinions and orders cannot touch on matters related to agency personnel. *Sears* had nothing to do with issues

touching on employee discipline, so the Court unsurprisingly had nothing to say about them. And *Sears*' discussion of the APA's definitional section and its application to 5 U.S.C. § 552(a)(2) makes plain that FOIA's proactive disclosure provision should be given broad scope.

The government also relies on *Rockwell International Corp. v. DOJ*, 235 F.3d 598 (D.C. Cir. 2001), to support its contention regarding employee disciplinary matters, but that case is inapposite. *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 5 U.S.C. § 552(a)(2). 235 F.3d at 603. *Rockwell* 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,'" and did not constitute a final opinion. *Id.* *Rockwell*'s outcome would presumably have been different if the report had "contemplated, evaluated, or rejected"—as resolutions of immigration complaints do—"specific disciplinary action against [a DOJ] employee." *Id.*

Second, the government contends that the resolutions are not final orders or opinions because they are "not the product of a statutorily mandated process but instead a voluntary one." Defs.' S.J. Memo. at 25. As an initial matter, a statute need not directly mandate EOIR's complaint process for the complaint resolutions to constitute final opinions and orders. The government contends otherwise by relying on *Rockwell* and *Common Cause v. IRS*, 646 F.2d 656 (D.C. Cir. 1981), but neither of those cases provides support. *Rockwell* did not hold that a statutory duty to create the requested record is a necessary predicate for finding that a document is an agency order or final opinion. After all, the internal investigation in *Rockwell* was a

completely voluntary, internal process used to dispute congressional findings. *See* 235 F.3d at 603. The government had made no commitment to issue the corresponding report. Under these circumstances, the D.C. Circuit had no need to determine, for example, whether a mandatory process reflected in regulations—as EOIR’s complaint process is, *see* DOJ Delegation Rule, 72 Fed. Reg. at 53,675; 8 C.F.R. § 1003.0—could lead to a final opinion or order.

Likewise, in *Common Cause*, the D.C. Circuit held that Internal Revenue Service (IRS) internal memoranda discussing an agency proposal to release the names of certain officials who contacted the IRS did not constitute final opinions under 5 U.S.C. § 552(a)(2)(A) (and that the documents were actually exempt from disclosure as deliberative process material protected by FOIA Exemption 5). 646 F.2d at 659-60. As in *Rockwell*, *Common Cause* presented the “voluntary suggestion, evaluation, and rejection of a proposed policy by an agency.” *Id.* at 659. The Court thus had no need to determine whether an agency must exercise a statutory duty before the result of that exercise constitutes an order or final opinion.

In this case, and in contrast to *Rockwell* and *Common Cause*, EOIR implemented and made mandatory a complaint process for the public’s use. As a result, the complaint resolutions here are nothing like the products of voluntary agency initiatives in *Rockwell* and *Common Cause*. EOIR has “committed to ensuring that any allegations are investigated and resolved.” Keller Decl. Ex. A at 1. Consistent with the Attorney General’s 2006 mandate, DOJ amended its regulations to add to the “existing description of the duties” of EOIR’s director the “[i]mplement[ation] [of] a process for receiving, evaluating, and responding to complaints of inappropriate conduct by EOIR adjudicators.” DOJ Delegation Rule, 72 Fed. Reg. at 53,675; *see also* 8 C.F.R. § 1003.0. And EOIR does, in fact, respond by, among other things, dismissing a complaint for various reasons or by finding that a complaint warrants the imposition of

corrective or disciplinary action. The government concedes that these complaints result in “final resolution[s].” *See, e.g.*, Rodrigues Decl. ¶ 85 (noting that EOIR released to AILA a “final settlement agreement” with an immigration judge); *id.* ¶ 88 (same with respect to a “final agency determination, a grievance decision upholding a one-day suspension”); *id.* ¶ 93 (same with respect to a “final resolution of [a] complaint”).

Third, the government contends that the resolutions do not constitute final opinions and orders because they “are not the product of an adversar[ial] process and do not carry any precedential weight.” Defs.’ S.J. Memo. at 25 (citing *Rockwell* and *Common Cause*). The first portion of the government’s contention is wrong as a factual matter: Resolutions of complaints are the product of an adversarial process. Immigration judge complaints are generally filed by a third party—including the immigrant himself or his attorney—about the conduct of an immigration judge. At least formally, EOIR has also committed to keeping the complainant apprised of whether action has been taken on his complaint, and states that it may contact the complainant as part of its investigation process. Keller Decl., Ex. A at 3 & Ex. B. Thus, to say that the process is non-adversarial vis-à-vis a complainant ignores the critical role that complainants play. In any event, when EOIR resolves a complaint, it necessarily determines whether to dismiss the complaint or take corrective or disciplinary action against an immigration judge, and 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.*, Murray Decl. ¶ 11 & Attach. C. And as ACIJ Keller 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.” Keller Decl. ¶ 28. Thus, although ACIJ

Keller states her view that the process is not an “adversar[ial]” one, *id.* ¶ 30, her description shows otherwise.

The government’s related contention that a final opinion or order must be precedential to fall under 5 U.S.C. § 552(a)(2)(A) has no basis in law and, in any event, does not help the government given the facts in this case. The government relies on *Sears* but again mistakes *Sears*’ description of the documents at issue with the establishment of a prerequisite for § 552(a)(2)(A)’s application. *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 “final opinion” under § 552(a)(2)(A) without any discussion as to whether document was precedential); *Niemeier*, 565 F.2d at 971-72 (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).

In any event, the government’s assertion that complaint resolutions “do not carry any precedential weight,” Defs.’ S.J. Memo. at 25, is undermined by the government’s own evidence. As ACIJ Keller acknowledges, resolutions *are* precedential when the agency considers “progressive discipline for an immigration judge who has failed to correct his or her conduct.” Keller Decl. ¶ 30; *see also id.*, Ex. A at 2 (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))). Thus, the resolutions are used to determine whether, and to what extent, immigration judges will be sanctioned. Moreover, the agency makes clear that its process involves determining whether to dismiss a complaint for “failure to state a claim,” that is, whether the “facts alleged, even if true, do not constitute inappropriate conduct.” *Id.*, Ex. A at 3; *see also id.* ¶ 29. In so doing, the agency must necessarily interpret and apply ethical and other policy obligations for immigration judges, further making clear that the process creates a body of interpretations within the agency.

**B. The Court Need Not Reach AILA’s APA and Mandamus Claims.**

The government contends that AILA’s APA and mandamus claims are subject to summary judgment because “[n]either act imposes an independent obligation on EOIR to proactively release” the requested records. Defs’ S.J. Memo. at 26 n.18. However, both APA and Mandamus Act claims may enforce legal obligations arising from separate statutes. The APA permits courts to “compel agency action unlawfully withheld” and “agency action not in accordance with law,” 5 U.S.C. § 706, in cases where “there is no other adequate remedy in a court,” *id.* § 704. Because the APA is a procedural statute, courts necessarily look to other sources of law, including regulations, to determine agencies’ substantive obligations. *See, e.g., Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 65 (2004). And as one of the cases cited by the government makes clear, Defs’ S.J. Memo. at 26 n.18, to determine whether mandamus relief is appropriate, a court necessarily looks to the substantive statute that is alleged to have been violated. *See Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002) (examining a provision of the Social Security Act to determine whether mandamus relief was appropriate).

The government, therefore, errs in its attempt to narrow APA and Mandamus Act claims to violations of substantive obligations imposed by those laws.

In any event, except to contend that the documents at issue are not final orders or opinions, and thus not within the legal obligation imposed on defendants by FOIA, the government does not challenge AILA's ability to obtain the relief it seeks under FOIA. *See* Compl., Prayer for Relief (seeking a declaration that the government's practice of failing to make final opinions and orders resolving complaints publicly available by electronic means is unlawful and an order that the government make electronically available all current and future final opinions and orders in the adjudication of such complaints). Accordingly, the Court need not reach AILA's requests for relief under the APA and mandamus relief, which AILA asserted in the alternative to its FOIA claim under 5 U.S.C. § 552(a)(2).

#### **CONCLUSION**

For the foregoing reasons, AILA's motion for summary judgment should be granted and the defendants' cross-motion for summary judgment denied.

Respectfully submitted,

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2. Plaintiff disputes that this paragraph sets forth a statement material to the resolution of this case. To the extent a response is necessary, it is disputed that immigration judges are “non-managerial” Department of Justice (DOJ) employees. Defendants’ declarant states that immigration judges have no “supervisory” responsibilities, not that they have no managerial responsibilities. Otherwise, the remainder of the paragraph is undisputed.

3. Disputed that Assistant Chief Immigration Judges (ACIJs) administer all discipline. As defendants’ own declarant states, suspensions are imposed by the Deputy Chief Immigration Judge or other DOJ officials. *See* Keller Decl. ¶ 28. The remainder of the paragraph is undisputed.

4. Undisputed.

5. Sentences one and three are undisputed. Undisputed that complaints raising conduct that comes within the jurisdiction of DOJ’s Office of Professional Responsibility (OPR) or Office of Inspector General (OIG) should be referred to those offices. Disputed that EOIR does in fact consistently refer such complaints. *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) (“According to documents responsive to a request filed under the FOIA, between September 2009 and August 2010 EOIR failed to forward any misconduct complaints to [the Office of Professional Responsibility], including ones that detailed evidence supporting allegations of civil and criminal law-breaking by EOIR adjudicators and other staff.”). However, plaintiffs do not contend that this statement is material to the resolution of this case.

6. Disputed that ACIJs determine whether discipline is appropriate in all circumstances. *See* Keller Decl. ¶ 28 (stating that suspensions of 14 days or more are proposed by the EOIR Director, the Chief Immigration Judge, or the Chief Immigration’s Judge’s

designee, and that all suspensions—whether or not proposed by ACIJs—are imposed by the Deputy Chief Immigration Judge or other DOJ officials). The remainder of the paragraph is undisputed.

7. Sentence one is undisputed. Sentence two is disputed to the extent it suggests that an immigration judge who is subject to disciplinary action may *only* file a grievance. *See* Keller Decl. ¶ 28 & Ex. A at 2 (stating that immigration judges can challenge disciplinary action either by filing a grievance or by pursuing applicable statutory remedies).

8. Disputed that this paragraph sets forth statements material to the resolution of this case. To the extent this paragraph is material, plaintiff has insufficient information about the agency's internal processing of complaints and maintenance of a complaint database system to know whether the statements are true.

9. Undisputed. (Plaintiff currently has more than 13,000 members. Deasy Decl. ¶ 3.)

10. Undisputed, if “processed” is defined to mean that EOIR released records in response to the FOIA request.

11. N/A. Defendants' Statement of Materials Facts omitted paragraph 11.

12. Undisputed.

13. Plaintiff disputes that this paragraph sets forth a statement material to the disposition of this case. To the extent that the paragraph is material, plaintiff has insufficient information about the agency's internal processing of plaintiff's FOIA request to know whether the statements are true.

14. Plaintiff disputes that this paragraph sets forth a statement material to the disposition of this case. To the extent that the paragraph is material, plaintiff has insufficient

information about the agency's internal processing of plaintiff's FOIA request to know whether the statements are true.

15. It is undisputed that defendants released records for 767 closed immigration judge complaints in the database. Whether some of those records should be treated as "outside the scope of the narrowed FOIA request" is a legal conclusion, not a factual matter. *See* Murray Decl. ¶¶ 3-4; Pl.'s S.J. Memo. at 14 n.5. Plaintiff disputes that the remainder of this paragraph sets forth a statement material to the disposition of this case. To the extent that the remainder is material, plaintiff has insufficient information about the agency's internal processing of plaintiff's FOIA request to know whether the statements are true.

16. Plaintiff disputes that this paragraph sets forth a statement material to the disposition of this case. To the extent that the paragraph is material, plaintiff has insufficient information about the agency's internal processing of plaintiff's FOIA request to know whether the statements are true.

17. Plaintiff disputes that this paragraph sets forth a statement material to the disposition of this case. To the extent that the paragraph is material, plaintiff has insufficient information about the agency's internal processing of plaintiff's FOIA request to know whether the statements are true.

18. Sentence one is undisputed as it describes events transpiring before EOIR filed its motion for summary judgment. However, defendants produced two additional interim productions of records after they moved for summary judgment. Murray Decl. ¶ 8. These last two productions contained records that had been sent to other agencies for consultation or referral or that EOIR rereleased with the disclosure of additional information. *Id.* Sentence two is undisputed. Sentences three and four are undisputed to the extent they identify the government's

stated rationale for redactions. To the extent that these sentences suggest that the information withheld is actually protected by Exemptions 5 and 6 or necessarily identifies immigration judges, those assertions are disputed legal conclusions, not factual matters. *See* Pl.'s S.J. Memo. at 16-29.

19. Undisputed.

Respectfully submitted,

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Immigration Review, and the Chief Immigration Judge, 72 Fed. Reg. 53,673, 53,673 (2007) (hereinafter, DOJ Delegation Rule).

4. More than 40 percent of the noncitizens whose proceedings are completed by immigration judges are pro se; many of these individuals are indigent and unable to afford a private attorney. EOIR, FY 2013 – Statistical Year Book (2014), Tab F1, *available at* <http://www.justice.gov/eoir/statspub/fy13syb.pdf> (hereinafter, 2013 Statistical Yearbook). Immigration judges have some responsibility for “ensur[ing] that pro se individuals understand the nature of the proceedings, as well as their rights and responsibilities.” EOIR, FY 2011 – Statistical Year Book (2012), Tab G1, *available at* <http://www.justice.gov/eoir/statspub/fy11syb.pdf>.

5. In FY 2013, immigration judges issued more than 143,000 decisions, and the Board of Immigration Appeals (BIA) received just over 16,000 appeals, representing an 11 percent appeal rate. 2013 Statistical Year Book, Tab V1.

6. The BIA’s review of immigration judges’ findings of fact is limited to determining whether such findings are clearly erroneous. 8 C.F.R. § 1003.1(d)(3). The BIA affirms some cases by a single member decision and without a written opinion. *Id.* § 1003.1(e)(4), (e)(5).

7. Over the past decade, some court of appeals decisions have criticized immigration judges for bias, abusive treatment of individuals appearing before them, and incompetence. *See, e.g., Islam v. Gonzales*, 469 F.3d 53, 56 (2d Cir. 2006); *Benslimane v. Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005). News stories highlighted the trend among court of appeals cases. *See, e.g., Adam Liptak, Courts Criticize Judges’ Handling of Asylum Cases*, N.Y. Times, Dec. 26, 2005, *available at* <http://www.nytimes.com/2005/12/26/national/>

26immigrationhtml?pagewanted=all&\_r=0. They also brought attention to specific incidents in immigration courts that provided cause for concern. *See, e.g.,* Gaiutra Bahadur, ‘*Bullying’ Immigration Judge Absent, Replaced*, Phila. Inquirer, June 2, 2006, available at [http://articles.philly.com/2006-06-02/news/25402880\\_1\\_immigration-courts-office-for-immigration-review-asylum-petitions](http://articles.philly.com/2006-06-02/news/25402880_1_immigration-courts-office-for-immigration-review-asylum-petitions); 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://articles.latimes.com/2006/feb/12/nation/na-judges12>.

8. The United States Attorney General initiated a review of the immigration courts in early 2006. *See* GAO, Executive Office for Immigration Review: Caseload Performance Reporting Needs Improvement 29 (2006), available at <http://www.gao.gov/new.items/d06771.pdf> (hereinafter GAO, Caseload Report); DOJ Delegation Rule, 72 Fed. Reg. at 53,675.

9. Based on that review, the Attorney General directed EOIR to implement a series of steps to improve the immigration courts. Keller Decl. ¶¶ 11-12. The Attorney General directed EOIR to review its “procedures for handling complaints against its adjudicators, and to 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, or OPR], and [DOJ’s Office of Inspector General, or OIG] in the handling of any particular complaint; and (iii) ensure a timely and proportionate response.” Memorandum 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), available at <http://www.justice.gov/ag/readingroom/ag-080906.pdf>.

10. EOIR's process for tracking and resolving complaints against immigration judges became more structured after the Attorney General's mandate. *See, e.g., Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigration, Citizenship, Border Security, & International Law of the H. Comm. on the Judiciary*, 110th Cong., 2d Sess. (Sept. 23, 2008) (testimony of Kevin Ohlson, Director, Executive Office for Immigration Review), *available at* <http://www.gpo.gov/fdsys/pkg/CHRG-110hhr44611/html/CHRG-110hhr44611.htm> (assuring Congress that EOIR had "implemented new, rigorous procedures for reporting and investigating allegations of judicial misconduct").

11. DOJ amended its regulations to add to the "duties" of EOIR's director the "[i]mplement[ation] [of] a process for receiving, evaluating, and responding to complaints of inappropriate conduct by EOIR adjudicators." DOJ Delegation Rule, 72 Fed. Reg. at 53,675; *see also* 8 C.F.R. § 1003.0.

12. After the Attorney General's mandate, EOIR began encouraging the public to rely more heavily on its complaint process, and it created a link on its website to facilitate public complaints. *See, e.g.,* GAO, Caseload Report at 27-29; EOIR, Fact Sheet: Asylum Variations in Immigration Court, Nov. 5, 2007, *available at* <http://www.justice.gov/eoir/press/07/AsylumVariationsNov07.htm>.

13. 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." Kevin D. Rooney, EOIR Director, Memorandum to All EOIR Employees: The Attorney General's Directives 4, *available at* <http://trac.syr.edu/immigration/reports/194/include/RooneyMemoMarch2007.pdf>. That position was also charged with "working with the Chief Immigration Judge, OPR, and OIG 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.*

14. EOIR created an electronic database to track immigration judge complaints, and it released to the public additional information about how the agency resolves those complaints. *See* Keller Decl. ¶¶ 17-19 & Ex. A, B. In announcing the provision of new information about the complaint process and instructions for filing a complaint, the Chief Immigration Judge “committed to ensuring that any allegations against our immigration judges are investigated and resolved in a fair and expeditious manner.” Press Release, EOIR, The Executive Office for Immigration Review Announces New Process for Filing Immigration Judge Complaints (May 20, 2010), *available at* <http://www.justice.gov/eoir/press/2010/IJConductProfComplaints05192010.pdf>.

15. Under the current complaint process, EOIR receives complaints based on reports from noncitizens appearing in immigration court, their attorneys, the BIA and courts of appeals, the news media, and government employees, among others. Keller Decl. ¶ 25.

16. EOIR resolves complaints by imposing disciplinary action (termination, suspension, or reprimand); taking corrective action, such as training or oral counseling; dismissing a 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. Keller Decl., Ex. A at 2-3, Ex. B.

17. 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.” Keller Decl. ¶ 28.

18. Since 2006, when EOIR's procedural changes to its complaint process began to take effect, news media<sup>1</sup> and scholars<sup>2</sup> have continued to discuss problems with immigration judges' behavior on the bench. Some individuals and groups have suggested that EOIR's complaint process remains inadequate and should be the subject of further reform.<sup>3</sup>

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<sup>1</sup> 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://www.democracynow.org/2010/10/22/lawless\\_courts\\_lack\\_of\\_accountability\\_allows](http://www.democracynow.org/2010/10/22/lawless_courts_lack_of_accountability_allows); Nina Bernstein, *Judge Who Chastised Weeping Asylum Seeker Is Taken Off Case*, N.Y. Times, Sept. 20, 2007, available at [http://www.nytimes.com/2007/09/20/nyregion/20immigrant.html?pagewanted=print&\\_r=0](http://www.nytimes.com/2007/09/20/nyregion/20immigrant.html?pagewanted=print&_r=0).

<sup>2</sup> See, e.g., Jacqueline Stevens, *Lawless Courts*, The Nation, Nov. 8, 2010, available at <http://www.thenation.com/article/155497/lawless-courts>; Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 28 J. Nat'l Ass'n Admin. L. Judiciary 471, 473-74 (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, *Bias on the Bench: Raising the Bar for U.S. Immigration Judges to Ensure Equality for Asylum Seekers*, 49 Wm. & Mary L. Rev. 1011, 1024-26, 1040 (2007) (discussing frequent criticism of immigration judges by courts of appeals and noting that "misconduct by [immigration judges], even one-time offenders, can be shockingly egregious").

<sup>3</sup> See, e.g., Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens As Aliens*, 18 Va. J. Soc. Pol'y & L. 606, 715 (2011) (urging DOJ's OPR to investigate the OCIJ staff for alleged failure to "forward evidence of adjudicator and staff misconduct to the OPR and OIG"); Betsy Cavendish & Steven Schulman, *Reimagining the Immigration Court Assembly Line: Transformative Change for the Immigration Justice System* 36 (2012), available at <http://www.appleseednetwork.org/wp-content/uploads/2012/03/Reimagining-the-Immigration-Court-Assembly-Line.pdf> (stating that, "[t]o the extent consistent with the Privacy Act, EOIR should . . . post on its website public reports on the disciplinary actions taken against Immigration Judges"); American Bar Association, *Reforming the Immigration System* 2-21, 2-22 (2010), available at [http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba\\_complete\\_full\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf) (addressing commentator concerns that "discipline of immigration judges is almost wholly contained within EOIR and DOJ, without external review in most instances," and that "[w]hen coupled with a lack of transparency," the opportunities for misuse and abuse of disciplinary procedures . . . are dramatically increased"); Marcia Coyle, *Bad Behavior by Judge Reverses Asylum Ruling*, National Law Journal, Jan. 25, 2010 (noting that immigration lawyers said that "complaints against immigration judges to [EOIR] seem to go into a 'black hole'"); Benedetto, *supra* n.2, at 519, 529 (concluding that the current disciplinary structure for IJs is "unsatisfactory" and recommending that complaints made to EOIR instead be reviewed by a

19. In the past five years, at least three federal courts of appeals have identified immigration judges by name whose decisions they have repeatedly reversed for apparent bias or other reasons. *See, e.g., Cruz Rendon v. Holder*, 603 F.3d 1104, 1111 n.3 (9th Cir. 2010); *Yung Ying Shi v. Holder*, 337 F. App'x 666, 668 (9th Cir. 2009); *Abulashvili v. Attorney Gen.*, 663 F.3d 197, 208 & n.11 (3d Cir. 2011); *Floroiu v. Gonzales*, 481 F.3d 970, 976 (7th Cir. 2007) (citing *Ko v. Gonzalez*, 421 F.3d 453 (7th Cir. 2005)); *Singh v. Holder*, 720 F.3d 635, 643-44 (7th Cir. 2013). At least three of these judges (Judges Zerbe, Garcy, and Ho) remain sitting immigration judges. *See* EOIR, EOIR Immigration Court Listing, <http://www.justice.gov/eoir/sibpages/ICadr.htm>.

20. Plaintiff AILA is a national association of more than 13,000 attorneys and law professors who practice and teach immigration law. Deasy Decl. ¶ 3.

21. AILA's FOIA request initially covered complaints resolved on or after January 1, 2007. Rodrigues Decl., Ex. A at 2.

22. After litigation began, government counsel expressed concern to counsel for AILA about the time and resources necessary to process AILA's request and asked whether AILA would consider narrowing the scope of its request. Murray Decl. ¶ 3. Counsel explained that EOIR maintained a database of all complaints pending on or after October 1, 2009, and stated that before October 2009, there was no centralized depository for records regarding complaints against immigration judges. *Id.* He stated that it would be more difficult for EOIR to provide records for complaints resolved before October 2009. *Id.*

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multi-member Ethics Review Board, bypassing "current evaluators of complaints against immigration judges" in light of "their failure to adequately enforce proper behavior on the immigration bench").

23. AILA informed the government that it would agree “to narrow the scope of its request to cover the same documents it originally requested, but with respect to complaints that EOIR resolved on or after October 1, 2009, the date that EOIR . . . said the complaint database came on line.” Murray Decl. ¶ 4.

24. The Transactional Records Access Clearinghouse (TRAC) makes available an interactive website that allows the public to see asylum denial rates by immigration judge name. *See* TRAC, Immigration Judge Reports – Asylum, <http://trac.syr.edu/immigration/reports/judgereports>.

25. Complaint 619 provided to AILA describes an incident in which an immigration judge yelled at an employee to such an extent that others considered calling security personnel and then sought to have those staff admonished for reporting the conduct and considering a call to security. *See* Murray Decl. ¶ 18. That incident resulted in a one-day suspension. *Id.*

26. Complaint 656 provided to AILA describes an incident in which an immigration judge referred to a respondent’s child with autism as a “wild animal posing as a child.” Murray Decl. ¶ 19. That complaint resulted in a one-day suspension. *Id.* Complaint 699 reflects correspondence among EOIR staff in which one person indicated that this same judge had received another complaint, and that no one would likely be surprised by that development. *Id.* ¶ 20.

27. A single judge was subjected to three separate complaints for calling a respondent “simple” and commenting on her illness and mastectomy, stating that he or she could not imagine a female noncitizen supervising crews on a construction site because she was “exceedingly mousy,” and stating 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. Murray Decl. ¶ 15.

28. Disclosing the identities of immigration judges is likely to have a positive deterrent effect on judges. Deasy Decl. ¶ 11; Realmuto Decl. ¶ 12. “Greater public scrutiny is likely to encourage greater voluntary compliance with ethics standards, standards of judicial conduct, and DOJ policies than the current system, in which immigration judges have not been identified by EOIR as the particular subjects of complaints.” Deasy Decl. ¶ 11; Realmuto Decl. ¶ 12. Release of the withheld information “would facilitate existing court monitoring efforts and promote new court monitoring projects by allowing the public greater access to information that would suggest or confirm a pattern of misconduct or abusive behavior by particular judges.” Realmuto Decl. ¶ 13.

29. EOIR rarely takes disciplinary action against immigration judges. Murray Decl. ¶ 12.

30. EOIR’s ACIJ for Ethics and Professionalism has recognized that EOIR’s online aggregate “statistics may under-report EOIR’s efforts to address unprofessional conduct, as the data do not include the number of judges who do not meet professionalism or other standards and are urged to retire or resign without any formal disciplinary proceeding.” Betsy Cavendish & Steven Schulman, *Reimagining the Immigration Court Assembly Line: Transformative Change for the Immigration Justice System* (2012), *available at* <http://www.appleseednetwork.org/wp-content/uploads/2012/03/Reimagining-the-Immigration-Court-Assembly-Line.pdf>; *see also* Keller Decl. ¶ 29.

31. Public observers have questioned the ability of EOIR's complaint process to address misconduct where complaints are not resolved by arbiters outside of EOIR. *See, e.g.,* Realmuto Decl. ¶ 6.

32. Among the sample of complaints released to AILA, 7 judges were the subject of 20 or more complaints each and were responsible for 185 complaints, or nearly a quarter of all complaints, in the release. Murray Decl. ¶ 13. Of those 7 judges, 5 were never subjected to disciplinary action of any kind. *Id.*

33. Thirty complaints were filed against Judge "HKX" in the sample released to AILA, and the judge was, at most, subjected to "oral counseling" as a result of those complaints. Murray Decl. ¶ 14. EOIR resolved 24 of the complaints by concluding that no further action was needed when the judge retired. *Id.*

34. Judge "OPU" was the subject of 29 complaints in the sample, 24 of which were resolved by "oral counseling" and an additional 1 by "training." Murray Decl. ¶ 16. This judge was the subject of repeated 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.*

35. Judge "PBZ" was the subject of 32 complaints in the sample, and at most received "written counseling" as a result of those complaints. Murray Decl. ¶ 17.

36. "Without 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.” Deasy Decl. ¶ 12; *see also* Realmuto Decl. ¶ 8. “[P]rivate attorneys are likely to feel more secure in reporting a complaint if they know that others have spoken up about the same types of conduct with a particular judge.” Deasy Decl. ¶ 12; Realmuto Decl. ¶ 14. Release of the immigration judge names is “likely to encourage the private immigration bar . . . to report instances of judicial misconduct to EOIR.” Deasy Decl. ¶ 12.

37. Release of the identities of immigration judges would allow researchers to find other public biographical information about immigration judges not reflected in the requested records themselves that could then be considered in assessing how EOIR resolves immigration judge complaints. *See* GAO, U.S. Asylum System: Significant Variation Existed in Asylum Outcomes Across Immigration Courts 66-67, Appendix I (2008), *available at* <http://www.gao.gov/assets/290/281794.pdf>.

38. EOIR has redacted information from records released to AILA that EOIR deems “non-responsive” to AILA’s FOIA request. Murray Decl. ¶ 10. Many of these redactions are not listed in the *Vaughn* indices. *Id.* In some cases, these redactions amount to full paragraphs or pages of records. *Id.*

39. EOIR has stated that it will keep a complainant apprised of whether action has been taken on his complaint and that it may contact the complainant as part of its investigation process. Keller Decl., Ex. A at 3 & Ex. B.

40. The files released to AILA include instances in which immigration judges have defended in writing their behavior that is subject to a complaint. *See, e.g.*, Murray Decl. ¶ 11.

41. Complaint resolutions are precedential when the agency considers “progressive discipline for an immigration judge who has failed to correct his or her conduct.” Keller Decl.

¶ 30; *see also id.*, Ex. A at 2.

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