

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13787

BROWARD BULLDOG, INC.,
a Florida corporation not for profit, and DAN CHRISTENSEN,
Plaintiffs/Appellants/Cross-Appellees,

v.

U.S. DEPARTMENT OF JUSTICE,
and FEDERAL BUREAU OF INVESTIGATION,
Defendants/Appellees/Cross-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida
No. 16-cv-61289 (Hon. Cecilia M. Altonaga)

BRIEF OF *AMICI CURIAE* IN SUPPORT OF
PLAINTIFFS/APPELLANTS/CROSS-APPELLEES AND IN
SUPPORT OF REVERSAL

Charles D. Tobin
Steven D. Zansberg

Ballard Spahr LLP
1909 K Street, NW
12th Floor
Washington, DC 20006-1157
Tel 202.661.2200
tobinc@ballardspahr.com
zansbergs@ballardspahr.com

Attorneys for *Amici Curiae*

**CERTIFICATE OF INTERESTED PARTIES AND CORPORATE
DISCLOSURE STATEMENT**

In accordance with Eleventh Circuit Rule 26.1-1, counsel certify that, in addition to the persons listed in the certificates of interested persons filed by the parties, the following persons (*Amici Curiae*, their parent corporations, publicly held corporations that own 10% or more of their stock, and their counsel) have an interest in the outcome of this case:

1. American Society of News Editors
2. The Associated Press
3. Association of Alternative Newsmedia
4. Bailen, Mark
5. Baker & Hostetler LLP
6. Ballard Spahr LLP
7. Barrett, Brian
8. BlackRock, Inc. (BLK)
9. Brown, Bruce D.
10. Covington & Burling LLP
11. Cummings, Garrett
12. Curley, Thomas
13. Dow Jones & Company, Inc.

14. Fletcher, Heald & Hildreth, PLC
15. Folliard, Robert
16. Forrest, Carolyn
17. Fox Television Stations, LLC
18. Gannett Co., Inc. (GCI)
19. GateHouse Media Inc.
20. Goldberg, Kevin M.
21. Goldstein, Jacob P.
22. Gray Television, Inc. (GTN)
23. Grunfeld, Polly
24. Kaiser, Karen
25. Leslie, Gregg
26. Linder, Craig
27. Marshall, Adam A.
28. McCraw, David
29. McGlaughlin, James
30. Moeser, Chris
31. Nash Holdings LLC
32. The National Press Club
33. National Press Photographers Association

34. New Media Investment Group, Inc. (NEWM)
35. New World Communications of Atlanta, Inc.
36. New World Communications of Tampa, Inc.
37. The New York Times Company (NYT)
38. News Corporation (NWS and NWSA)
39. The News Media Alliance
40. Oregon Television Inc.
41. Osterreicher, Mickey H.
42. Radio Television Digital News Association
43. The Reporters Committee for Freedom of the Press
44. Shelley, Dan
45. Society of Professional Journalists
46. TEGNA Inc. (TGNA)
47. Tobin, Charles
48. Townsend, Katie
49. Twenty-First Century Fox, Inc. (FOX and FOXA)
50. UTV of Orlando, Inc.
51. Weissman, Joseph
52. Wimmer, Kurt
53. WP Company LLC

54. Zansberg, Steven
55. Zweifach, Gerson A.

LIST OF AMICI CURIAE

1. With some 500 members, **American Society of News Editors** (“ASNE”) is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

2. **The Associated Press** (“AP”) is a news cooperative organized under the Not-for-Profit Corporation Law of New York, and owned by its 1,500 U.S. newspaper members. The AP’s members and subscribers include the nation’s newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 300 locations in more than 100 countries. On any given day, AP’s content can reach more than half of the world’s population.

3. **Association of Alternative Newsmedia** (“AAN”) is a not-for-profit trade association for 110 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream

press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

4. **Dow Jones & Company, Inc.**, is a global provider of news and business information, delivering content to consumers and organizations around the world across multiple formats, including print, digital, mobile and live events. Dow Jones has produced unrivaled quality content for more than 130 years and today has one of the world's largest newsgathering operations globally. It produces leading publications and products including the flagship Wall Street Journal; Factiva; Barron's; MarketWatch; Financial News; Dow Jones Risk & Compliance; Dow Jones Newswires; and Dow Jones VentureSource.

5. Through affiliated companies, **Fox Television Stations, LLC**, owns and operates 28 local television stations throughout the United States, including four television stations operating in the State of Florida and one television station operating in the State of Georgia. The stations are WOFL FOX 35 in Orlando, Florida, and WOGX FOX 51 in Gainesville, Florida, owned by Oregon Television, Inc., and WRBW MY65 in Orlando owned by UTV of Orlando, Inc., and WAGA FOX 5, owned by New World Communications of Atlanta, Inc. The 28 stations have a collective market reach of 37.28% percent of U.S. households. Each of the 28 stations also operate YouTube channels, social media platforms and Internet

websites offering news and information for their local markets, including fox35orlando.com, wogx.com, fox13news.com, and fox5atlanta.com.

6. **Gannett Co., Inc.** is an international news and information company that publishes USA Today and more than 100 other daily newspapers in the United States, including the Montgomery Advertiser, Pensacola News Journal, the Tallahassee Democrat, Florida Today, the Treasure Coast Newspapers, the Fort Myers News-Press, and the Naples Daily News. Each weekday, Gannett's newspapers are distributed to an audience of more than 8 million readers and the digital and mobile products associated with the company's publications serve online content to more than 100 million unique visitors each month.

7. **GateHouse Media** is a preeminent provider of print and digital local content and advertising in small and midsize markets. Our portfolio of products, which includes 404 community publications and more than 350 related websites and six yellow page directories, serves over 128,000 business advertising accounts and reaches approximately 10 million people on a weekly basis.

8. **Gray Television Group, Inc.** owns 92 television stations in 50 small and mid-sized markets that collectively broadcast approximately 180 program streams including 35 channels affiliated with the CBS Network, 26 channels affiliated with the NBC Network, 19 channels affiliated with the ABC Network and 13 channels affiliated with the FOX Network. Gray owns number-one or

number-two ranked television station operations in essentially all of its markets, which collectively cover approximately 9.4 percent of total United States television households..

9. **The National Press Club** is the world’s leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

10. **The National Press Photographers Association (“NPPA”)** is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

11. **The New York Times Company** is the publisher of The New York Times and The International Times, and operates the news website nytimes.com.

12. **The News Media Alliance** is a nonprofit organization representing the interests of online, mobile and print news publishers in the United States and Canada. Alliance members account for nearly 90% of the daily newspaper circulation in the United States, as well as a wide range of online, mobile and non-daily print publications. The Alliance focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

13. **The Reporters Committee for Freedom of the Press** is an unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment and Freedom of Information Act litigation since 1970.

14. **Radio Television Digital News Association** ("RTDNA") is the world's largest and only professional organization devoted exclusively to broadcast and digital journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

15. **Society of Professional Journalists** (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

16. **Tegna Inc.** owns or services (through shared service agreements or other similar agreements) 46 television stations in 38 markets.

17. **WP Company LLC (d/b/a The Washington Post)** publishes one of the nation’s most prominent daily newspapers, as well as a website, www.washingtonpost.com, that is read by an average of more than 20 million unique visitors per month.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	vii
SOURCE OF AUTHORITY TO FILE BRIEF	viii
STATEMENT OF THE ISSUES.....	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	5
I. THE PUBLIC HAS A COMPELLING INTEREST IN UNDERSTANDING THE FBI’S ACTIONS, AND ITS REASONING, WHICH IS THE VERY PURPOSE OF FOIA	5
II. THE FBI’S ORDINARY COURSE OF CONDUCT IN FOIA LITIGATION—CHARACTERIZED BY EGREGIOUS DELAYS, OBFUSCATION, AND REPEATED MISREPRESENTATIONS— DOES NOT SUPPORT THE DISTRICT COURT’S PRESUMPTION OF GOOD FAITH	11
III. NEITHER THE DECLARATIONS IT SUBMITTED, NOR ITS LEGALLY DEFICIENT <i>VAUGHN</i> INDEXES, ENTITLED THE FBI TO SUMMARY JUDGMENT	19
IV. THE FBI’S ASSERTION OF EXEMPTION 7(E) AS GROUNDS TO WITHHOLD PORTIONS OF ITS POWERPOINT PRESENTATION WAS PART AND PARCEL OF THAT AGENCY’S UNWARRANTED OVERUSE OF THAT EXEMPTION	21
CONCLUSION	27
CERTIFICATE OF COMPLIANCE.....	ix
CERTIFICATE OF SERVICE	x

TABLE OF AUTHORITIES

Cases	Page(s)
<i>ACLU Found. v. DHS</i> , 243 F. Supp. 3d 393 (S.D.N.Y. 2017)	25
<i>ACLU of N. Cal. v. DOJ</i> , 70 F. Supp. 3d 1018 (N.D. Cal. 2014)	26
<i>Aguiar v. DEA</i> , 865 F.3d 730 (D.C. Cir. 2017)	25
<i>Am. Immigration Council v. DHS</i> , 30 F. Supp. 3d 67 (D.D.C. 2014)	22, 23
<i>Animal Legal Def. Fund v. FDA</i> , 836 F.3d 987 (9th Cir. 2016)	2
<i>Blackwell v. FBI</i> , 646 F.3d 37 (D.C. Cir. 2011)	23
<i>Campbell v. DOJ</i> , 164 F.3d 20 (D.C. Cir. 1998)	17
<i>Canning v. DOJ</i> , 919 F. Supp. 451 (D.D.C. 1994)	16
<i>Citizens Comm’n on Human Rights v. FDA</i> , 45 F.3d 1325 (9th Cir. 1995)	13
<i>Citizens for Responsibility & Ethics in Wash. v. DOJ</i> , 746 F.3d 1082 (D.C. Cir. 2014)	16
<i>Cox Broad. Corp. v. Cohn</i> , 420 U.S. 469 (1975)	9, 10
<i>Davin v. DOJ</i> , 60 F.3d 1043 (3d Cir. 1995)	23
<i>Dep’t of Interior v. Klamath Water Users Protective Ass’n</i> , 532 U.S. 1 (2001)	26

El Badrawi v. DHS,
583 F. Supp. 2d 285 (D. Conn. 2008).....17

Elec. Frontier Found. v. CIA,
2013 WL 5443048 (N.D. Cal. Sept. 30, 2013).....16, 17, 21

Islamic Shura Council of S. Cal. v. FBI,
278 F.R.D. 538 (S.D. Cal. 2011)16

Johnson v. FBI,
118 F. Supp. 3d 784 (E.D. Pa. 2015).....16

Jones v. FBI,
41 F.3d 238 (6th Cir. 1994)13, 17, 18

Kimberlin v. DOJ,
139 F.3d 944 (D.C. Cir. 1998).....21

King v. DOJ,
830 F.2d 210 (D.C. Cir. 1987).....20

Leopold v. DOJ,
130 F. Supp. 3d 32 (D.D.C. 2015).....15

Miccosukee Tribe of Indians of Fla. v. United States,
516 F.3d 1235 (11th Cir. 2008)13, 17

Morley v. CIA,
508 F.3d 1108 (D.C. Cir. 2007).....20

Nat’l Sec. Counselors v. CIA,
960 F. Supp. 2d 101 (D.D.C. 2013).....15, 16

Negley v. FBI,
658 F. Supp. 2d 50 (D.D.C. 2009).....13, 16

New York Times Co. v. Department of Justice,
756 F.3d 100 (2d Cir. 2014)10

News-Press v. DHS,
489 F.3d 1173 (11th Cir. 2007)4

Oglesby v. U.S. Dep't of Army,
920 F.2d 57 (D.C. Cir. 1990).....15

Ray v. DOJ,
908 F.2d 1549 (11th Cir. 1990)13

Richmond Newspapers, Inc. v. Virginia,
448 U.S. 555 (1980).....9

Rosenfeld v. DOJ,
57 F.3d 803 (9th Cir. 1995)23

Rugiero v. DOJ,
257 F.3d 534 (6th Cir. 2001)23

Sciacca v. FBI,
23 F. Supp. 3d 17 (D.D.C. 2014).....16

Spirko v. USPS,
147 F.3d 992 (D.C. Cir. 1998).....20, 21

Utahamerican Energy, Inc. v. Mine Safety & Health Admin.,
725 F. Supp. 2d 78 (D.D.C. 2010).....16

Weiner v. FBI,
943 F.2d 972 (9th Cir. 1991)18

Weisberg v. DOJ,
705 F.2d 1344 (D.C. Cir. 1983).....15

Statutes & Other Authorities

Br. of *Amicus Curiae* The Reporters Comm. for Freedom of the Press
and 23 Media Organizations in Support of Appellee,
Schwartz v. DEA, No. 16-750 (2d Cir. Sept. 29, 2016).....25

Freedom of Information Act*passim*

John Roth et al., *Monograph on Terrorist Financing:
Staff Report to the National Commission on Terrorist
Attacks Upon the United States* (2004).....23, 24

H. Permanent Select Comm. on Intelligence & S. Select Comm. on Intelligence, *Rep. on Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001*, S. Rep. No. 107-351, H. R. Rep. No. 107-792 (2002)24

Nat'l Comm'n on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (2004).....24

Order, *Associated Press v. Department of State*, No. 1:15-cv-345 (D.D.C August 7, 2015)10

Stipulation, *United States v. Moussaoui*, No. 01-cr-00455-LMB (E.D. Va. Mar. 1, 2006), ECF No. 163224

Thomas R. Eldridge et al., *9/11 And Terrorist Travel: Staff Report of the National Commission on Terrorist Attacks Upon the United States* (Aug. 21, 2004)23

STATEMENT OF INTEREST

The *Amici Curiae* are nine news organizations whose publications, disseminated over multiple communications platforms, reach a large and diverse audience within the United States and around the world. Also included in the *Amici Curiae* are seven press trade associations and the Reporters Committee for Freedom of the Press, a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media.

Amici Curiae routinely utilize the Freedom of Information Act (FOIA) to obtain records that illuminate the conduct of Executive Branch agencies, and they report that information to their readers, viewers, and listeners. By way of illustrative examples, to aid its important journalism about government waste and fraudulent claims, *Amicus* Gannett Co., Inc.'s newspaper the *News-Press* successfully litigated in this Court against the Federal Emergency Management Agency for access under FOIA to information about the recipients of disaster relief following the devastating 2004 Florida hurricanes.¹ More recently, to shed light on the federal government's surveillance of Dr. Martin Luther King, Jr., the *Commercial Appeal* newspaper in Memphis successfully fought for, and obtained, FBI records confirming that the famed civil rights photographer Ernest Withers

¹ *News-Press v. DHS*, 489 F.3d 1173 (11th Cir. 2007).

was a paid government informant.² And *Amicus* Tegna, Inc., through its Minneapolis television station KARE 11, employed FOIA as the foundation for a series of award-winning reports exposing that the Department of Veterans Affairs relied on unqualified medical personnel to conduct examinations of, and deny benefits to, veterans suffering from severe brain injuries at the Minneapolis VA Medical Center.³

In addition, these *Amici*, in other FOIA cases, have been subjected to the same types of litigation tactics employed by the Appellees—tactics that, if sanctioned by this Court, would eviscerate the statutory right of Americans to learn “what [their] government is up to.” Thus, *Amici*, and their millions of readers, viewers and listeners, share a strong interest in the outcome of this appeal.

² See *Memphis Publ'g Co. v. FBI*, 879 F. Supp. 2d 1 (D.D.C. 2012); see also Marc Perrusquia, *Photographer Ernest Withers Doubled As FBI Informant To Spy On Civil Rights Movement*, The Commercial Appeal (Sept. 12, 2010), <http://cdn.knoxblogs.com/editor/wpcontent/uploads/sites/6/2011/11/photographer-ernest-withers-fbi-informant>; Marisa Gerber, *In FBI Records, Clues About A Photographer's Work As An Informant*, L.A. Times (Feb. 8, 2013), <http://articles.latimes.com/2013/feb/08/nation/la-na-nn-fbi-ernest-withers-informant-20130208>.

³ See KARE Staff, *Kare 11 Staff Investigates honored for VA exposé*, Kare 11 (Apr. 7, 2016), <http://www.kare11.com/news/investigations/kare-11-investigates-honored-for-va-expose/124426830>.

SOURCE OF AUTHORITY TO FILE BRIEF

Pursuant to Fed. R. App. P. 29(a)(2), all parties to the appeal have given consent for *Amici Curiae* to file this brief.⁴

⁴ Pursuant to Fed. R. App. P. 29(c)(5), *Amici* state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person—other than the *Amici*, their members, or their counsel—contributed money that was intended to fund the preparing or submitting the brief.

STATEMENT OF THE ISSUES

Whether the District Court erred in granting summary judgment to the Appellees when there were disputed issues of material fact regarding:

- A. The adequacy of the search performed by FBI to locate responsive records, and
- B. The applicability of various exemptions from disclosure to the portions of records withheld or withheld in full.

SUMMARY OF THE ARGUMENT

This FOIA action is riddled with far more disputed issues of fact than a court typically confronts in this type of litigation.⁵ Notwithstanding the boilerplate assertions in eight separate declarations the FBI filed below, a fact-finder must sort through genuine issues of material fact regarding *both* (1) the adequacy of the FBI's efforts to locate all responsive records *and* (2) its assertion of multiple exemptions from the disclosure of the responsive records it has located, belatedly and piecemeal, over an unjustifiably protracted period of time.

The subject of the Appellants' FOIA request records at issue is of paramount public interest: records related to the FBI's investigation into the possible involvement of Florida-based Saudi nationals in planning and/or financing the 9/11 terrorist attacks, and the agency's subsequent, unexplained about-face on what that investigation had found. In addition, these records may shed light on the accusations by high-ranking former Members that the FBI deliberately misled Congress for more than 15 years, willfully concealing information from the American public to protect a foreign power. DE-28-1 at 61 ¶ 30; *id.* at 64 ¶ 44 ("I am troubled by what appears . . . to be a persistent effort by the FBI to conceal

⁵ See *Animal Legal Def. Fund v. FDA*, 836 F.3d 987, 989 (9th Cir. 2016) ("[S]ome FOIA cases require resolution of disputed facts.").

from the American people information concerning possible Saudi support of the September 11 attacks.”).⁶

Nevertheless, and despite nine sequential, belated discoveries of thousands of pages of documents, which the FBI previously asserted did not exist, the District Court accepted at face value the inherently self-contradictory declarations of Records Section Chief David M. Hardy, and even accorded them a “presumption of good faith.” DE-99 at 17-18. As he has done in FOIA cases filed against the FBI across the nation, Mr. Hardy once again attested that his agency had diligently conducted an adequate search, even though his declarations failed to describe with any specificity precisely which records repositories were searched or which search terms were utilized. And, also consistent with “standard” FBI litigation practices, the *Vaughn* indexes it filed to justify and explain the reasons for its withholding in full 850 pages of responsive records, and the extensive redactions from 240 more pages, fall woefully short of the specificity and detail required to foreclose a FOIA plaintiff’s opportunity to challenge through cross examination or countervailing evidence.

The FBI’s conduct of FOIA litigation, in this case and numerous others, denies the public its right to inspect agency records, in violation of Congress’

⁶ Documents bearing a “DE” prefix reference the ECF docket numbers of filings in *Broward Bulldog, Inc. et al., v. DOJ*, No. 16-cv-61289-CMA (S.D. Fla.) before Judge Cecilia M. Altonaga.

statutory mandate of disclosure. By relying on vague explanations of how responsive documents were located, and failing to specify which portions of records were withheld on the basis of statutory exemptions and why, the government denies records requesters any opportunity to meaningfully challenge the agency's unilateral decisions. The process—effectively relegating FOIA requesters to shadow boxing while blindfolded—denies citizens not only their right to access government records, but also due process.

This Court has previously recognized that:

[i]n enacting the FOIA . . . , Congress sought to open agency action to the light of public scrutiny. . . . The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.

News-Press, 489 F. 3d at 1190 (citations omitted). Left undisturbed, the judgment below will deprive the Appellants, and the American people, of FOIA's promise and purpose "to open agency action to the light of public scrutiny." It also will leave unanswered disturbing questions about the events of 9/11, perhaps the most traumatic shared experience in our nation's history.

ARGUMENT

I. THE PUBLIC HAS A COMPELLING INTEREST IN UNDERSTANDING THE FBI'S ACTIONS, AND ITS REASONING, WHICH IS THE VERY PURPOSE OF FOIA

The FBI's actions in this case warrant this Court's careful scrutiny. On September 8, 2011, the *Broward Bulldog* revealed the existence of a previously unknown FBI investigation of Abdulaziz and Anoud al-Hijji, a Saudi couple residing in Sarasota, Florida.⁷ The enormous gravity of the revelation could hardly be overstated: the public "learn[ed] that a Saudi family that actually met with [9/11 mastermind Mohammed] Atta up and disappeared without a trace just days before the attack, something that the FBI investigated but never bothered to tell Congress or the 9/11 Commission."⁸ Former Senator Bob Graham, Co-Chair of the 9/11 Commission, expressed "surprise" that the FBI never told the Commission about the investigation,⁹ and noted that the *Bulldog*'s report "opens the door to a new chapter of investigation as to the depth of the Saudi role in 9/11."¹⁰

⁷ Anthony Summers & Dan Christensen, *FBI Found Direct Ties Between 9/11 Hijackers and Saudis Living Florida; Congress Kept in Dark*, *The Florida Bulldog* (Sept. 8, 2011), <http://www.floridabulldog.org/2011/09/fbi-found-direct-ties-between-911-hijackers-and-saudis-living-in-florida-congress-kept-in-dark>.

⁸ John Cook, *The Mysterious Saudi Family That Vanished Two Weeks Before 9/11*, *Gawker* (Sept. 8, 2011), <http://gawker.com/5838498/the-mysterious-saudi-family-that-vanished-two-weeks-before-911>.

⁹ Mystery Surrounds the Ritzy Florida Home Linked to 9/11 Terrorists—and Why the FBI Didn't Tell Congressional Committee About It, *Daily Mail*

The next day, the FBI issued a press release that acknowledged the existence of the al-Hijji investigation, but insisted that “[a]ll of the documentation pertaining to the 9/11 investigation was made available to the 9/11 Commission” and congressional committees; the FBI also categorically denied that it found any connections between the Sarasota family and the 9/11 hijackers.¹¹ DE-28-1 at 4 ¶ 14; *id.* at 47 ¶ 59. Yet, Senator Graham has testified that the FBI did *not* disclose its investigation of the Sarasota Saudi family to Congress, *see* DE-28-1 at 60 ¶ 28-64 ¶ 43, which leaves “lingering” questions about the candor of the FBI’s public representations.¹² The FBI’s handling of the Sarasota family investigation

(Sept. 8, 2011), <http://www.dailymail.co.uk/news/article-2035199/Mystery-surrounds-posh-Florida-home-linked-9/11-terrorists-FBI-failed-report-it.html>.

¹⁰ Zac Anderson & Robert Eckhart, *FBI Investigated Another Sarasota Link to 9/11*, Herald-Tribune (Sept. 8, 2011), <http://www.heraldtribune.com/news/20110908/fbi-investigated-another-sarasota-link-to-911>.

¹¹ Susan Taylor Martin, *Saudi Couple Who Left Country Quickly Not a Threat: FBI*, Tampa Bay Times (Sept. 12, 2011), <http://www.tampabay.com/news/saudi-couple-who-left-country-quickly-not-a-threat-fbi/1191192>.

¹² Susan Taylor Martin & Stephen Nohlgren, *Questions Over Saudis’ Abrupt Exit From Sarasota Still Lingering*, Tampa Bay Times (Sept. 23, 2011), <http://www.tampabay.com/news/questions-over-saudis-abrupt-exit-from-sarasota-still-lingering/1193346>.

continued to receive national and international attention,¹³ prompting calls to re-open the 9/11 investigations.¹⁴

The public interest again intensified in March 2013, when, in response to an earlier FOIA request by the *Bulldog*, the FBI released 31 redacted pages of records pertaining to its Sarasota investigation. The newly released records included the widely publicized April 16, 2002 memorandum, authored by FBI Special Agent Gregory Sheffield (the “Sheffield Memo”), which documented “many connections” between the al-Hijjis and the 9/11 hijackers.¹⁵ The press observed that this account was “[c]ontrary to previous statements made by the FBI to news

¹³ Tom Jackman, *Did Arlington Have a More Ominous Link to 9-11?*, Wash. Post (Sept. 12, 2011), https://www.washingtonpost.com/blogs/the-state-of-nova/post/did-arlington-have-a-more-ominous-link-to-9-11/2011/09/12/gIQASuBCNK_blog.html?utm_term=.71053a3a47d3; Anthony Summers *et al.*, *London-Based Oil Executive Linked to 9/11 Hijackers*, The Telegraph (Feb. 18, 2012), <http://www.telegraph.co.uk/news/worldnews/september-11-attacks/9089896/London-based-oil-executive-linked-to-911-hijackers.html>.

¹⁴ *Michael Moore Backs Call to Reopen Investigation of 9/11 Attacks*, Democracy Now! (Sept. 29, 2011), https://www.democracynow.org/2011/9/29/michael_moore_backs_call_to_re; Jamie Reno, *Was the Saudi Government Involved in the 9/11 Terror Attacks?*, The Daily Beast (March 13, 2012), <https://www.thedailybeast.com/was-the-saudi-government-involved-in-the-911-terror-attacks>.

¹⁵ Michael Pollick, *Sarasota Family Had ‘Many Connections’ to 9/11 Terror Attacks*, Herald-Tribune (Apr. 16, 2013), <http://www.heraldtribune.com/news/20130416/sarasota-family-had-many-connections-to-911-terror-attacks>.

media,”¹⁶ prompting further allegations that the FBI appears to have “covered up” the connection between the Saudi government and the hijackers.¹⁷

The controversy intensified further two years later, when the Meese Commission issued its final report repudiating the Sheffield Memo as “poorly written” and “wholly unsubstantiated.”¹⁸ Instead, the Meese Commission declared, there were no connections found between “the Sarasota Family” and the 9/11 attackers. In an April 2015 interview with *The New York Times*, Senator Graham continued to question the FBI’s forthrightness with Congress and the public.¹⁹

¹⁶ *Id.*; see also Dan Christensen & Anthony Summers, *FBI Report: Florida Family Had Ties to People Linked to 9/11 Attacks*, Seattle Times (Apr. 16, 2013), <https://www.seattletimes.com/nation-world/fbi-report-florida-family-had-ties-to-people-linked-to-9-11-attacks/> (“The information in the documents runs counter to previous FBI statements. It also adds to concerns raised by official investigations but never fully explored, that the full truth about Saudi Arabia and the 9/11 attacks has not yet been told.”).

¹⁷ Paul Sperry, *Inside the Saudi 9/11 Coverup*, N.Y. Post (Dec. 15, 2013), <http://nypost.com/2013/12/15/inside-the-saudi-911-coverup>.

¹⁸ Dan Christensen, *Report Backtracks on Sarasota Saudis*, Miami Herald (Mar. 27, 2015), <http://www.miamiherald.com/news/local/crime/article16524998.html>.

¹⁹ Carl Hulse, *Florida Ex-Senator Pursues Claims of Saudi Ties to Sept. 11 Attacks*, N.Y. Times (Apr. 13, 2015), <https://www.nytimes.com/2015/04/14/world/middleeast/florida-ex-senator-pursues-claims-of-saudi-ties-to-sept-11-attacks.html>.

Others accused the Meese Commission of helping the FBI “whitewash[]” the “Saudi-9/11 connection in Florida.”²⁰

Today, over six years after the *Bulldog* first reported it, the al-Hijjis’ abrupt departure from Sarasota just two weeks before the 9/11 attacks—when they left behind a newly purchased car, a refrigerator full of food, and fresh fruit on the kitchen counter—remains “one of the strangest and most enduring mysteries of the 9/11 attacks,” as does the FBI’s handling of that investigation, and its lack of transparency about it.²¹

The disclosure of the agency records at issue may or may not resolve these controversies; but there can be no serious dispute that their disclosure is essential to maintain the public’s trust in its government’s ability to safeguard national security, and be accountable to the people whom it serves. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (Burger, C.J.) (“People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”); *cf. Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (“[O]fficial records and documents open

²⁰ Paul Sperry, *How the FBI is Whitewashing the Saudi Connection to 9/11*, N.Y. Post (Apr. 12, 2015), <http://nypost.com/2015/04/12/saudi-role-in-911-being-whitewashed-by-fbi>.

²¹ Shane Harris, *The FBI Is Keeping 80,000 Secret Files on the Saudis and 9/11*, The Daily Beast (May 12, 2016), <https://www.thedailybeast.com/the-fbi-is-keeping-80000-secret-files-on-the-saudis-and-911>.

to the public are the basic data of governmental operations. Without [access to such] information . . . most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.”).

In recent years, strong judicial enforcement of FOIA has helped shed light on many important government actions and investigations that significantly impact us all. For example:

- The court in *Associated Press v. Department of State*, No. 1:15-cv-345 (D.D.C August 7, 2015), ECF No. 17, ordered the State Department to promptly respond to six FOIA requests, some more than five years old, regarding key records from the tenure of Hillary Clinton as Secretary of State, including emails sent to and from her on various topics of urgent national concern, and further ordered the State Department to continue its searching for responsive “Records Regarding Surveillance and Anti-Terrorism Programs”;
- The Court in *New York Times Co. v. Department of Justice*, 756 F.3d 100, 103 (2d Cir. 2014), *amended on denial of reh’g*, 758 F.3d 436 (2d Cir. 2014), rejected some the Office of Legal Counsel’s *Vaughn* indexes claiming various exemptions justified withholding of legal memoranda authorizing the use of predator drones to kill American citizens.

The case at bar, too, is a prime example of the importance of independent judicial review to perform a checking function on Executive Branch agencies, precisely as Congress envisioned.

II. THE FBI’S ORDINARY COURSE OF CONDUCT IN FOIA LITIGATION—CHARACTERIZED BY EGREGIOUS DELAYS, OBFUSCATION, AND REPEATED MISREPRESENTATIONS—DOES NOT SUPPORT THE DISTRICT COURT’S PRESUMPTION OF GOOD FAITH

As grounds for finding that the FBI conducted an adequate search for responsive documents, the District Court indulged a presumption of good faith to the Declarations of David M. Hardy. DE-99 at 17-18. However, those declarations were not entitled to any such presumption, in light of the Government’s disingenuous, equivocal, and dilatory conduct over years. The timeline below demonstrates the FBI’s lackadaisical search efforts, and its pattern of repeatedly declaring it had fully complied, only later to retract that assertion:

Event No.	Date	Event
First FOIA request—prior litigation (ongoing)		
1	Sept. 26, 2011	Broward Bulldog (BB) makes first FOIA request to FBI seeking any records documenting its investigation of “the Sarasota Family” and its possible connection to the 9/11 attacks. <i>Broward Bulldog v. DOJ</i> , 12-cv-61735 (S.D. Fla.) (“ <i>BB v. DOJ-I</i> ”), Dkt. 1 at 21 ¶ 77.
2	Sept. 5, 2012	<i>BB v. DOJ-I</i> lawsuit filed. DE-28-1 at 5 ¶ 18.
3	Jan. 9, 2013	FBI declares that it had “ not located any records responsive to [BB’s] request.” <i>Id.</i> at 5 ¶ 19; <i>id.</i> at 65 ¶ 49.
4	Mar. 28, 2013	FBI locates 35 pages responsive to BB’s request (including “the Sheffield Memo”). <i>Id.</i> at 5-6 ¶¶ 21-22.
5	Apr. 2013	FBI finds 46 additional pages and produces them. <i>Id.</i> at 7-8 ¶ 25.
6	April & May 2013	FBI locates 23 boxes containing 80,266 pages in its Tampa Field Office. <i>Id.</i> at 8 ¶ 26.

Event No.	Date	Event
Second round of FOIA requests		
7	Apr. 8, 2015	BB files a second FOIA request (the first at issue in this case) for “the Sarasota Family case file” that the FBI provided to the Meese Commission. <i>Id.</i> at 10 ¶ 36.
8	July 4, 2015	BB submits a narrower, third FOIA request . <i>Id.</i> at 11 ¶ 39.
9	June 15, 2016	This lawsuit (“ <i>BB v. DOJ-II</i> ”) filed. DE-1.
10	Oct. 31, 2016	FBI releases 220 redacted pages. DE-27-1 ¶ 11.
11	Nov. 21, 2016	FBI locates an additional 1,166 pages that are potentially responsive to BB’s FOIA requests DE-17 ¶ 5.
12	Dec. 30, 2016	FBI produces 86 additional redacted pages. Hardy testifies that as of that date the FBI has “released all reasonably segregable non-exempt documents responsive to [Plaintiffs’] requests.” DE-27-1 at 45 ¶ 88 (emphasis added).
13	Jan. 27, 2017	FBI locates an additional 313 pages of responsive documents (releases 170 redacted pages). DE-34-1, Ex. A.
14	Jan. 31, 2017	Again, Hardy asserts that the FBI “has released <i>all</i> reasonably segregable non-exempt information from documents response to plaintiffs’ FOIA request.” DE-34-1 ¶ 7 (emphasis added).
15	Feb. 13, 2017	FBI locates an additional 745 pages (releases 190 redacted pages). DE-52-1 at 3 ¶ 6 & Ex. A.
16	Feb. 22, 2017	FBI locates an additional 61 pages of responsive records FBI labels its release of all non-exempt information responsive to BB’s FOIA requests now “complete.” DE-52-1 at 3 ¶ 7 & Ex. B.
17	Feb. 28, 2017	The District Court calls the FBI’s actions in responding to BB’s FOIA requests “shocking” and “shameful.” DE-73-6 at 13:17-14:9.

Event No.	Date	Event
18	Mar. 14, 2017	The FBI says it has located 11 additional pages responsive to BB's request. DE-66-1 at 7 ¶ 16.
19	Mar. 15, 2017	FBI files its second motion for summary judgment while conceding that its search for responsive documents remained incomplete. DE-66 at 11-12.
20	Mar. 24, 2017	FBI locates an additional 302 pages responsive to BB's request (releases 20 redacted pages). DE-83-1 at 3-4 ¶ 7 & Ex. A.

Under this record, the District Court erred in applying a presumption of good faith to the FBI's representations that "it . . . conducted a search reasonably calculated to uncover *all* relevant documents." *Miccousukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1248 (11th Cir. 2008) (quoting *Ray v. DOJ*, 908 F.2d 1549, 1558 (11th Cir. 1990), *rev'd on other grounds*, *Dep't of State v. Ray*, 502 U.S. 164 (1991)); *see, e.g., Jones v. FBI*, 41 F.3d 238, 242 (6th Cir. 1994) (where agency's responses to requests evidenced "bad faith," its declarations are not entitled to a presumption of good faith in evaluating the sufficiency of its search efforts). The District Court overlooked settled FOIA law that holds "[t]he adequacy of the agency's search is judged by a standard of reasonableness, construing the facts in the light most favorable to the requestor." *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1328 (9th Cir. 1995); *Negley v. FBI*, 658 F. Supp. 2d 50, 59 (D.D.C. 2009) ("Any doubt about the adequacy of the search should be resolved in favor of the requester.").

The District Court ruled that the Appellants had failed to specify any documents that were missing or omitted from the FBI's disclosed records or *Vaughn* index, even though they were effectively precluded from doing so. DE-99 at 18-19. However, when the FBI filed its Motion for Summary Judgment and *Vaughn* index (March 15, 2017), it had not even completed its search for responsive documents. Indeed, it did not conduct a single search of its Central Records System (CRS) until *after* that motion had been filed. And that search resulted in the FBI's locating four Memoranda for the Record (MFR) that were first disclosed to Appellants twelve days *after* the FBI's summary judgment motion was filed, on March 27, 2017. *See* DE-66-1 at 6-8 ¶¶ 15-16. With the FBI itself engaging in this type of ongoing scavenger hunt, it would have been impossible for Appellants to pinpoint, as the District Court would require, which documents were missing from the *Vaughn* index. Were this Court to affirm the FBI's hide-the-ball strategy, future FOIA plaintiffs will be severely hampered in pursuing government records that, as here, are of the utmost public concern. *See* Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. Rev. 185, 227-28 (2013) (arguing that federal courts have created an unworkable set of procedural roadblocks in FOIA cases, which run counter to Congress' mandate that they exercise independent review of agency action: "a plaintiff will likely have no way of demonstrating an agency's

bad faith, or impugning the affidavits, unless discovery is available. Thus, this [judicially-created] rule, too, places the plaintiff in a classic catch-22.”).

Indeed, Mr. Hardy’s supporting Declaration does not even identify what “leads” resulted in four additional MFRs being located on CRS—nor the search terms the FBI used to conduct that search. *See* DE-66-1 at 7-8 ¶ 16. Thus, Appellants could not know of or demonstrate the underinclusiveness of the agency’s search:

An agency seeking summary judgment in a FOIA case bears the burden of showing that, *even with the facts viewed in the light most favorable to the requester*, the agency has conducted a search ‘reasonably calculated to uncover all relevant documents.’ *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). To carry its burden, the agency may submit a ‘reasonably detailed affidavit, *setting forth the search terms* and the type of search performed, and averring that *all files likely to contain responsive materials (if such records exist) were searched.*’ *Oglesby v. Dep’t of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

Leopold v. DOJ, 130 F. Supp. 3d 32, 39-40 (D.D.C. 2015) (emphases added); *see also Aguiar v. DEA*, 865 F.3d 730, 738 (D.C. Cir. 2017) (holding that agency’s declaration explaining its search methodology was “not sufficiently detailed to support a summary judgment because it d[id] not disclose the search terms . . . and the type of search performed.” (citation omitted)); *Nat’l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 154 (D.D.C. 2013) (finding the agency’s search inadequate,

and denying its motion for summary judgment, where “the CIA provide[d] no description of the search parameters it used to locate responsive records.”²²

Moreover, the FBI’s Declarations were as lacking in detail and specificity as the declarations others courts have found legally insufficient to warrant judgment as a matter of law.²³ In short, the content and the context in which the eight

²² *Utahamerican Energy, Inc. v. Mine Safety & Health Admin.*, 725 F. Supp. 2d 78, 83-84 (D.D.C. 2010) (finding the agency’s search inadequate where its narrow search parameters failed to correspond to FOIA and did not include alternative name—one often used by industry officials—as search term)); *see also Negley*, 658 F. Supp. 2d at 60-61 (agency “did not search for other permutations of the name, and therefore the search was not reasonably calculated to turn up all responsive files”); *Canning v. DOJ*, 919 F. Supp. 451, 461 (D.D.C. 1994) (“Plaintiff presented evidence that the FBI was aware of the fact that this individual was known by two names. Given this, it seems clear that an adequate search should have produced files listed under both names. Because the agency failed to do so . . . the agency’s search was inadequate.”).

²³ The District Court deemed the Plaintiffs’ citation to a prior court finding that Mr. Hardy had misrepresented the truth “not relevant” to its analysis. *See* DE-99 at 17 n.12. *See Islamic Shura Council of S. Cal. v. FBI*, 278 F.R.D. 538, 545 (S.D. Cal. 2011) (“Simply put, the Government lied to the Court.”), *rev’d on other grounds*, 757 F.3d 870 (9th Cir. 2014). However, many courts, across the country, have rejected the credibility and legal sufficiency of Mr. Hardy’s routine, boilerplate attestations. *See, e.g., Citizens for Responsibility & Ethics in Wash. v. DOJ*, 746 F.3d 1082, 1102 (D.C. Cir. 2014) (Hardy’s “near-verbatim recitation of the statutory standard is inadequate.”); *Johnson v. FBI*, 118 F. Supp. 3d 784, 798 (E.D. Pa. 2015) (“The Hardy Declaration” recites only “vague, general, and patently conclusory language”); *Sciacca v. FBI*, 23 F. Supp. 3d 17, 30 (D.D.C. 2014) (“[T]he Hardy Declaration is manifestly insufficient as a matter of law to allow the Court to assess the applicability of the FOIA exemptions.”); *Elec. Frontier Found. v. CIA*, 2013 WL 5443048, at *22 (N.D. Cal. Sept. 30, 2013) (“The Hardy [D]eclaration fails to provide a sufficiently detailed and

separate Declarations were proffered refute the conclusion that they were entitled to the ordinary “presumption of good faith.” After all, the adequacy of an agency’s search must be assessed “based on what the agency knew at its conclusion rather than what the agency speculated at its inception.” *Campbell v. DOJ*, 164 F.3d 20, 28 (D.C. Cir. 1998). Courts should not accord a “presumption of good faith” to multiple contradictory declarations submitted by a federal agency that has engaged in the course of conduct that the FBI did here.²⁴

Lastly, even apart from its conduct in responding to Appellants’ FOIA requests, the serious lingering questions concerning the FBI’s underlying conduct—including whether it purposefully misled Congress—merits a more stringent review of its assertion that it conducted an adequate search:

particularized explanation of the basis for the agency’s nondisclosure. . . . [T]he FBI has proffered generalized and conclusory reasons for redacting.” (emphasis added)); *El Badrawi v. DHS*, 583 F. Supp. 2d 285, 304-05, 313 (D. Conn. 2008) (concluding that Hardy’s declaration “fails to meet the ‘relatively detailed and nonconclusory’ standard,” and finding that FBI’s filing of repeated supplemental affidavits “leaves the court with little faith that the agencies will timely submit comprehensive and sufficiently detailed affidavits, even if specifically ordered to do so”).

²⁴ This Court has previously held that when confronted with a series of delayed discoveries of responsive records, the Court should not presume such delay necessarily suggests either good or bad faith; rather, “the better course is to evaluate the reasoning behind the delay.” *Miccosukee Tribe of Indians*, 516 F.3d at 1257. Here, the Government did not come forward with any plausible “reasoning” to explain its months and months of delay in conducting searches for records, which the District Court labeled unjustified and “shameful.” DE-73-6 at 13:17-14:9.

Even where there is no evidence that the agency acted in bad faith with regard to the FOIA action itself there may be evidence of bad faith or illegality *with regard to the underlying activities* which generated the documents at issue. Where such evidence is strong, *it would be an abdication of the court's responsibility to treat the case in the standard way and grant summary judgment* on the basis of *Vaughn* affidavits alone. It would risk straining the public's ability to believe . . . that the courts are neutral arbiters of disputes whose procedures are designed to produce justice out of the clash of adversarial arguments.

Jones, 41 F.3d at 242-43 (emphases added). Nor is it consistent with due process, or with FOIA's core principle of governmental transparency, to permit these cases to be resolved on the basis of *ex parte* submissions to the Court. *See, e.g., Weiner v. FBI*, 943 F.2d 972, 979 (9th Cir. 1991) (“*In camera* review does not permit effective advocacy.”); *cf. id.* (“[T]he purpose of [a public filing] is not merely to inform the requester of the agency's [methodology in conducting a search], but to afford the requester an opportunity to intelligently advocate [for more thorough or alternative search methods] and to afford the court an opportunity to intelligently judge the contest.”).

Amici urge the Court not to condone the type of conduct the FBI engaged in here in responding to a news organization's effort to discover the truth about official government conduct. After all, FOIA is the mechanism Congress put in place precisely to empower the public to do so.

III. NEITHER THE DECLARATIONS IT SUBMITTED, NOR ITS LEGALLY DEFICIENT VAUGHN INDEXES, ENTITLED THE FBI TO SUMMARY JUDGMENT

The FBI's clear strategy in litigating this FOIA case has been to hide the ball from records requesters by providing vague explanations for its withholding decisions, lacking any detail that would permit meaningful rebuttal or challenge. The FBI also routinely files *ex parte* declarations with the trial court to justify its withholding decisions, obscuring the key component of the adjudicatory process from public view. As a result, FOIA requesters are denied the opportunity to effectively challenge the Government's asserted exemptions. One concrete example proves the larger point. Here is the sum total information provided to the Appellants to justify the FBI's withholding an entire page of information from its PPT Presentation of April 25, 2014 to the Meese Commission, citing Exemption 7(E)(3), *see* DE-73-3 at 3:

Broward Bulldog 1531 contains information about when the [9/11] conspirators moved to their respective departure cities. This information, when combined with other information withheld in this document, allows insight into the specific factors significant to analysis by the FBI. Armed with this knowledge, others who plan to cause harm to the United States could alter their behaviors and patterns, allowing them to go undetected.

DE-105-1 at 10 ¶ 23 (emphasis added). Thus, the only information available to the Appellants about the withheld page, and the purported need for secrecy under Exemption 7(E)(3), is that it shows "when the conspirators moved to their

respective departure cities.” And, the Government avers, if a reader were to interpret this information, by using “other information *withheld* in this document” (s)he could thereby gain meaningful “insight into . . . the analysis by the FBI.”

Id. It is self-evident that if the information in question *cannot* be “combined with other information *withheld* in this document”—precisely because that other information is withheld—then no such insight can be adduced. Thus, the Government concedes that disclosure of the dates, by themselves, does not reveal anything about FBI’s analysis or guidelines.

To accept as sufficient such a nebulous and self-contradictory “explanation” for *why* a claimed exemption applies, would eviscerate the rule that “*Vaughn*’s call for specificity imposes on the agency the burden of *demonstrating* applicability of the exemptions.” *King v. DOJ*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis added); *see also Morley v. CIA*, 508 F.3d 1108, 1123 (D.C. Cir. 2007) (“[C]ategorical description of redacted material coupled with categorical indications of anticipated consequences is clearly inadequate.” (citation omitted)).

Moreover, for the Court to conduct *in camera* review instead of requiring a proper *Vaughn* index “deprives the FOIA requester of an opportunity to present his interpretation of the withheld documents,” and, “absent some ‘adversary testing,’ the district court may be at a disadvantage in evaluating the government’s characterizations of the withheld documents.” *Spirko v. USPS*, 147 F.3d 992, 997

(D.C. Cir. 1998) (citations omitted)); *Elec. Frontier Found.*, 2013 WL 5443048, at *22 (“Absent a particularized explanation of why [the exemption] applies to information withheld from a document, Plaintiff does not have a meaningful opportunity to contest . . . whether the claimed exemption applies.”).

At bottom, appropriately detailed *Vaughn* indexes “permit adequate adversary testing of the agency’s claimed right to an exemption” and hold government agencies to FOIA’s promise of broad disclosure with exemptions construed narrowly. *Kimberlin v. DOJ*, 139 F.3d 944, 950 (D.C. Cir. 1998) (citation omitted). *Amici* urge the Court to adhere to FOIA law’s commitment to this adversarial process, which the District Court did not.

IV. THE FBI’S ASSERTION OF EXEMPTION 7(E) AS GROUNDS TO WITHHOLD PORTIONS OF ITS POWERPOINT PRESENTATION WAS PART AND PARCEL OF THAT AGENCY’S UNWARRANTED OVERUSE OF THAT EXEMPTION

The District Court initially rejected the FBI’s redactions to the PowerPoint Presentation (“PPT”) under Exemption 7(E), finding that the information the FBI sought to withhold “does not discuss any FBI investigative techniques and procedures,” and merely “encompasses facts and information gathered about FBI suspects.” DE-99 at 38.

On reconsideration, however, the District Court reversed itself, upholding the FBI’s redaction of 20 pages from the PPT Presentation under Exemption 7(E). DE-108 at 5. The District Court concluded that “[t]he latest Hardy declaration

[Number Six] lays out how the redactions in Document 22 prevent disclosure of law enforcement techniques and procedures, even though the redacted content does not directly discuss techniques and procedures.” *Id.* Without further explanation, the District Court approved all the redactions of critical information the FBI sought under Exemption 7(E). *Id.*²⁵

In so doing, the District Court failed to consider the extent to which the same information as the redacted/withheld portions of the PPT Presentation was already in the public domain. The government carries its “evidentiary burden” on Exemption 7(E) when it provides “(1) a description of the technique or procedure at issue in each document, (2) a reasonably detailed explanation of the context in which the technique is used, (3) an exploration of why the technique or procedure

²⁵ Among the key items of information withheld, exclusively under Exemption 7(E), were multiple lines of text under headings “Investigative Findings—Financial: Ample financing was provided [REDACTED] . . .,” DE-73-3 at Broward Bulldog-1514, “Early to Mid-2000: Pilots/Intended Pilots Arrive U.S.,” *id.* at Broward Bulldog-1519, “Funding of the 9/11 Attacks,” *id.* at Broward Bulldog-1524, “Early to Mid-2001: Additional Funding,” *id.* at Broward Bulldog-1525, and “Early to Mid-2001: Non-Pilots Arrive U.S.,” *id.* at Broward Bulldog-1526. In addition, seven pages were withheld from the PowerPoint presentation, in their entirety (no headings or other information disclosed), exclusively under Exemption 7(E). *See* DE-73-3 at 3.

is not generally known to the public” *Am. Immigration Council v. DHS*, 30 F. Supp. 3d 67, 75-76 (D.D.C. 2014) (citation omitted).²⁶

The FBI failed to carry this burden because practically all of the information it seeks to suppress from the PPT Presentation is already a matter of public record. *See Rugiero v. DOJ*, 257 F.3d 534, 551 (6th Cir. 2001) (“[Exemption 7(E)] only protects techniques and procedures not already well-known to the public.” (citing *Davin*, 60 F.3d at 1064; *Rosenfeld v. DOJ*, 57 F.3d 803, 815 (9th Cir. 1995))).

Publicly issued government reports and judicial documents extensively discuss *the very same* kind of information that the FBI seeks to redact from its PPT Presentation. Evidence about the “kinds of identification the hijackers owned”²⁷

²⁶ The D.C. Circuit, among other courts, holds that a government agency must show a risk of circumvention of the law for “guidelines,” as well as “techniques and procedures,” for law enforcement investigations or prosecutions. *See, e.g., Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011); *Davin v. DOJ*, 60 F.3d 1043, 1064 (3d Cir. 1995). This reading is correct, but the issue is immaterial on this appeal: because the FBI has failed to show that the redacted material would in fact disclose any *unknown* techniques or procedures, it has not carried its burden under Exemption 7(E).

²⁷ *See, e.g.,* Thomas R. Eldridge et al., *9/11 And Terrorist Travel: Staff Report of the National Commission on Terrorist Attacks Upon the United States* (Aug. 21, 2004) (“*Travel Report*”) at 8-33 (setting out twenty-five-page chronology identifying each visa, driver’s license, and identification card each hijacker obtained, its date of issuance, the office or location where the hijacker obtained the document, and, where available, supporting documentation the hijacker submitted), https://govinfo.library.unt.edu/911/staff_statements/911_TerrTrav_Monograph.pdf; John Roth et al., *Monograph on Terrorist Financing: Staff Report to the National Commission on Terrorist Attacks Upon the United States* (2004)

and “the dates of the pilots’ and intended pilots’ arrivals in the United States,” as well as “where” and “by what mode” they entered,²⁸ have been thoroughly discussed in official documents. So too have “the funding of the attacks,” “the previous flights the conspirators took before” 9/11, “the weapons [they] bought in advance of the flight”; “the timing of the purchase of [their] plane tickets”; and “when [they] moved to their respective departure cities.”²⁹

Given the voluminous information about these subjects already in the public domain, the FBI’s bald and unsubstantiated representation that excerpts from the

(“*Financing Report*”), https://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf; Nat’l Comm’n on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (2004), <https://govinfo.library.unt.edu/911/report/911Report.pdf>; H. Permanent Select Comm. on Intelligence & S. Select Comm. on Intelligence, *Rep. on Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001*, S. Rep. No 107-351, H. R. Rep. No. 107-792 (2002) (“*Joint Inquiry Report*”), https://fas.org/irp/congress/2002_rpt/911rept.pdf; Stipulation, *United States v. Moussaoui*, No. 01-cr-00455-LMB (E.D. Va. Mar. 1, 2006), ECF No. 1632 (“*Moussaoui Stipulation*”), <http://www.vaed.uscourts.gov/notablecases/moussaoui/exhibits/prosecution/ST00001.html>.

²⁸ See, e.g., *Joint Inquiry Report*, at 138 (“The thirteen remaining hijackers, the ‘muscle,’ whose role was to overcome pilots and control passengers, began arriving in the United States in April 2001. Except for one threesome, they arrived in pairs, the last in June. Twelve of the thirteen were from Saudi Arabia, and one was from the United Arab Emirates. . . . As FBI Director Mueller noted, these hijackers arrived in the United States ‘within a fairly short window,’ each transiting through the United Arab Emirates.”); see also generally *Travel Report*; *Financing Report*; *The 9/11 Commission Report*; *Joint Inquiry Report*; *Moussaoui Stipulation*.

²⁹ See generally *Travel Report*; *Financing Report*; *The 9/11 Commission Report*; *Joint Inquiry Report*; *Moussaoui Stipulation*.

PPT Presentation would disclose “techniques and procedures” not already well-known to the public was simply not credible. *See ACLU Found. v. DHS*, 243 F. Supp. 3d 393, 404 (S.D.N.Y. 2017) (“Section 7(E) requires that the material being withheld . . . not be apparent to the public.”).

The FBI’s reflexive and excessive use of Exemption 7(E) in this case is no aberration; indeed, it reflects a worrying trend in the government’s increasing reliance on this exemption.³⁰ In FY 2016, the FBI applied Exemption 7(E) a total of 2,469 times³¹—a 305% increase since FY 2012 (when it applied the exemption 810 times),³² and a 442% increase since both FY 2008 and 2004 (when it applied the exemption 558 times).³³ And this upsurge is attributable only in small part to

³⁰ *See, e.g.*, Br. of *Amicus Curiae* The Reporters Comm. for Freedom of the Press and 23 Media Organizations in Support of Appellee at 11-13, *Schwartz v. DEA*, No. 16-750 (2d Cir. Sept. 29, 2016), ECF No. 76 (noting “staggering” rise in reliance on Exemption 7(E) by DEA and government agencies generally), <https://www.rcfp.org/sites/default/files/2016-09-29-schwartz-v-dea.pdf>.

³¹ DOJ Annual FOIA Report, Fiscal Year 2016 at 31 (“FY 2016 Report”), <https://www.justice.gov/oip/page/file/920581/download>.

³² DOJ Annual FOIA Report, Fiscal Year 2012 at 19 (“FY 2012 Report”), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/oip-foia-fy12.pdf>.

³³ *See* DOJ Annual FOIA Report, Fiscal Year 2008 at 9 (“FY 2008 Report”), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/foiapg5.pdf>; DOJ Annual FOIA Report, Fiscal Year 2004 (“FY 2004 Report”), <https://www.justice.gov/oip/doj-foia-2004-annual-report-initial-foiapa-access-requests>.

the rise in the number of total FOIA requests to the FBI.³⁴ It is evident that the FBI and other government agencies have aggressively advocated for expansive, and textually insupportable interpretations of the terms “technique,” “procedures,” and “guidelines.” *See, e.g., ACLU of N. Cal. v. DOJ*, 70 F. Supp. 3d 1018, 1039 (N.D. Cal. 2014) (the fact that “the public is unaware of the specifics of how and when” certain techniques are employed “is not enough to sustain a withholding under Exemption 7(E)” (citation omitted)), *appeal docketed*, No. 14-17339 (9th Cir. Nov. 26, 2014). This Court should apply Exemption 7(E) based on the ordinary meaning of the terms within it, consistent with “the basic policy that disclosure, not secrecy, is the dominant objective of [FOIA].” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 7-8 (2001) (citation omitted).

The District Court’s wholesale and summary approval of the FBI’s redactions to the PowerPoint Presentation under Exemption 7(E) was improper. This Court should not sanction it.

³⁴ In FY 2016, for example, the FBI processed 13,758 FOIA requests—a 15.8% increase over FY 2012 (when it processed 11,882 requests), a 28.8% decrease over FY 2008 (when it processed 17,717 requests), and a 28.1% increase over FY 2004 (when it processed 10,736 requests). *See* FY 2016 Report at 24; FY 2012 Report at 13; FY 2008 Report at 1; FY 2004 Report.

CONCLUSION

For the foregoing reasons, as well as those stated in the Appellants' Opening Brief, the *Amici Curiae* respectfully urge this Honorable Court to reverse the judgment below and to remand the case for further proceedings.

Respectfully submitted,

s/ Charles D. Tobin

Charles D. Tobin

Charles D. Tobin
Steven D. Zansberg

Ballard Spahr LLP
Attorneys for *Amici Curiae*
1909 K Street, NW
12th Floor
Washington, DC 20006-1157
Tel 202.661.2200
Fax 202.661.2299
tobinc@ballardspahr.com
zansbergs@ballardspahr.com

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,236 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportional typeface with Times New Roman 14-point font, in text and footnotes, using Microsoft Word 2010.

s/ Charles D. Tobin

Charles D. Tobin

CERTIFICATE OF SERVICE

I certify that on October 23, 2017, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the Court's CM/ECF system, and that all participants in the case are registered CM/ECF users and service will be accomplished by the Court's CM/ECF system.

s/ Charles D. Tobin

Charles D. Tobin