No. 16-15178

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, et al.,

Plaintiffs-Appellees,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California

BRIEF FOR APPELLANT FEDERAL BUREAU OF INVESTIGATION

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INTRODUCTION

In this case, the district court reached the remarkable conclusion that core law enforcement training and guidance materials of the nation's preeminent law enforcement agency, the Federal Bureau of Investigation (FBI), were not "compiled for law enforcement purposes" under Exemption 7 of the Freedom of Information Act (FOIA). And it did so in the face of a statute that specifically protects a law enforcement agency's guidance documents when their release could lead to circumvention of the law. In so ruling, the court denied the FBI any opportunity to establish that materials, if released, could "endanger the life or physical safety" of sources and "risk circumvention of the law," 5 U.S.C. § 552(b)(7)(E)-(F), even though the court recognized that these concerns were legitimate and valid. Government Excerpts of Record (GER) 24.

This ruling is inconsistent with the text and history of Exemption 7 and with every appellate decision that has considered the issue, including a holding directly on point by the D.C. Circuit. While this Court has not yet addressed this issue, the holding is in significant tension with the reasoning of this Court's prior decisions. The district court ruling must be reversed and the case remanded so the district court can evaluate the harms that release of the information would cause.

STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court under 5 U.S.C. § 552(a)(4)(B). GER 35. On December 8, 2015, the district court ordered the FBI to release FOIA documents requested by the plaintiffs. *See* GER 28. The government filed a notice of appeal on February 5, 2016. *See* GER 1. This Court has jurisdiction under 28 U.S.C. §§ 1291, 1292(a)(1).

STATEMENT OF THE ISSUE

Exemption 7 of FOIA provides that records may be withheld from disclosure when they satisfy a threshold requirement of being "compiled for law enforcement purposes" and their release would cause one of six defined harms. 5 U.S.C. § 552(b)(7). The question in this case is whether the threshold requirement – that the record be "compiled for law enforcement purposes" – is satisfied by general FBI training materials and enforcement guidelines that govern a wide range of the FBI's law enforcement activities.

STATEMENT OF THE CASE

A. FOIA Exemption 7.

Exemption 7 of the Freedom of Information Act provides that the law – and its disclosure requirement – "does not apply to matters that are . . . records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information" would cause one of

six listed harms. 5 U.S.C. § 552(b)(7). Those six listed harms serve various purposes, such as avoiding "interfer[ence] with enforcement proceedings," protecting individuals from an "unwarranted invasion of personal privacy," and preventing the disclosure of "a confidential source." *Id*. § 552(b)(7)(A), (C), (D). Exemption 7(E), which is the subsection that was cited most frequently to justify withholding here, protects from disclosure those law enforcement records that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." *Id*. § 552(b)(7)(E).

Thus, in every Exemption 7 case, the government must first show that the "records or information [were] compiled for law enforcement purposes." *Id*. § 552(b)(7). It must then also show that one of the six enumerated exceptions applies to the records. Here, the Court did not address the enumerated exceptions because it held that the threshold requirement was not met – namely, that the FBI guidance and training materials were not compiled for law enforcement purposes. GER 25.

B. Plaintiff's FOIA Requests and the District Court Proceedings.

1. This is a FOIA case stemming from two broad, multi-faceted FOIA requests submitted in 2010 by the American Civil Liberties Union, the San

Francisco Bay Guardian, and the Asian Law Caucus, seeking information about FBI investigations and surveillance of Muslim communities in northern California. GER 34. The first request (GER 51-63) included three parts and thirty-three subparts. *Id*. It sought, among other things, all

> [f]inal memoranda, policies, procedures, directives, guidance, protocols, legal analysis, training materials, and other documents reflecting policy pertaining to the following matters that were created or effective since September 2001:
>
> a. Use of informants by FBI;
>
> b. Opening or carrying out 'assessments';
>
> c. Written materials setting forth legal reasoning or authority relied upon by FBI in conducting investigations and assessments; * * *
>
> f. The FBI Citizenship Academy;
>
> g. The FBI Junior Agent Program; and
>
> h. Domain management.

GER 52-53. The request also sought, among other things, specific policies and procedures and training materials "regarding Islam, Muslim culture, and/or Muslim, Arab, South Asian, or Middle Eastern communities in the United States"; training on the "use of race, religion, ethnicity, language, or national origin for law enforcement purposes"; individual records related to FBI activities in northern California pertaining to "FBI investigations and assessments of mosques; Islamic centers; Muslim community centers; members of mosques . . . ; Muslim leaders;

and imams"; and wide ranging aggregate data on numerous topics. GER 53-54. At the request of plaintiffs, the FBI granted a fee waiver and expedited status for the first request, GER 96. The second FOIA request, sent in July 2010, included twelve parts. GER 65-71. That request sought, among other things, "[l]egal memoranda, procedures, policies, directives, practices, guidance, or guidelines" that pertained to the use of racial and demographic information, the mapping of ethnically oriented businesses or facilities, the behavioral characteristics or information associated with crime or exploitation by terrorist groups, and how racial and ethnic data can be used. GER 66-67.

While the FBI advised plaintiffs that it was still searching for and evaluating files in June 2010, plaintiffs filed this lawsuit in August 2010 challenging the response to the first request, and amended their complaint to include a challenge to the response to the second request. GER 77-80, 96 & GER 33-83 (Complaint).

In mediation, the parties agreed to a production schedule. Between December 2010 and June 2012, the FBI reviewed over 98,000 pages of potentially responsive material, and released over 50,000 pages to plaintiffs in monthly installments, in full or in part. *See* GER 97-103, 115-16. Additional pages were released after consultation with other government agencies. GER 103-04.

Because of the large number of documents at issue, the parties agreed to a sampling methodology to resolve disputes over FOIA exemptions in litigation.

Overall, 3,659 pages were reviewed as part of that sampling and the FBI produced a *Vaughn* index for those pages. GER 115-16 (Hardy decl.) & GER 157-276 (sample *Vaughn* index pages). The bulk of the documents were withheld under Exemption 7. Documents were also withheld under other FOIA exemptions, including Exemptions 1, 2, and 5.

The withheld documents include a very broad array of sensitive FBI training and guidance materials, including the 2011 Domestic Investigations and Operations Guide, which is the manual that governs all FBI investigations and operations activity,[1] and documents providing training on those requirements, *see*, *e.g.*, GER 160-63; documents that provide training on policies and standards with respect to how to handle confidential sources and validate the information they provide, *see*, *e.g.*, GER 188-200, 219-31; training materials on confidential source funding, *see*, *e.g.*, GER 250-57; training material for conducting interviews, *see*, *e.g.*, GER 201-03; and intelligence policy guidance materials, *see*, *e.g.*, GER 232-36.

2. Many of the sampled documents were withheld in whole or in part based on Exemption 7, and the parties agreed to litigate the Exemption 7 issue first since

[1] This and other key guidance documents – such as the Confidential Human Source Policy Manual and Validation Standards Manual, the Confidential Funding Policy Guide, and the 2011 Intelligence Policy Implementation Guide and Directive – are outside the sample, so while they are responsive to the FOIA request they are not described in the *Vaughn* index that is part of the record.

it covered the bulk of the withheld materials. The FBI submitted two declarations supporting the Exemption 7 claims, and a nearly 600 page long *Vaughn* index that described each of the redactions in detail on the 3,659 sampled pages. GER 94-156 (Hardy declarations); GER 157-276 (*Vaughn* excerpts). The first Hardy declaration described the FBI's filing systems, the scope of the search, the *Vaughn* index, and an explanation of the basis for asserting the FOIA exemptions, including Exemption 7. GER 94-128. The declaration addressed Exemption 7's threshold requirement by showing how the documents were compiled for law enforcement purposes. GER 121-22. The second Hardy declaration further described this link. GER 131-42. The FBI explained that "the FBI is the primary investigative agency of the federal government." GER 121 (citing statutory and other authorities). The FBI has "authority and responsibility to investigate all violations of federal law not exclusively assigned to another agency." *Id*. It also has authority to "conduct investigations and activities to protect the United States and its people from terrorism and threats to national security, and further the foreign intelligence objectives of the United States." *Id*.

The FBI explained that Exemption 7 had been claimed for information in five types of documents:

(1) Special Agent Law Enforcement Training (including cultural training);

(2) Law Enforcement Policies, Procedures and Guidelines;

(3) the FBI's Citizens Academy and Junior Agent Programs;

(4) Domain Management and Assessments; and

(5) the FBI's Confidential Human Source Program.

GER 132. Each of these programs, the FBI explained, "has a training component, most have an investigative component, and all have legal policies and guidelines by which agents must abide." *Id*. The declaration explained that each "topical area[] relate[s] to the enforcement of federal laws and the enforcement activity is within the law enforcement duty of the FBI." *Id*.

The FBI provided extensive detail on the connection between each of these programs and the FBI's law enforcement responsibilities. For example, the training programs have a nexus to law enforcement because "training [is] an essential law enforcement function," GER 133, and the requested information "is embedded in training materials" from several FBI training entities that, among other things, serve to "provide[] [agents] with a full understanding of the relevant policies, protocols, procedures, and the legal basis under which they must operate at all times." GER 133-34. The FBI next explained that written policies, procedures, and guidelines "further[] . . . the FBI's core law enforcement mission." GER 134.

The FBI explained that domain management and assessments relate to documents created as part of the FBI's "broader analytic and planning functions"

to locate and identify threats, but which are "integral parts of, and inseparable from" the FBI's role in "detect[ing], prevent[ing], and enforce[ing] violations of federal law." GER 135. The FBI also explained that confidential human sources are a "key tool" for the FBI's exercise of its law enforcement functions. GER 139. Sources serve to "strengthen and further all types of FBI investigative efforts" with the "ultimate mission" being "law enforcement against all types of crimes encompassed within [FBI's] jurisdiction." GER 139-40.

The FBI further explained the connection to law enforcement with respect to "each specific document on a block by block basis" in the *Vaughn* index. GER 141-42. The extensive *Vaughn* index describes each redacted or withheld document and the nature of the redactions. *See* GER 157-276 (*Vaughn* excerpts). As an example, the *Vaughn* index describes Document No. 9, a 15 page power point presentation titled "Confidential Human Source Assessment Recruitment & Handling 101." GER 188. All of the pages were released in part. *Id*. The *Vaughn* index described the redactions in detail over twelve pages. For example, on slides M-213 and M-214, the FBI redacted "tools and methods [that special agents] use to protect the identities of [confidential human sources] when utilizing [them] in FBI investigations" including, for example, "how the FBI covertly meets with its informants." GER 189. M-215 and M-216 include "guidelines to utilize when assessing and recruiting" confidential human sources, including the "factors that

influence [a special agent's] decisions to recruit certain individuals." GER 190. Each redaction in the document was described in significant detail to justify application of the various applicable exemptions, including Exemption 7 and the applicable subcategory. GER 188-200.

C. District Court Decision.

1. In March 2015, the district court held that the FBI had not established that the sampled materials constituted "records or information compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). The court reasoned that to qualify under Exemption 7, the government must "link its decision to withhold information to the enforcement of a *particular* provision of federal law." GER 23 (emphasis added).

The court recognized that the FBI "has a clear law enforcement mandate" which "derives from 28 U.S.C. §§ 509, 533, and 534, which permit the FBI to investigate and gather intelligence." GER 24. But the court reasoned that the FBI "fail[ed] to meet this burden" to show a "nexus between the enforcement of a federal law and the documents." *Id*. The court accepted the FBI's showing that the "types of documents the FBI withheld advance law enforcement interests" such as "community outreach efforts," using "[i]nformants . . . [to] learn of dangerous illegal activity," and "training" to better "detect[] and prevent[]" illegal activity. *Id.* (citing Supplemental Hardy Decl. (GER 135-40)). The court accepted that the

documents contained "information about such tactics." GER 25. But the court held that these were nonetheless not records compiled for law enforcement purposes under the statute because "[n]either the Hardy declarations nor the FBI's pleadings tether the activities the withheld documents concern to the enforcement of any particular law." *Id*. Because the withheld material did not "relate to particular investigations," the court concluded, "Exemption 7 is not the appropriate umbrella under which to shield these documents from public view." *Id.*

The court did not address the government's showing that the sampled documents satisfied the applicable Exemption 7 subcategories. Thus, for example, because the Court held that Exemption 7 was entirely unavailable to the FBI, it would not consider the FBI's showing that "tools . . . used to protect the identities of" confidential sources (GER 189) would, if released, "endanger the life or physical safety" of those sources. 5 U.S.C. § 552(b)(7)(F); *see*, *e.g.*, GER 240 (release of informant file numbers could "jeopardize the safety of this informant").[2]

2. On December 8, 2015, the court entered an agreed-upon judgment whereby (absent an appeal) the FBI would be required to produce the sampled

[2] Other documents were withheld based on Exemptions 1, 2, and 5. Plaintiffs did not challenge the Exemption 1 withholdings and withdrew its challenge to the Exemption 2 withholdings. Plaintiffs prevailed with respect to the government's Exemption 5 withholdings, and the government is not appealing the district court's ruling on that exemption. *See* GER 17 (dkt. 152).

documents (*i.e.*, the 3,659 pages for which a draft *Vaughn* index was created) within sixty days. GER 26-30. The parties would also be required to confer on a disclosure schedule for the remainder of the FOIA materials. GER 28. The court stayed these disclosure obligations in the event of an appeal, and the government filed its notice of appeal on February 5, 2016. GER 1, 28.

SUMMARY OF ARGUMENT

In this case, the district court held that some of the most sensitive law enforcement training and guidance materials created and used by the FBI, the nation's primary law enforcement agency, were not "compiled for law enforcement purposes" under Exemption 7 of the Freedom of Information Act. This holding cannot be squared with this Court's precedent, with the statutory text, or with the holdings of other courts of appeals that have addressed this same issue.

This Court has held that in applying the Exemption 7 threshold test, a "law enforcement agenc[y] such as the FBI should be accorded special deference" and need only show a "'rational nexus' between its law enforcement duties and the document for which Exemption 7 is claimed." *Binion v. U.S. Dep't of Justice*, 695 F.2d 1189, 1194 (9th Cir. 1983). The district court did not follow this precedent, and instead required that the documents be tied to a particular investigation or criminal law being enforced. GER 23-25. But in 1986, Congress eliminated the requirement that the documents come from a specific investigatory file. *See* Pub.

L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48 (1986). Indeed, every appellate court that has considered the issue has held that a law enforcement agency's general training or guidance documents qualify under the Exemption 7 threshold. This Court should no depart from that uniform body of decisions. *See*, *e.g.*, *Tax Analysts v. IRS*, 294 F.3d 71, 79 (D.C. Cir. 2002). And here, the government's extensive factual showing – comprising a nearly 600-page Vaughn index and two detailed declarations – are more than adequate to show that the documents at issue here, such as training materials for conducting interviews or handling confidential sources, have a direct connection to the FBI's law enforcement duties. The district court's contrary holding must therefore be reversed.

STANDARD OF REVIEW

This Court uses a two-step process to review a district court's grant of summary judgment in a FOIA case. First, this Court reviews de novo whether the documents submitted by the agency provide an adequate factual basis for the district court's decision. *Lion Raisins, Inc.* v. *USDA*, 354 F.3d 1072, 1078 (9th Cir. 2004). Second, the Court reviews "the district court's conclusions of fact * * * for clear error, while legal rulings, including its decision that a particular exemption applies, are reviewed de novo." *Lane* v. *Dep't of Interior*, 523 F.3d 1128, 1135 (9th Cir. 2008). In this case, the issue on appeal – whether the FBI's general law enforcement guidelines and training materials that cover a wide range

of the FBI's law enforcement activities are documents "compiled for law enforcement purposes" – is a legal questions reviewed de novo.

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT EXEMPTION 7 DOES NOT PROTECT FBI TRAINING AND GUIDANCE MATERIALS.

Exemption 7 of the Freedom of Information Act protects from disclosure certain types of "records or information compiled for law enforcement purposes." *See* 5 U.S.C. § 552(b)(7). If that threshold test is met, the information can be protected from disclosure if its release would cause one of the six specific harms identified in the Exemption 7 subcategories. *See FBI v. Abramson*, 456 U.S. 615, 627 (1982); *Milner v. Dep't of the Navy*, 562 U.S. 562, 578-79 (2011) ("Exemption 7, for example, shields records compiled for law enforcement purposes, but only if one of six specified criteria is met"). Thus, whether records are compiled for law enforcement purposes is only the first step in determining whether that information is subject to protection.

This Court has explained that "the government's burden for satisfying the threshold requirement of exemption 7 is easier to satisfy than the burden for other requirements" where the "releasing agency [is] . . . the Federal Bureau of Investigation, [which] has a clear law enforcement mandate." *Rosenfeld v U.S. Dep't of Justice*, 57 F.3d 803, 808 (9th Cir. 1995); *see Binion*, 695 F.2d at 1193

("law enforcement agencies such as the FBI should be accorded special deference in an Exemption 7 determination"). Thus, with respect to satisfying the Exemption 7 threshold, a law enforcement agency like the FBI "need establish only a 'rational nexus' between its law enforcement duties and the document for which Exemption 7 is claimed." *Binion*, 695 F.2d at 1194; *see also Rosenfeld*, 57 F.3d at 808 (in case seeking investigation files, looking for a "'rational nexus' between enforcement of a federal law and the document for which [a law enforcement] exemption is claimed") (alteration in original); *Church of Scientology v. Department of the Army*, 611 F.2d 738, 748 (9th Cir.1979) (same).

When a law enforcement agency's activities "are authorized by federal regulation and are part of the duties of [the] law enforcement agency," documents relating to those activities meet the Exemption 7 threshold. *Binion*, 695 F.2d at 1194. This Court ultimately asks whether the "document [was] compiled with a *rational nexus to a legitimate law enforcement purpose*." *Rosenfeld*, 57 F.3d at 811 (emphasis added); *see Church of Scientology*, 611 F.2d at 748 (looking at whether "the files '. . . were compiled for . . . enforcement purposes'").

A. The District Court Ruling Is Inconsistent With this Court's Precedent, the Plain Language of the Statute, and the Rulings of Other Circuit Courts.

The district court here held that the FBI's factual showing failed to establish that the documents were "compiled for law enforcement purposes" because the

FBI's factual submissions did not "link its decision to withhold information to the enforcement of a particular provision of federal law." GER 23. The court reached this conclusion in spite of accepting that the "Supplemental Hardy Declaration describes at length *how the types of documents the FBI withheld advance law enforcement interests.*" GER 24 (emphasis added). The court also accepted that disclosing these "various techniques to combat unlawful activity . . . would undermine their effectiveness." *Id*. But the court nevertheless reasoned that "Exemption 7 is not the appropriate umbrella under which to shield these documents from public view" because they "*do not relate to particular investigations,* and thus cannot be linked to any *particular provision of law*." GER 25 (emphasis added).

As will be shown next, the district court's analysis cannot be squared with this Court's precedent, the text of Exemption 7, its legislative history, or the decisions of the appellate courts who have addressed the identical issue. Nor can it be squared with the FBI's robust factual showing that explained in exhaustive detail how the various training and guidance materials were linked to the FBI's core functions of criminal law enforcement and national security investigations, which themselves could lead to law enforcement actions.

1. This Court's Precedent Does Not Support the District Court Decision.

The district court's error here is simple and evident given this Court's precedent. In *Binion*, this Court explained that the Exemption 7 threshold is met when the FBI "establish[es] a 'rational nexus' between its law enforcement duties and the document for which Exemption 7 is claimed." *Binion*, 695 F.2d at 1194. This Court in *Rosenfeld* likewise explained that the "document [must be] compiled with a rational nexus to a legitimate law enforcement purpose." 57 F.3d at 811. And the district court here recognized just such a nexus when it held that the "documents . . . advance law enforcement interests" such as "community outreach efforts" that "serve the purpose of establishing working relationships with community partners whose cooperation is essential to law enforcement missions"; "[i]nformants [who] help law enforcement learn of dangerous illegal activity"; and "training materials [that] make FBI personnel more effective at detecting and preventing" illegal activity. GER 24.

Given these conclusions by the district court, it was legal error to then hold that these documents have no "nexus" to the FBI's "law enforcement duties." *Binion*, 695 F.2d at 1194; *Rosenfeld*, 57 F.3d at 811. This Court explained in *Binion* that a court is not to "engage in a 'formalistic reading' of this exemption" to deny protection to law enforcement materials, 695 F.2d at 1194 (quoting *Abramson*, 456 U.S. at 615), but the district court did exactly that here in declining

to apply the straightforward threshold language of Exemption 7 to materials that were indisputably created to implement the FBI's law enforcement mandate.

2. Congress Made Plain That General Law Enforcement Materials Are Within the Scope of Exemption 7.

The district court appeared to believe that general materials that apply to a range of FBI law enforcement activities – such as guidelines for training FBI agents for handling confidential informants, which are used across the board in the agency's law enforcement and national security work – could not qualify under the Exemption 7 threshold because they do not "relate to particular investigations" or "cannot be linked to any particular provision of law" that is being enforced. GER 25. But in addition to being inconsistent with this Court's precedent, which asks whether the documents relate to the agency's "law enforcement duties" rather than a specific investigation, *Binion*, 695 F.2d at 1194, this reasoning is also inconsistent with the text of the statute and the amendments Congress made in 1986 to expressly remove language that had previously tied the exemption to investigatory files.

a. The statutory text asks whether the documents were compiled for a "law enforcement purpose[]," 5 U.S.C. § 552(b)(7), not, as the district court required, whether they were compiled for the "enforcement of [a] particular law" or whether they "relate to particular investigations." GER 25.

The district court's reliance on a specific statute or investigation might have been more easily reconcilable with an earlier version of the exemption that has since been superseded for precisely the reasons highlighted by this case. Prior to 1986, the threshold requirement was narrower – it specified that only "*investigatory* records compiled for law enforcement purposes" could be protected under Exemption 7. 5 U.S.C. § 552(b)(7) (1985) (emphasis added). The Supreme Court explained in 1982 that that version of Exemption 7 "was intended to prevent premature disclosure of *investigatory materials* which might be used in a law enforcement action." *Abramson*, 456 U.S. at 621 (emphasis added). That focus on investigatory materials – in other words, the files from a specific criminal investigation – closely reflects the district court's approach here, since the court also seemed to think that to be covered by Exemption 7, the documents must "relate to particular investigations." GER 25.

But Congress amended Exemption 7 in 1986, removing the word "investigatory" from the statute and making it clear that the threshold test was not limited to files relating to a specific investigation. Instead, the test established by the amended statute is readily satisfied by the types of documents at issue in this case, namely, a law enforcement agency's general training and guidance materials that are used in carrying out all of its law enforcement functions. Congress amended the provision in 1986 to "broaden the scope of" Exemption 7. S. Rep.

No. 98-221, at 23 (1983);[3] s*ee* Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48 (1986). The language of the amended statute and the legislative history surrounding the enactment make plain that Congress intended to permit protection of documents that are not files from a specific investigation.

b. Congress was motivated to make that change out of a "concern that the confidentiality of informants and sensitive law enforcement investigations is jeopardized by FOIA disclosures" and FOIA "is used by lawbreakers 'to evade criminal investigation or to retaliate against informants.'" S. Rep. No. 98-221, at 2. The Committee that crafted the amendments found, "based upon testimony of the FBI and other federal law enforcement agencies, that this exemption, in practice, has created problems with respect to the disclosure of sensitive non-investigative law enforcement materials." *Id*. at 23. The change was "intended to ensure that sensitive law enforcement information is protected under Exemption 7 regardless of the particular format or record in which the record is maintained." *Id*. The Committee explained that the amendment "should . . . resolve any doubt that

[3] Senate Report 221 accompanied S. 774 in the 98th Congress, and the legislative history shows that the 1986 amendments to Exemption 7 adopted text "identical" to that in S. 774, and that Senate Report 221 thus explains the "meaning and intended effect of the [1986] amendments." 132 Cong. Rec. 27,189 (1986) (Sen. Leahy); *id*. at 31,423-31,424 (Sen. Hatch) (revisions to Exemption 7 "derive precisely" from S. 774); *see also id*. at 29,619 (Rep. Kindness) (explaining that the Senate Report on S. 774 reflects the "meaning and intended effect of the [House] amendments"). Courts have therefore relied on this Report in interpreting the provision. *See, e.g.*, *Tax Analysts v. IRS*, 294 F.3d 71, 79 (D.C. Cir. 2002).

law enforcement manuals and other non-investigatory materials can be withheld under (b)(7) if they were compiled for law enforcement purposes and their disclosure would result in one of the six recognized harms to law enforcement interests." *Id.* The Committee specifically rejected the approach of two appellate courts that had held that Exemption 7 did not apply to a DEA law enforcement manual because it "'was not compiled in the course of a specific investigation.'" *Id*. (quoting *Sladek v. Bensinger*, 605 F.2d 899, 903 (5th Cir. 1979) and citing *Cox v. Department of Justice*, 576 F.2d 1302, 1310 (8th Cir. 1978)).

This change was underscored by a similar amendment made to Exemption 7(E), which is applicable to most of the records in this case. Prior to 1986, that provision covered only those records that would "disclose investigative techniques and procedures." 5 U.S.C. § 552(b)(7)(E) (1985). Congress amended the provision to cover information that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." Pub. L. No. 99-570, § 1802, 100 Stat. 3207-48. The congressional report explained that this change, "like the deletion of 'investigatory' from the exemption's threshold language, is intended to facilitate the protection of non-investigatory materials" and "make clear that 'techniques and procedures for law enforcement investigations and prosecutions'

can be protected, regardless of whether they are 'investigative' or non-investigative." S. Rep. No. 98-221, at 245. The report further explained that Congress was "expand[ing] (b)(7)(E)" to cover law enforcement and prosecution guidelines in part due to a court decision that had "den[ied] protection for prosecutorial discretion guidelines." *Id*. at 25 (citing *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753 (D.C. Cir. 1978)).

c. Shortly after the enactment of the 1986 Amendments, the Attorney General issued a memorandum on their implementation. *See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act* (1987) (AG Memo), *available at* https://www.justice.gov/archive/oip/86agmemo.htm.[4] That memorandum explained that Congress "modified th[e] threshold requirement in two distinct respects – by deleting the word 'investigatory' and by adding the words 'or information' – so that Exemption 7 now extends potentially to all 'records or information compiled for law enforcement purposes.'" *Id*. at 5. The memorandum explained that "[u]nder the former threshold language, agencies and

[4] The Supreme Court has repeatedly cited a similar contemporaneous Attorney General memorandum as a reliable interpretation of FOIA. *See FCC v. AT&T Inc.*, 562 U.S. 397, 409 (2011) (Attorney General's 1974 Memorandum "viewed . . . as a reliable guide in interpreting FOIA"); *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 169 (2004); *FBI v. Abramson*, 456 U.S. 615, 622 n.5 (1982); *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 n.3 (1982); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 151 (1980).

courts considering Exemption 7 issues often struggled with the 'investigatory' requirement, as some kinds of sensitive law enforcement information did not readily fit the label of 'investigatory'" and "[c]ourts generally interpreted this statutory term as requiring that the records in question result from specifically focused law enforcement inquiries." *Id*. at 6. Thus, "[e]ven records generated pursuant to routine agency activities that could never be regarded as 'investigatory' now qualify for Exemption 7 protection where those activities involve a law enforcement purpose" and "[t]his includes records generated for general law enforcement purposes that do not necessarily relate to specific investigations." *Id*. at 7.

Accordingly, the memorandum explained, "[r]ecords such as law enforcement manuals, for example, which formerly were found unqualified for Exemption 7 protection only because they were not 'investigatory' in character, now should readily satisfy the exemption's threshold requirement." AG Memo at 7; *accord id*. at 16 ("One of the Exemption 7 weaknesses specifically addressed by Congress in achieving FOIA reform was its inadequacy to protect such records as law enforcement manuals which, though certainly containing law enforcement 'techniques' and 'procedures,' did not satisfy the former 'investigatory' requirement of the exemption."). Likewise, because of the similar removal of the term "investigative" in Exemption 7(E), "a technique or procedure now can

properly be protected under Exemption 7(E) wherever it is 'for law enforcement investigations or prosecutions' generally." *Id*. at 15. Thus, "[t]he elimination of the 'investigatory' requirement should be regarded and applied in light of its evident purpose, which was to ensure that valid law enforcement information whose disclosure could cause one of the harms cognizable under Exemption 7 is not foreclosed from protection merely due to its noninvestigatory character." *Id*. at 8 n.14.

The district court's decision simply cannot be squared with this detailed discussion of the 1986 FOIA amendment. Instead, the district court's recognition that these are the "types of documents . . . [that] advance law enforcement interests" (GER 24) confirms that they are precisely the sort of "routine agency activities [that] . . . involve a law enforcement purpose." AG Memo at 7; *see* S. Rep. No. 98-221, at 23 (Congress tackling "problems with respect to the disclosure of sensitive non-investigative law enforcement materials"). And the district court's reasoning – that the files here failed to satisfy the threshold because they did not pertain to "a particular provision of federal law" or a "particular investigation[]" (GER 23, 25) – directly contradicts the purpose of the statutory change, to *overturn* court decisions holding that a law enforcement manual could not be protected because it "was not compiled in the course of a specific investigation." S. Rep. No. 98-221 at 23 (quoting *Sladek*, 605 F.2d at 903); *see* AG Memo at 6.

3. Appellate Courts Consistently Recognize that a Law Enforcement Agency May Protect General Law Enforcement Materials From Disclosure Under Exemption 7.

a. Consistent with the text of the statute and the history of the 1986 amendments, the courts of appeals have universally read this threshold test to cover the types of materials that the district court here held could not be protected under Exemption 7 – general training and guidance materials of a law enforcement agency. Some courts have even employed a "per se" rule whereby "all records and information compiled by an agency [such as FBI] . . . whose primary function is law enforcement, are 'compiled for law enforcement purposes' for purposes of Exemption 7." *Jordan v. U.S. Dep't of Justice*, 668 F.3d 1188, 1193 (10th Cir. 2011); *see Irons v. Bell*, 596 F.2d 468, 473-75 (1st Cir. 1979). In those courts, of course, general law enforcement materials of a law enforcement agency like the FBI would "per se" qualify as being compiled for law enforcement purposes.

This Court has not adopted a "per se" rule.[5] Instead this Court, like the D.C. Circuit and the Third Circuit, generally asks whether there is a "rational nexus" between the record and a law enforcement purpose. *See Rosenfeld*, 57 F.3d at 808; *see also Pratt v. Webster*, 673 F.2d 408, 420-21 (D.C. Cir. 1982); *Abdelfattah v. DHS*, 488 F.3d 178, 184 (3d Cir. 2007). And while this Court has not yet

[5] Given this Court's precedent, we are not asking the Court to establish a "per se" rule and it need not address the "per se" rule in this appeal, but do wish to flag our preservation of the issue in the event there is further review.

addressed the applicability of Exemption 7 to general law enforcement materials that do not relate to a specific investigation, both the D.C. Circuit and the Third Circuit have held that such general materials meet the Exemption 7 threshold and therefore qualify for Exemption 7 protection. *See Abdelfattah*, 488 F.3d at 185; *Tax Analysts v. IR*S, 294 F.3d 71, 79 (D.C. Cir. 2002).

This Court has stated that its Exemption 7 test "resembles . . . closely" the one applied in the D.C. Circuit. *Rosenfeld*, 57 F.3d at 808. And the D.C. Circuit has held that the threshold test is satisfied for the types of general law enforcement materials at issue here, although it did so in a case – *Tax Analysts* – that post-dates *Rosenfeld*.

In *Tax Analysts*, the FOIA requester sought certain technical assistance memoranda prepared by the IRS to address various tax enforcement issues. The D.C. Circuit held that it was error for the district court to require information to concern, as part of the threshold Exemption 7 test, "investigations which focus directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions." *Tax Analysts*, 294 F.3d at 77. The D.C. Circuit explained that cases addressing requests for information about specific investigations have "no bearing on the issue in this case," which concerned "disclosure of internal agency material relating to

guidelines, techniques, and procedures for law enforcement investigations and prosecutions outside the context of a specific investigation." *Id*. at 78.

With respect to general law enforcement materials, the D.C. Circuit held that they "clearly satisfy the 'law enforcement purposes' threshold of Exemption 7." *Tax Analysts*, 294 F.3d at 78. The court explained that the "legislative history [of the 1986 FOIA amendments] makes it clear that Congress intended the amended exemption to protect both investigatory and non-investigatory materials, including law enforcement manuals and the like." *Id*. at 79; *see also PHE, Inc., v. Dep't of Justice*, 983 F.2d 248, 249, 251 (D.C. Cir. 1993) (obscenity investigation manual); *Church of Scientology Int'l v. IRS*, 845 F. Supp. 714, 722-23 (C.D. Cal. 1993) (IRS Law Enforcement Manual pages). Accordingly, "under the amended threshold of Exemption 7, an agency may seek to block the disclosure of internal agency materials relating to guidelines, techniques, sources, and procedures for law enforcement investigations and prosecutions, even when the materials have not been compiled in the course of a specific investigation." *Tax Analysts*, 294 F.3d at 79; *see also EPIC v. DHS*, 777 F.3d 518, 523 (D.C. Cir. 2015) (policy memo "set[ting] forth the steps taken to decide whether and when to disrupt wireless networks during critical emergencies" that was "created to prevent crime and keep people safe, which qualify as law enforcement purposes," satisfies Exemption 7 threshold).

The Third Circuit reached the same conclusion in *Abdelfattah*. There, the court explained that the 1986 amendments "broadened the applicability of Exemption 7 by expressly removing the requirement that the records be 'investigatory.'" *Abdelfattah*, 488 F.3d at 185. The court held that "under the plain language of the statute . . . an agency seeking to invoke Exemption 7 does not have to identify a particular individual or incident as the object of an investigation into a potential violation of law or security risk." *Id.*; *see Jordan*, 668 F.3d at 1193 ("The statute refers to 'law enforcement *purposes*,' not 'law enforcement *proceedings*.'").

In sum, all the appellate courts to have considered the issue have found that general law enforcement materials satisfy the Exemption 7 threshold, and no appellate court has held otherwise. *See Abdelfattah*, 488 F.3d at 186 ("Our research has not disclosed any contrary appellate decisions.").

b. Like the D.C. Circuit and the Third Circuit, this Court applies the "rational nexus" test in evaluating the threshold applicability of Exemption 7, as we have explained. *Rosenfeld*, 57 F.3d at 808. The test is straightforward for a purely law enforcement agency, like the FBI, and under it the government "need only establish a 'rational nexus' between its law enforcement duties and the document for which Exemption 7 is claimed." *Binion*, 695 F.2d at 1194; *see Rosenfeld*, 57 F.3d at 808.

However, unlike the D.C. Circuit and Third Circuit, this Court has never addressed the application of the rational nexus test to general law enforcement materials. Instead, this Court's cases addressing the Exemption 7 threshold standard have all involved requests for documents pertaining to specific investigatory files and the question faced was whether those specific investigations were legitimate or pretextual. *See Rosenfeld*, 57 F.3d at 808 (files concerning the Free Speech Movement at Berkeley); *Wiener v. FBI*, 943 F.2d 972, 986 (9th Cir. 1991) (files on investigations of John Lennon); *Church of Scientology*, 611 F.2d at 748 (files pertaining to the Church of Scientology or its founder); *cf. Binion*, 695 F.2d at 1194 (request for individual's pardon records). Importantly, nothing in those cases precludes this Court from following the D.C. Circuit and the other appellate courts in recognizing that Exemption 7 covers the FBI's general law enforcement training and guidance materials.

In *Rosenfeld*, this Court addressed a FOIA request "to obtain information about FBI investigations of several individuals and 1960s protests at the University of California, Berkeley." 57 F.3d at 806. The Court there framed the rational nexus test in terms of that particular investigation: Because the FBI "has a clear law enforcement mandate," the court held that "the government 'need only establish a "rational nexus" between enforcement of a federal law and the document for which [a law enforcement] exemption is claimed.'" *Rosenfeld*, 57

F.3d at 808 (alteration in original) (quoting *Church of Scientology*, 611 F.2d at 748). On the facts before it, this Court in *Rosenfeld* concluded that some of the specific FBI investigations at issue had no "legitimate law enforcement purpose" and were in fact "pretextual." 57 F.3d at 808; *see id*. at 809 (FBI "government appointment investigations . . . satisfy the rational nexus test" but district court correct that "purpose for which these documents [regarding Clark Kerr] were compiled was pretextual" because there was "evidence showing that the FBI waged a concerted effort in the late 1950s and 1960s to have Kerr fired from the presidency of UC Berkeley").

Rosenfeld's articulation of the rational nexus test quoted *Church of Scientology*, a decision issued before the 1986 amendments to Exemption 7. In *Church of Scientology*, this Court also applied the threshold requirement of Exemption 7 to an investigatory file relating to a specific employment "background investigation of a particular individual" being conducted by the Naval Investigative Service. 611 F.2d at 744. In applying the exemption, the court held that there was "no showing that the investigation involved the enforcement of any statute or regulation within the authority of [the agency]" because it involved a

mixed-function agency that was performing a role more like an "'internal audit'" rather than something with an "'enforcement purpose.'" *Id.* at 744, 749.[6]

Rosenfeld and *Church of Scientology* involved requests for investigatory files, and the district court erred in reading them to preclude utilization of Exemption 7 to cover general law enforcement materials of the FBI, like the guidance documents and training materials at issue here.

B. Under the Proper Legal Framework, the Documents at Issue Here Were Compiled for Law Enforcement Purposes and Readily Satisfy the Exemption 7 Threshold.

1. Consistent with the reasoning of this Court in *Binion*, decisions from the D.C. Circuit and Third Circuit provide the appropriate framework for evaluating general law enforcement materials. In *Abdelfattah*, the Third Circuit explained that in the 1986 amendments, Congress "did broaden the sweep of the exemption's coverage" from the previous version, which required the agency to "identify a particular individual or incident as the object of the investigation," adopting a broader threshold test requiring the agency to show "a 'nexus' between the agency activity giving rise to the records and its law enforcement duties." 488 F.3d at 184. This is the same analysis this Court described in *Binion* in determining whether

[6] Rather than order the release of the information, the Court in *Church of Scientology* remanded the case given the "highly sensitive nature" of the materials so that the district court could further "inquire into . . . [the agency's] law enforcement authority and whether the document was compiled for a law enforcement purpose." *Id*. at 749.

pardon files qualified under Exemption 7 – whether there is a "'rational nexus' between its law enforcement duties and the document for which Exemption 7 is claimed." 695 F.2d at 1194. As this Court explained, the Court should assess whether the "document [was] compiled with a *rational nexus to a legitimate law enforcement purpose*." *Rosenfeld*, 57 F.3d at 811 (emphasis added); *see Abdelfattah*, 488 F.3d at 186 (agency must "demonstrate [a rational] relationship between its authority to enforce a statute or regulation and the activity giving rise to the requested documents").

Under this framework, the district court should have looked at the different functions performed by the agency and to which the documents pertain, and determined whether those functions qualify as among the agency's law enforcement duties. Applying this analysis, all of the documents at issue here readily meet the Exemption 7 threshold. Indeed, plaintiffs' FOIA request expressly sought, among other things, all FBI "guidance" used in several basic law enforcement functions, such as the "use of informants by FBI." GER 41. Thus, it should come as no surprise that such records are at the core of a FOIA exemption designed to prevent harms that may be caused by the release of "information compiled for law enforcement purposes," 5 U.S.C. § 552(b)(7), including information that "could reasonably be expected to disclose the identity of a confidential source." *Id.* § 552(b)(7)(D).

2. The FBI explained that documents regarding five types of FBI law enforcement activities contained information warranting protection under Exemption 7. Each of those five types of activities – even in the district court's telling – qualifies as a law enforcement duty of the FBI. *See* GER 24. There is no question here that the documents pertain to the five outlined activities, and there is thus a "rational nexus between [the FBI's] law enforcement duties and the document[s] for which Exemption 7 is claimed." *Binion*, 695 F.2d at 1194.

a. The first type of activity is special agent law enforcement training (including cultural training). GER 132. The training of law enforcement special agents is a core law enforcement function – training ensures that special agents operate effectively and consistent with legal requirements. *See Melendres v. Arpaio*, 784 F.3d 1254, 1265-66 (9th Cir. 2015) (affirming injunction requiring training of law enforcement officers to address alleged constitutional violations); *United States v. Moses*, 796 F.2d 281, 284 (9th Cir. 1986) (in the context of evaluating probable cause, training helps a "trained law enforcement agent . . . 'perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer'").

While the district court got the law wrong, it recognized that training is closely linked to the FBI's law enforcement functions, concluding that "training materials make FBI personnel more effective at detecting and preventing [crime]."

GER 24. The FBI provided a thorough justification, explaining that training is an "essential law enforcement function" that is necessary to ensure that special agents have a "full understanding of the relevant policies, guidelines, protocols, procedures, and the legal basis under which they must operate at all times." GER 134-35. And the training materials at issue here, as the FBI explained, were "from law enforcement training sessions," which the FBI described in detail. GER 133, 134 n.4 (discussing "firearms training"; "investigative techniques"; "defensive tactics"; "driving techniques"; "skills . . . to identify and handle critical situations in high-risk environments"; "interview techniques . . . designed for teaching agents how to better understand and analyze the behaviors and body language of sources from different cultures").

b. The second category of materials at issue are law enforcement policies, procedures, and guidelines. GER 132. These include guidelines on an agency's "use of informants; how it opens and carries out 'assessments'; how the FBI conducts its investigations . . . ; how the FBI utilizes racial, religious, language, national origin, or similar factors for law enforcement purposes." GER 134; *see* GER 162 (power point includes "guidelines for when FBI personnel can use different investigative techniques"); GER 166 ("guidelines for approval of [undisclosed participation] in . . . investigations" which could reveal "circumstances under which FBI personnel . . . may or may not engage in

undisclosed participation and to what extent"); GER 191 ("guidelines to utilize when assessing and recruiting [confidential human sources]"); GER 207 ("the types of evidence the FBI needs in order to justify continuing an enterprise [domestic terrorism] investigation"); GER 212 ("guidelines FBI Special Agents should follow in order to best detect deception when interviewing subjects"); GER 215 (guidelines for FBI interviews).

These types of activities – conducting investigations, engaging in undisclosed participation (*i.e.*, undercover policing), utilizing confidential sources, interviewing witnesses – have a clear and direct "'nexus' . . . [to the FBI's] law enforcement duties." *Abdelfattah*, 488 F.3d at 184. Indeed, it simply is not plausible that Congress would have specifically protected information that "would disclose guidelines for law enforcement investigations . . . if such disclosure could reasonably be expected to risk circumvention of the law," 5 U.S.C. § 552(b)(7)(E), but then crafted the Exemption 7 threshold to preclude the FBI from seeking this protection for the type of information at issue here.

The district court was therefore wrong to conclude that general law enforcement guidelines failed to qualify because they "do not relate to particular investigations and . . . cannot be linked to any particular" criminal law being enforced. GER 25. Indeed, these types of general guidelines are used to conduct *all* of the FBI's investigative activity, and therefore to help it enforce all criminal

laws within its jurisdiction, emphasizing the need to protect these core law enforcement records. The district court decision, on the other hand, put at risk the FBI's most sensitive guidance and training materials.

c. The next category of materials concerns two community outreach programs – the Citizens Academy and Junior Agent programs – which the FBI uses to "build cooperative relationships and educate the public about suspicious activities or potential threats." GER 135. Citizens Academy graduates "receive training in evidence" and "basic law enforcement procedure." *Id*. They allow the "FBI . . . to exchange ideas and dispel misunderstandings" in communities. *Id*. These programs, the FBI explained, can frequently "result in tips and leads in active FBI investigations." *Id*. As the district court acknowledged, these outreach efforts help the FBI "establish[] working relationships with community partners whose cooperation is essential to law enforcement missions." GER 24.

d. Similarly, there is an obvious nexus between the FBI's confidential source program and its law enforcement duties. As the FBI explained, confidential sources are a "cornerstone" and a "key tool" used in pursuing law enforcement and intelligence gathering missions, GER 139, and common sense confirms this. The district court recognized that confidential "[i]nformants help law enforcement learn of dangerous illegal activity." GER 24. There can be no real dispute that documents pertaining to these various law enforcement programs such as the

human source program have a "rational nexus [to the FBI's] law enforcement duties" when the law is applied correctly. *Binion*, 695 F.2d at 1194

e. The final category of material – domain management and assessment – pertains to documents that help "analy[ze] threats to . . . the United States . . . in areas related to the FBI's responsibilities, including domestic and international criminal threats." GER 137. The FBI uses data and analysis to help "proactively identify threats," and this "authority enables the FBI to identify and understand trends, causes, and potential indicia of criminal activity and other threats to the United States that would not be apparent from the investigation of discrete matters alone." GER 138.

This threat-assessment role directly relates to the FBI's core mission of detecting and preventing crime and identifying national security threats. As Justice Alito has explained, the "context of Exemption 7 confirms that, read naturally, 'law enforcement purposes' involve more than just investigation and prosecution of offenses that have already been committed," but also includes those "proactive steps . . . to prevent criminal activity and maintain security." *Milner*, 562 U.S. at 582 (Alito, J., concurring).[7]

[7] *Milner* involved Exemption 2, which protects records "related solely to . . . internal personnel rules and practices." 5 U.S.C. § 552(b)(2). The Court declined to read Exemption 2 as covering Navy rules governing storage facilities for ammunition and ordinance, rejecting the theory that Exemption 2 allowed

Similarly, this Court recognized that the FBI's work in assisting the President and the pardon attorney determine whether to grant a pardon serves a law enforcement function because "FBI pardon applicant investigations are authorized by federal regulation and are part of the duties of this law enforcement agency," and "the determination whether to grant a pardon has clear law enforcement implications." *Binion*, 695 F.2d at 1194. And in a related context, this Court employed a practical test in determining whether a law enforcement function is at issue, asking whether the information "tell[s] the [agency] how to catch lawbreakers" or "tell[s] lawbreakers how to avoid the [agency's] enforcement efforts." *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1082, 1087 (9th Cir. 1997) (applying prior interpretation of Exemption 2). Developing assessments to help analyze threats and identify indicia of criminal activity likewise are

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withholding of agency policies that could risk circumvention of the law. *Id*. at 567-68. But the Court acknowledged the serious concerns if the information was not protected, and remanded the case for consideration of Exemption 7, *id*. at 581. Justice Alito, concurring, reasoned that Exemption 7 might apply to the information if the ammunition storage information was "compiled as part of an effort to prevent crimes of terrorism and to maintain security." *Id*. at 585. Of course, the FBI analytic information at issue here is a much easier fit within Exemption 7 than the Navy storage information at issue in *Milner*, given the FBI's core law enforcement role and the fact that the material is used to help the FBI enforce the law. *See Milner v. U.S. Dep't of the Navy*, 575 F.3d 959, 979 (9th Cir. 2009) (W. Fletcher, J., dissenting) (reasoning that the Navy storage information would not qualify as having been compiled for law enforcement purposes because the agency component that created the documents lacks the "ability to conduct investigations or adjudications to enforce laws or regulations"), *rev'd*, 562 U.S. 562 (2011).

legitimate duties of the FBI and have obvious law enforcement purposes, since the goal is ultimately to take "proactive steps . . . to prevent crime." *Milner*, 562 U.S. at 582 (Alito, J., concurring). In short, they help the FBI "catch lawbreakers" and, as Justice Alito explained, "[i]f crime prevention and security measures do not serve 'law enforcement purposes,' then those charged with law enforcement responsibilities have little chance of fulfilling their duty to preserve the peace." *Id.* at 583.

The district court did not dispute this law enforcement role, and recognized that the FBI has a "clear law enforcement mandate" to "investigate and gather intelligence." GER 24; *see* GER 24 n.6 (recognizing that the FBI's domestic investigations and operations guide "authorizes the FBI to engage in intelligence analysis and planning to facilitate and support investigative activities and other authorized activities") (quoting DIOG § 15.1 (2011 ed.)). The district court nevertheless held that this material did not meet the Exemption 7 threshold, quoting this Court's statement in *Rosenfeld* that certain "'generalized monitoring and information-gathering' are not sufficient justifications to apply Exemption 7." GER 23 (quoting *Rosenfeld*, 57 F.3d at 809).

The district court seemed animated by its view that, because these training and guidance materials – including the domain management and assessment materials – were not necessarily tied to a specific investigation, they were

altogether excluded from Exemption 7 under this general monitoring concern. But the district court's reliance on *Rosenfeld* to justify that concern is missing key context. In *Rosenfeld*, this Court stated that in the case of a specific investigation of a man named Kerr, a "conspicuous[] absen[ce] . . . [of] any possible criminal liability by Kerr" or any reason to conduct a legitimate background investigation showed that the FBI was engaged in "*precisely the sort of* generalized monitoring and information-gathering that are *not related to the Bureau's law enforcement duties*." 57 F.3d at 809 (emphasis added). That suggests that this Court had in mind a distinction between two kinds of generalized law enforcement activities (including monitoring): those that are unrelated to an agency's legitimate duties (and therefore are not exempt from disclosure), and those that are related to the agency's legitimate law enforcement mission (and therefore satisfy the rational nexus standard). This Court did not suggest that all of the FBI's efforts to evaluate threats are illegitimate before there is a specific crime identified, much less that documents relating to the FBI's legitimate and authorized predictive assessment role are not within Exemption 7 at all.

Moreover, the inquiry in *Rosenfeld* was made to determine if the specific investigation at issue in that case was legitimate or "pretextual" or investigative documents were "compiled with an illegitimate law enforcement purpose, to have Kerr fired" from his position as a university president. 57 F.3d at 809-10. No such

inquiry is necessary or appropriate here because the general materials at issue here were not compiled in the course of a specific investigation whose validity might be questioned, but are designed to be used in a wide variety of legitimate investigations. *See*, *e.g.*, GER 266-67 (withholding "interview simulation" that included "certain cultural identifiers particular to targets of counterterrorism . . . efforts" because revealing those identifiers could "single out the targets and their exact locations" and "then be exploited by terrorists to . . . avoid detection"). And as the district court and Justice Alito have both recognized, the FBI's efforts to identify threats are authorized and legitimate law enforcement functions. GER 24; *Milner*, 562 U.S. at 582 (Alito, J., concurring).

3. Because of its ruling, the district court did not assess whether the specific harms that Exemption 7 was designed to protect against – such as a risk that the law would be circumvented, or that a confidential source's safety would be endangered – would be caused by the documents at issue here. However, the district court did appear to acknowledge generally that the FBI was properly concerned about those harms. *Compare* GER 24 ("FBI employs many various techniques to combat unlawful activity, some of which, if publicly disclosed, would undermine their effectiveness"), *with* 5 U.S.C. § 552(b)(7)(E) (guidelines properly withheld if they "could reasonably be expected to risk circumvention of the law"). And the government's *Vaughn* index describes in detail why limited

material was redacted in order to ensure that confidential informants remain safe, and that investigative techniques critical to FBI efforts are not disclosed. *See*, *e.g.*, GER 188-200, 240.

Plaintiffs' uncommonly broad FOIA request was not tailored to their expressed concerns regarding FBI targeting, and swept in almost all of the FBI's general guidance records. *Compare* GER 20 (plaintiffs sought "release of records concerning the investigation and surveillance of Muslim communities in northern California") *with* GER 41 (FOIA request seeks all "policies, procedures, guidance . . . training materials . . . since September 2001" for the "use of informants," "carrying out 'assessments,'" "[d]omain management," and "conducting investigations"). Nonetheless, the FBI has processed the full set of materials – nearly 100,000 pages – and has been able to disclose over half of them in full or in part. GER 98-102 (describing processing and release of records). With respect to a sample set of over 3,500 pages of material, the government has explained in painstaking detail why certain parts of the documents cannot be released without causing the harms Congress identified. *See* GER 157-276 (Vaughn excerpts). On remand, a detailed review by the court of each of those claims will be needed with respect to the sampled materials. As the government's detailed *Vaughn* index demonstrates, the government properly withheld information based on the specific harms Congress identified in Exemption 7.

CONCLUSION

This Court should vacate the district court's order and remand for further proceedings.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellant states that it knows of no related case pending in this Court.

/s/ August E. Flentje
August E. Flentje

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,221 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ August E. Flentje
August E. Flentje

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ August E. Flentje
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