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

REPLY BRIEF
FEDERAL BUREAU OF INVESTIGATION

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INTRODUCTION

As we explained in our opening brief, the various types of FBI documents at issue here – which fall into five general, but overlapping, categories – were all compiled to further the FBI's legitimate and important law enforcement purposes, and therefore readily meet the Exemption 7 threshold as interpreted by this Court and other courts. *See Binion v. U.S. Dep't of Justice*, 695 F.2d 1189, 1194 (9th Cir. 1983) (asking whether there is a "'rational nexus' between [the agency's] law enforcement duties and the documents for which Exemption 7 is claimed"); *see also Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 808 (9th Cir. 1995). And because the "Federal Bureau of Investigation . . . has a clear law enforcement mandate," *Rosenfeld*, 57 F.3d at 808, "special deference" is accorded to the FBI's determination that its activities are necessary for law enforcement. *Binion*, 695 F.2d at 1193; *see Rosenfeld*, 57 F.3d at 808 ("rational nexus test requires courts to accord a degree of deference to a law enforcement agency's decisions").

Here, as we explained in our brief, the district court disregarded these principles and the need for deference in evaluating the FBI's functions, and instead ordered the release of nearly 50,000 pages of core law enforcement training and guidance materials because they "do not relate to *particular investigations*, and thus cannot be linked to any *particular provision*" of substantive criminal law. GER 25

(emphasis added). The district court's ruling misinterprets the statutory language and misapplies this Court's precedent, and should be reversed.

ARGUMENT

I. THE FBI MATERIALS AT ISSUE HERE WERE COMPILED FOR LEGITIMATE LAW ENFORCEMENT PURPOSES.

Instead of defending the district court's reasoning, plaintiffs appear to agree that the district court went too far in holding that none of the FBI files warranted protection because the files did not relate to specific investigations. *See* Br. 43 ("there is no requirement to identify a particular investigation"); Br. 23 ("Nor did the Public Interest Groups argue for such a requirement"); Br. 44-45 (agreeing that "programmatic documents" may be protected); Br. 52 (general law enforcement materials "*may* meet the Exemption 7 threshold"). Indeed, plaintiffs appear to recognize that a different inquiry is necessary in cases "where 'there is an ongoing law enforcement investigation'" compared to those where there is "information that 'does not relate to any ongoing investigation.'" Br. 52 (quoting *Tax Analysts v. IRS*, 294 F.3d 71, 77-78 (D.C. Cir. 2002)). Thus, the district court's broad holding is incompatible even with plaintiffs' view of the law. *See* GER 25 ("Exemption 7 is not the appropriate umbrella" because "the withheld documents do not relate to particular investigations, and thus cannot be linked to any particular provision of law"). On this basis alone, reversal is required, with direction to consider whether the general materials relate to the FBI's law enforcement functions.

Instead, plaintiffs seek to divert this Court's attention by suggesting that the various types of FBI activities that are addressed in the documents – training; community outreach; developing confidential sources; and the pre-investigation activities of domain management and assessments – are somehow improper. But the issue on appeal is not whether plaintiffs can discern any nefarious intent or perceived cultural bias from documents that the FBI has voluntarily released. Indeed, the question is not even whether the information withheld by the FBI satisfies the provisions of a particular statutory exemption under the Freedom of Information Act (FOIA). Instead, this appeal asks only whether the district court correctly interpreted the threshold language of Exemption 7 to exclude altogether the FBI's general training, guidance, and related documents that were compiled as part of the FBI's law enforcement mission.

A. The Touchstone of This Court's Inquiry is to Ensure a Legitimate Law Enforcement Purpose Underlies the Documents.

1. This Court's cases addressing the Exemption 7 threshold confirm that courts must conduct a limited check – employing special deference when addressing a law enforcement agency like the FBI – to ensure that the documents relate to the agency's law enforcement activities. The materials at issue here – core training and guidance materials relating to law enforcement functions undertaken by the nation's primary federal law enforcement agency – easily pass this test.

Plaintiffs incorrectly suggest that the government's position here calls into question the rational nexus test. Br. 34, 41.[1] Rather, plaintiffs' arguments seek to narrow existing Ninth Circuit law by imposing a requirement that the government must identify a specific substantive criminal law to which any records relate. Br. 34. Instead, as this Court explained, the question is whether there is a "'rational nexus' between [the FBI's] *law enforcement duties* and the document for which Exemption 7 is claimed," *Binion*, 695 F.2d at 1194 (emphasis added). This Court's precedents do not artificially insist that the government must identify a specific substantive criminal statute. The essential component of this Court's threshold test under Exemption 7 is not a formalistic connection between the records and any specific provision of criminal law. Instead, it is a functional test that asks whether the records bear a nexus to the agency's law enforcement duties. *Id*. (concluding that pardon investigations qualify as FBI law enforcement duties because they are

[1] Plaintiffs likewise incorrectly state that the FBI is arguing "for a per se rule." Br. 48 (emphasis omitted). While other courts have adopted such a rule, *see* Opening Br. 25, the FBI accepts this Court's precedent requiring an additional factual showing of a rational nexus between the records and the agency's law enforcement functions. Here, the FBI explained how each type of activity is connected to the FBI's broad law enforcement duties. Once that showing is made, this Court properly defers to the FBI's judgment. *See Rosenfeld*, 57 F.3d at 808 ("rational nexus test requires courts to accord a degree of deference to a law enforcement agency's decisions"); *Binion*, 695 F.2d at 1193. Deference is particularly appropriate in assessing the FBI's explanation of how a certain general technique – such as its use of confidential informants – serves a law enforcement purpose. And the FBI's factual showing here – nearly 600 pages of Vaughn index and multiple declarations – goes well beyond simply asserting entitlement to protection based on a per se rule.

"authorized by federal regulation and are part of the duties of this law enforcement agency").

The cases where this Court has looked to specific statutory bases for a criminal investigation are those in which the Court sought to evaluate the legitimacy or pretextual nature of the law enforcement purpose identified by the government, which was specific to a particular investigation in those cases. *See Wiener v. FBI*, 943 F.2d 972, 985-86 (9th Cir. 1991) (citation to specific criminal statutes not sufficient because the court must determine if the "claimed law enforcement purpose was in fact a pretext").

A law enforcement agency can – and indeed it must – take general steps that do not pertain to any specific investigation (or to any single specific substantive criminal statute that is within the agency's enforcement authority) in order to be effective in enforcing those criminal laws. Plaintiffs' singular focus on an asserted need to "identify the law [the FBI] sought to enforce" (Br. at 44) is just another way of imposing the district court's erroneous requirement that the document "relate to particular investigations." GER 25. Instead, the materials at issue here – which include sensitive training and confidential source handling materials – are the backbone of the FBI law enforcement regime without which *none* of our criminal laws can effectively be enforced. Thus, the FBI activities related to the records at issue serve clear "law enforcement purposes," 5 U.S.C. § 552(b)(7). If it were

necessary to cite a law advanced by those activities, the government would refer to every law in Title 18 that is within the FBI's enforcement authority. *See* GER 121 (FBI is the "primary investigative agency of the federal government with authority and responsibility to investigate all violations of federal law not exclusively assigned to another agency"); GER 131 (documents "are related to the enforcement of federal laws . . . within the law enforcement duty of the FBI"). Enforcement of all federal criminal laws is directly served by, for example, having standards and methods to recruit confidential sources; developing positive community relations; and domain management, namely, being aware of a field office's surroundings. These activities do pertain "to the enforcement of 18 U.S.C. § 1956 (laundering of monetary instruments)" (Br. 45), just as they pertain to any other specific, substantive law within the FBI's law enforcement authority. But it would be purposeless to require the FBI to single out one specific statutory provision where the records at issue concern the entire array of the agency's law enforcement authority. Contrary to plaintiffs' suggestion, that broad applicability does not render the records at issue here "untethered to the government's efforts to enforce the law" (Br. 44), but renders them directly connected to the FBI's broad law enforcement authority.

2. In their opposition brief, plaintiffs rely on *Rosenfeld* to argue that some of the documents at issue should not be protected from disclosure because, plaintiffs allege, they pertain to "general monitoring of specific individuals, groups, and

communities." Br. 27. But plaintiffs are wrong to suggest that there is any such categorical exception to FOIA Exemption 7. In any event, such a rationale is inadequate to justify the district court's vastly overbroad decision, which rejected the application of Exemption 7 to every single document without further analysis.

Plaintiffs cannot escape the statutory standard of Exemption 7 merely by asserting that documents pertain to "general monitoring" activities. A law enforcement agency may properly take steps prior to launching a particular investigation that serve the overarching goal of detecting and preventing crime or identifying national security threats.

This Court's discussion in *Rosenfeld* concerning general monitoring arose as part of an effort to determine whether the particular investigation at issue in that case was legitimate – in the words of Exemption 7, that the particular investigation served actual "law enforcement purposes" rather than some improper, pretextual purpose. Thus, this Court premised its analysis in *Rosenfeld* by explaining that it "need not accept the government's claim that a previous investigation had a law enforcement purpose if the asserted purpose is 'pretextual or wholly unbelievable.'" 57 F.3d at 808; s*ee also Wiener*, 943 F.2d at 986 (more information about "the kinds of criminal activity of which John Lennon was allegedly suspected" required to determine if "the claimed law enforcement purpose was in fact a pretext").

In assessing the legitimacy of the particular investigation at issue in *Rosenfeld* (personnel investigations of Clark Kerr, Chancellor of the University of California), this Court evaluated documents that seemed to be part of an FBI "effort . . . to have Kerr fired from the presidency of UC Berkeley." *Rosenfeld*, 57 F.3d at 809. The materials included documents assessing whether Board of Regent members would "support or oppose an attempt to have Kerr removed" and a "notation on the margin of one report [by J. Edgar Hoover] that he knew 'Kerr is no good.'" *Id*. This evidence helped show there was "no rational nexus to a plausible law enforcement purpose – that any asserted purpose for compiling these documents was pretextual," *id*., and that the FBI was "investigating Kerr to have him removed . . . because FBI officials disagreed with his politics." *Id*. It was in that context that this Court explained these "documents constitute '*precisely the sort of* generalized monitoring and information-gathering that are not related to the Bureau's law enforcement duties.'" *Id*. (emphasis added) (quoting *Lamont v. Department of Justice*, 475 F. Supp. 761, 775 (S.D.N.Y. 1979).[2] By disregarding this context and omitting critical language, plaintiffs misread the significance of the phrase in *Rosenfeld*. *See* Br. 32 (omitting from the quote above "documents constitute 'precisely the sort of'").

[2] *Lamont* and its progeny rested heavily on the prior version of Exemption 7, which required files to derive from a specific investigation, and are therefore of limited utility in assessing the application of the 1986 version of Exemption 7 to this case. *See Lamont*, 475 F. Supp. at 774 & n.50.

Lamont, in turn, cited the Attorney General's 1974 FOIA Memorandum in support of its general monitoring language. *See* 475 F. Supp. at 7785 n. 58 (citing Attorney General's Memorandum on the 1974 Amendments to the FOIA (AG Memo)).[3] But that discussion addressed regulatory monitoring, not pre-investigation activities undertaken by a law enforcement agency like the FBI to assist in a broad range of criminal investigations. Thus, even where there is not a specific investigation, the FBI materials at issue here satisfy Exemption 7 because they are "volation-oriented, *i.e.*, . . . focused on preventing, discovering or applying sanctions against noncompliance with federal statutes or regulations." AG Memo. They are not "general information-gathering activities (*e.g.*, reporting forms submitted by a regulated industry or by recipients of Federal grants) developed in order to monitor, generally or in particular cases, the effectiveness of existing programs and to determine whether changes may be appropriate." *Id*.; *see id*. ("[r]ecords generated for such purposes as determining the need for new regulations or preparing statistical reports are not 'for law enforcement purposes'"). Because the factual showing here established that these activities are tied to the FBI's law enforcement role, this reasoning from *Lamont* – and in turn, *Rosenfeld* – is inapt.

[3] The AG Memo is available at: https://www.justice.gov/oip/attorney-generals-memorandum-1974-amendments-foia.

The concerns this Court expressed in *Rosenfeld* have no analogue here. The inquiry into the legitimacy of a particular investigation is an inapt effort where the documents at issue do not concern a single investigation. This is not a case where the FBI is pursuing an investigative lead for political reasons, or is trying to harm the careers of individuals. This case does not involve regulatory monitoring. Instead, the records here involve the necessary steps that a law enforcement agency must take before it can launch a specific criminal investigation – namely, training, guidance, domain management, assessments, community relations, and developing confidential sources. As the FBI explained, these types of "intelligence analysis and planning . . . *facilitate and support investigative activities*." GER 137. But because such materials are created "to develop situational awareness . . . such materials are not normally developed for the purpose of a single investigation." GER 139. Congress agrees with that need, only underscoring the law enforcement purpose of these types of activities. *See* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 2001(a), 118 Stat. 3638, 3700 (FBI must "fully institutionalize the shift . . . to a preventative counterterrorism posture"); GER 136.

3. Plaintiffs argue that because there is a cultural or religious component to some of the training and related materials in the record, this renders the law enforcement rationale for the training illegitimate. This argument is a non sequitur that finds no support in the statutory language or this Court's precedents. The FBI

has adopted strict guidelines and rules on the use of race, ethnicity, and religion in domain management and assessments. *See, e.g.*, FBI, *Domestic Investigations and Operations Guide* § 4.3.1 (Oct. 15, 2011) (2011 DIOG)[4] (addressing when data may be collected based on "race, ethnicity, national origin, or religious affiliation" and barring "[a]ny such activities that are based solely on such considerations"); *see also* U.S. Dep't of Justice, *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity* (Dec. 2014) (Use of Race Policy).[5] These policies are public and fully available to plaintiffs in pursing their goal of evaluating the propriety of the FBI's use of race, ethnicity, religion, or national origin in its activities. *See, e.g.*, 2011 DIOG 4.2.2 ("if investigative experience and reliable intelligence reveal that members of a terrorist or criminal organization are known to commonly possess or exhibit a combination of religion-based characteristic or practices . . . it is rational and lawful to consider such a combination in gathering intelligence about the group"). But whether or not plaintiffs agree with those policies is irrelevant to

[4] The 2011 DOIG is available at:

https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29/fbi-domestic-investigations-and-operations-guide-diog-2011-version.

[5] The Use of Race Policy is available at:

www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf.

determining whether the records at issue here were "compiled for law enforcement purposes," within the meaning of FOIA Exemption 7.

Instead, the policies themselves demonstrate the law enforcement purposes that underlie the records here. Plaintiffs cite the Justice Department's Use of Race Policy to suggest that the functions addressed by the documents at issue here are not legitimate or law enforcement related. *See* Br. 47 n.10. That policy expressly demonstrates how it serves law enforcement purposes, however. As the latest version of the policy explains:

> Good law enforcement work also requires that officers take steps to know their surroundings even before there is a specific threat to national security. Getting to know a community and its features can be critical to building partnerships and facilitating dialogues, which can be good for communities and law enforcement alike.

Use of Race Policy 10. This type of legitimate pre-enforcement activity is "[g]ood law enforcement work" (*id.*), and is directly related to the FBI's law enforcement functions under Exemption 7.

4. Plaintiffs point out that the FBI has a national security role in addition to its traditional law enforcement functions. Br. 51, 57. But neither plaintiffs' brief nor the record in this case suggests that the records at issue here were compiled for any purpose other than the FBI's law enforcement mission. Plaintiffs do not contend that the FBI's national security role is entirely distinct from its law enforcement duties, or that a "law enforcement purpose[]" can be excluded from the statutory

language on the ground that it implicates national security concerns. The district court similarly did not rely on national security concerns as a basis for departing from the language of FOIA Exemption 7. Any such argument has therefore been waived. In any event, jurists who have faced the issue have concluded that similar work that has the goal of preventing crime or ensuring security qualifies as a law enforcement purpose under Exemption 7. *See Abdelfattah v. DHS*, 488 F.3d 178, 185 (3rd Cir. 2007) (accepting legitimacy of "investigation into a potential . . . security risk"); *Milner v. Dep't of the Navy*, 562 U.S. 562, 582 (2011) (Alito, J., concurring) (Exemption 7 should cover "proactive steps" to "prevent crime"); *Milner v. Dep't of the Navy*, 575 F.3d at 959, 979 (9th Cir. 2009) (W. Fletcher, J., dissenting) (reasoning that when considering preventive actions, the critical factor is whether the agency has the "ability to conduct investigations . . . to enforce laws or regulations"); *see also Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1082, 1087 (9th Cir. 1997) (in Exemption 2 case, reasoning that law enforcement function includes "how to catch lawbreakers"); *Rosenfeld*, 57 F.3d at 810 (observing that neither party contested that investigating "whether . . . FSM . . . would be likely to lead to civil disorder" was "a valid law enforcement purpose"); *Pratt v. Webster*, 673 F.2d 408, 420 (D.C. Cir. 1982) (threshold may be satisfied if activities "relate[] to the enforcement of federal laws or to the maintenance of national security"); *Lamont*, 475 F. Supp. at 776 (recognizing that general security surveillance that is

"less precise than that directed against more conventional types of crime" may be "based on a law-enforcement objective"); *id*. (quoting unpublished decision, *Linebarger v. FBI*, No. 76 Civ. 1826 (N.D. Cal. Aug. 1, 1977), for the proposition that documents must "reflect a sufficient nexus between the conduct of the investigation and legitimate concern for national and internal security as to warrant their classification as being for law enforcement purposes").

B. Each Type of Document at Issue Here Was Compiled in Service of a Legitimate Law Enforcement Purpose.

As the government explained in its opening brief (at 31-43), the government's factual showing explained how each type of document related to a legitimate FBI law enforcement purpose. The government's extensive factual record, including both the declarations that directly address the Exemption 7 threshold (GER 94-156) and the nearly 600-page Vaughn index that describes the documents in detail, demonstrates that there is 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, or, stated another way, that there is a "rational nexus between enforcement of a federal law and the document." *Rosenfeld*, 57 F.3d at 808.

1. Training. Officers must be trained – to comply with the Constitution and other enforcement guidelines, such as the Domestic Investigations and Operations Guide and the Use of Race Policy. *See*, *e.g.*, *United States v. Moses*, 796 F.2d 281, 284 (9th Cir. 1986). Plaintiffs cannot plausibly dispute the self-evident proposition

that general training materials can serve a legitimate law enforcement purpose. That proposition also highlights the district court's improper focus on particular investigations, which was, as we explained in the opening brief, inconsistent with the 1986 FOIA amendments. Training documents, like the other materials at issue here, are by their nature not related to a specific investigation or limited to the techniques for enforcing a specific identified substantive criminal statute.

Plaintiffs claim that training materials should not qualify for Exemption 7 protection if they involve what plaintiffs describe as "race-based training documents" (Br. 19). Plaintiffs also argue that the FBI "did not explain what law enforcement was being taught here" (Br. 60). Much of plaintiffs' argument is based on documents that were released. *See* GER 134; Br. 19 (describing documents that were released); SER 102-211 (document on Arab culture released in full). But the withholding of limited portions of the records was based on Exemption 7 and the extensive explanation of the link between those materials and the FBI's law enforcement purposes. As the FBI explained here, some "training materials . . . concern interview techniques which are specifically designed for teaching agents how to better understand and analyze the behaviors and body language of sources from different cultures." GER 134 n. 4. Interview techniques are an essential component of the FBI's law enforcement mission. *Cf. Haynes v. Washington*, 373 U.S. 503, 515 (1963) (questioning suspects and witnesses "is undoubtedly an

essential tool in effective law enforcement"). And if the detailed information on interview techniques were released, "criminals and terrorists would then be able to counter FBI efforts to infiltrate terrorist cells to gather necessary intelligence from within these groups undetected." GER 134 n.4; *see* SER 94 (interview training scenarios are "not known to the public" and "release of such information presents an increased risk of circumvention").

The connection between the training materials and the harm to these law enforcement purposes qualifies the documents for protection under Exemption 7, and the fact some training addresses cultural factors to facilitate cooperation does not render the training illegitimate. As we have explained, the FBI follows strict policies on the use of race and national origin in law enforcement, and plaintiffs have provided no argument to explain why documents addressing these policies are unrelated to law enforcement. *See* DIOG § 4; Use of Race Policy. Moreover, the district court did not adopt any such distinction regarding training on cultural factors in its broad disclosure order, and the district court's order cannot be upheld on this basis.[6]

[6] As an example, plaintiffs cite documents numbered 220-241 (addressed at SER 88-90) as relating to "general monitoring of . . . Muslim Americans" (Br. 57). But plaintiffs never contended in district court that these documents failed to serve a law enforcement purpose, underscoring the overbreadth of the district court decision. *See* SER 215 (not citing documents 220-241 among those in which it challenged the Exemption 7 threshold). In any event, the FBI explained that these

2. Community relations. As we explained in our opening brief, community outreach is an essential law enforcement function because, among other things, community relations can "result in tips and leads in active FBI investigations" (GER 135) and "dispel misunderstandings" in communities (*id*.). Plaintiffs' only argument on this point is to assert that this does not serve a law enforcement purpose unless there is a specific federal law cited that is being enforced. Br. 58. As we have explained, this argument is flawed.

Agents must build relationships in the communities in which they are enforcing the law, and this community policing approach has been repeatedly recognized as a legitimate and important law enforcement function by Congress, the courts, and the executive branch. *See* Public Safety Partnership and Community Policing Act of 1994, Pub. L. No. 103-322, § 10002, 108 Stat. 1796, 1807 (purpose of law to, among other things, "substantially increase the number of law enforcement officers interacting directly with members of the community" and "develop[] . . . innovative programs to permit members of the community to assist . . . law

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"documents consist of presentations providing FBI personnel instructions on how best to interview individuals when pursuing counterintelligence investigations" (SER 87). In other words, they relate to interview techniques, where there is a clear nexus to the FBI's critical law enforcement duties, as the FBI explained. *See* GER 134 n.4 ("interview techniques" are "extremely useful in the FBI's counterterrorism and counterintelligence divisions" and release of that information could enable "criminals and terrorists . . . to counter FBI efforts to infiltrate terrorist cells to gather necessary intelligence").

enforcement agencies"); *Illinois v. Lidster*, 540 U.S. 419, 425 (2004) ("law ordinarily permits police to seek the voluntary cooperation of members of the public in the investigation of a crime" and this is "in part, . . . because voluntary requests play a vital role in police investigatory work"); *Fields v. City of Tulsa*, 753 F.3d 1000, 1010 (10th Cir. 2014) (recognizing legitimacy of "community policing [which Tulsa Police Department had engaged in] for more than two decades, participating in about 3,500 community events between 2004 and 2011," and rejecting Establishment Clause challenge by officer who was required to take part in community policing work at a local mosque); U.S. Dep't of Justice, Bureau of Justice Assistance, *Understanding Community Policing Monograph* (Aug. 1994) https://www.ncjrs.gov/pdffiles/commp.pdf (recognizing community policing as a "collaboration between the police and the community that identifies and solves community problems" whereby "all members of the community become active allies in the effort to enhance the safety and quality of neighborhoods"). This is one reason that courts have accepted the reasonableness of law enforcement activity that is not tied to a specific criminal investigation but is based upon community policing. *Cf. Hopkins v. Bonvicino*, 573 F.3d 752, 763 (9th Cir. 2009) (recognizing reasonableness of "police officers' 'community caretaking function' [which] allows them 'to respond to emergency situations'"). The FBI's law enforcement purposes are not limited to investigations of particular suspected violators. Like other

agencies, the FBI's law enforcement mission also requires community involvement that allows agents to protect members of the community from danger, as well as to identify and follow up on leads concerning completed criminal activity.

Accordingly, it was error for the district court to recognize that these outreach efforts "establish[] . . . cooperation [that] is essential to law enforcement missions" (GER 24), but to hold that these records somehow lacked a law enforcement purpose.

3. Confidential informants. Plaintiffs argue that documents that teach FBI agents methods and techniques for recruiting confidential human sources are not related to law enforcement because the FBI is "actually . . . talking in a coercive setup to unsuspecting, innocent civilians." Br. 59. Plaintiffs provide no citation to the record for this assertion. As the FBI explained, confidential sources are critical to effective law enforcement investigation, and the district court agreed, stating that "[i]nformants help law enforcement learn of dangerous illegal activity." GER 24. It was a flawed legal theory that led the district court to find as a matter of fact the importance of confidential informants to a law enforcement agency like the FBI (*id*.), but then to hold that documents governing such a critical law enforcement tool are not "information compiled for law enforcement purposes," 5 U.S.C. § 552(b)(7).

Plaintiffs claim that they "did not seek the identities of any confidential informants," Br. 37 n.6, but their filings below refute that assertion. *See* SER 21-23 (motion for summary judgment claiming plaintiffs were entitled to information that

could identify sources with implied grants of confidentiality). The information at issue here could help identify confidential informants, and the FBI supported that concern with a detailed factual showing. As the FBI explained with respect to just one of the documents challenged by plaintiffs and highlighted in their appeal brief, redacted information describes "tools and methods [special agents] use to protect the identities of [confidential sources] when utilizing [confidential sources] in FBI investigations""; "[t]hese tools and methods have not been released to the general public"; and if "[a]rmed with this information, those with malicious intent would be able to unearth the covert relationships [special agents] maintain with [confidential sources] and expose the identities of [confidential sources] working with the FBI." GER 189; *see also* GER 190 (revealing "factors . . . [of] source acquisition" could "reveal to criminals which individuals are or may potentially become FBI informants"); GER 192 (revealing technique may "lead to the exposure of informants' identities"); GER 194; GER 198 (information could "provide criminals . . . with an idea of how they may uncover the identities of FBI [confidential sources]"). Many other documents would present the same concerns if released.[7]

[7] *See*, *e.g.*, SER 277 (source management technique, if revealed, could allow criminals to "gain insight regarding whom among them they should intimidate, coerce, or even eliminate to prevent detection by the FBI's [confidential source] program"); Dkt. No. 114-3 (Vaughn index) at 219 (withholding information "provided by a confidential source" that is "singular in nature, and if released, could reveal their identity"), 302 (information "protected to withhold identifying

Plaintiffs' cavalier attitude toward the identity of confidential sources in the many documents at issue is risky. The district court's order correctly recognized the importance to law enforcement of protecting these sources (GER 24), but nonetheless incorrectly required that information to be disclosed.

4. Domain management and assessments. As the FBI explained, domain management and assessment documents pertain to the FBI's authority to "identify and understand trends, causes, and potential indicia of criminal activity and other threats . . . that would not be apparent from the investigation of discrete matters alone." GER 138. These activities are critical to the FBI's protection of national security. *See* GER 136 (domain management and assessment activities authorized by Pub. L. No. 108-458, §§ 2001-03; Executive Order 12333 § 1.7(g); and DOIG Chapters 5 and 15). They also play a critical role in combatting criminal gangs. *See* GER 136 (citing No. Pub. L. 109-162, § 1107, 119 Stat. 2960, 3903 (2006)).

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information of . . . a confidential source"). The FBI also identified other serious concerns with revealing information about confidential sources, such as providing details on handling court testimony that, if revealed, could allow criminals to "sabotage the FBI's use of these strategies and coerce, threaten, and/or intimidate" sources. GER 191; *see*, *e.g.*, GER 194 ("if criminals knew how SAs help maintain CHSs' confidence during intimidating circumstances, criminals may be able reverse this technique, strike fear into those informing for the FBI, and reduce or eliminate the flow of reliable information from certain CHSs to the FBI").

The FBI's Domestic Investigations and Operations Guide provides guidelines for assessments and for the types of activities that are appropriate prior to opening an assessment or beginning an investigation. *See* GER 136-138 (citing DIOG § 5, governing the types of assessment activities that may be conducted). These activities, as the FBI explained, are authorized "to facilitate and support investigative activities." GER 137 (quoting DIOG § 15.2.1). Because these pre-investigation 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. These types of proactive efforts to prevent crime have also been recognized as warranting protection under Exemption 7. *See Milner*, 562 U.S. at 582 (Alito, J., concurring) (law enforcement purpose under Exemption 7 includes "proactive steps . . . to prevent criminal activity and to maintain security"); *Maricopa Audubon Soc'y*, 108 F.3d at 1087 (applying prior interpretation of Exemption 2 and asking whether the information "tell[s] the [agency] how to catch lawbreakers" or "tell[s] lawbreakers how to avoid the [agency's] enforcement efforts").

Plaintiffs cite one domain management document – at SER 220 (which they refer to as Exhibit 7-1) – as an example of where the FBI "failed to show any rational nexus between the enforcement of a federal law" and the document (Br. 55). This document, the FBI explained, is a "Powerpoint presentation[] on threats within the

San Francisco domain." SER 229. It describes certain "criminal enterprises" (SER 220) and the enterprise's "criminal activity" (SER 221) including specific case examples of "document fraud and misrepresentation," "[m]oney laundering," "mortgage fraud and tax evasion," and "drug trafficking" (SER 224). Plaintiffs never claimed in district court that this document failed to meet the Exemption 7 threshold (*see* SER 215 (declining to challenge Exemption 7 threshold for document 184)), and from the face of the document it is hard to see how plaintiffs can now claim that this document is not closely tied to the FBI's law enforcement duties.

Similarly, plaintiffs state in their brief that "'[d]omain management . . . is racial mapping that involves local FBI offices tracking groups . . . based on race and ethnicity." Br. 55. This was not the basis for the district court's ruling, GER 24, so it cannot be affirmed based on allegations that some small subset of the approximately 50,000 documents at issue involves (allegedly) improper profiling. But those specific concerns are also unwarranted when considering this case. As we have explained, there are strict guidelines and rules on the use of race, ethnicity, and religion in domain management and assessments, and those policies directly address this type of concern by plaintiffs. *See* Use of Race Policy 10 (it is "permissible" for FBI office to "map out the features of the city within its area of responsibility in order to gain a better understanding of potential liaison contacts and outreach opportunities" and include in that mapping "population demographics, including

concentrations of ethnic groups"); 2011 DIOG § 4.3.3.2.1 (FBI may "identify locations of concentrated ethnic communities in the field office's domain, if these locations will reasonably aid the analysis of potential threats and vulnerabilities, and, overall, assist domain awareness for the purposes of performing intelligence analysis"); 2011 DIOG § 4.3.3 (addressing how "reality of common ethnicity or race among many criminal and terrorist groups" is addressed in light of "the prohibition against racial or ethnic profiling"); 2011 DIOG § 4.2.2 ("if investigative experience and reliable intelligence reveal that members of a terrorist or criminal organization are known to commonly possess or exhibit a combination of religion-based characteristics or practices . . . it is rational and lawful to consider such a combination in gathering intelligence about the group"). And plaintiffs do not argue that references to race, religion, or culture justify an exception to the clear statutory language of FOIA Exemption 7.

Plaintiffs also point to a handful of documents that they say pertain to "specific facts, individuals, or groups" (Br. 53) and cite two examples, SER 220-227 (Doc. 184, Ex. 7-1 to plaintiffs' motion for summary judgment) and SER 301-303 (Doc. 166, Ex. 7-5 to plaintiffs' motion for summary judgment). They also claim that these two documents are examples of the types of domain management and assessment documents that do not satisfy the threshold showing. *See* Br. 55-56. Plaintiffs argue that the government made no effort to show that these documents

were tied to specific violations of the law, but as discussed above, that is not the standard for meeting the Exemption 7 threshold. In fact, the government made an extensive factual showing that it met the threshold, which the district court made no effort to analyze. There may be a good reason for this – plaintiffs themselves *did not* assert in their motion for summary judgment that these documents failed to satisfy the Exemption 7 threshold, *see* SER 214 (claiming only that document 166 did not satisfy the Exemption 7(E) subpart); SER 215 (same with respect to document 184), and the government therefore had no occasion to focus on that issue with respect to these two documents. Indeed, given the breadth of plaintiffs' FOIA request, the fact that some documents that related to specific investigations were swept into the searches is unsurprising. *See* GER 52-53 (FOIA request).

In any event, the FBI showed that this information is related to the FBI's law enforcement functions, by explaining that redacted information would identify "FBI squads and units" that are not known to the public (SER 229-30); the number of agents assigned to those squads (SER 233); "criminal groups" that "operat[e] within a particular geographic region" (SER 230); an assessment of "threats to . . . certain geographic regions" (SER 232); and techniques to address those threats (*id.*), including a "sensitive investigative technique" that is "used in Criminal Enterprise investigations" (SER 234). *See also* SER 305 (redacting squad identities); SER 306 (intelligence gathering tools that are not known to the public); SER 307-08

(redacting information on "targets of the FBI's investigation into criminal intrusion matters" and priority of those investigations); SER 309 (geographic vulnerabilities). There is a more than rational law enforcement nexus with respect to these documents.

II. THE SCOPE OF THE DISTRICT COURT ORDER IS FAR BROADER THAN SUGGESTED BY PLAINTIFFS.

Plaintiffs claim that the "scope of this appeal is narrow" because they made only a "surgical" challenge to information "described in Exhibits 7 and 8" of their summary judgment motion. Br. 22, 24. But that argument is inaccurate both because of the scope of the district court's order and the nature of the sampling method adopted by the parties. And notwithstanding the scope of the ruling plaintiffs' originally sought, the district court entered a much broader ruling here that threatens disclosure of enormous quantities of information properly protected by Exemption 7.

The documents listed in the exhibits that formed the basis for plaintiffs' arguments in district court (Exhibits 7 and 8, as well as Exhibit 9)[8], comprise around

[8] Plaintiffs challenged redactions identified on Exhibit 9 in their summary judgment motion as including information that was "reasonably segregable," *see* SER 29, which the district court denied as "moot" because it "has now ordered the production of the applicable information withheld under Exemption 7," GER-28, which would necessarily encompass production of the information identified on Exhibit 9 in order to render that motion "moot."

2639 pages of the 3665 pages in the sample. Of the remaining 1024 pages that plaintiffs now say they are not disputing, approximately 777 pages involved documents with Exemption 7 claims.[9] Thus, plaintiffs' challenge expressly included 77% of the material (around 2639 of the 3416 pages) that implicate Exemption 7. Such a large percentage cannot be described as narrow or surgical.

Apart from plaintiffs' stated intention, the court's reasoning offers no basis to differentiate the documents plaintiffs now say they seek from the remainder of those before the court.[10] More problematic, the district court's order, because it "altogether precluded" the FBI from relying on Exemption 7, GER 20, if left to stand, would seem to require the production of *all* of the sensitive Exemption 7 materials within the 50,000 withheld pages beyond the litigation sample, as plaintiffs appear to acknowledge (Br. 24 n.5). *See* GER 28 (FBI must produce all "similarly

[9] Given the breadth of the district court's disclosure order, it was not clear whether plaintiffs would disavow application of the order to the extent its logic went beyond the relief they originally sought. Plaintiffs now state (Br. 26) that they are not seeking those documents not listed in their summary judgment filing, including three documents the government cited in its brief. *See* Opening Br. 35 (citing GER 207, 212, and 215 (describing documents 15, 31, and 32) as examples of guideline documents). As explained below, the effect of plaintiffs' position remains unclear, because the district court's rationale does not differentiate among any of the documents in which the government asserted Exemption 7 claims, including the approximately 777 documents not sought by plaintiffs in their motion.

[10] The breadth of the district court's legal reasoning suggests that it would apply to the remaining 777 pages, irrespective of plaintiffs' original intentions. *See* SER 64 (district court agreeing with plaintiffs that the ruling on the sampling "gets applied to the entire pool").

situated information . . . withheld under Exemption[] . . . 7"). Thus, plaintiffs' challenge potentially affects almost all of the information at issue where Exemption 7 would apply (50,000 pages less approximately 777 pages of Exemption 7 material where plaintiffs state they do not seek disclosure).

Plaintiffs' acknowledgment of the narrower scope of their claim in district court ought to give this Court serious pause in considering whether to affirm the district court's overbroad legal ruling. Plaintiffs claimed on summary judgment that a small subset of the sampled documents, consisting of around 313 pages (of a total of over 3600 pages – around 8.7%), failed to meet the Exemption 7 threshold of being compiled for law enforcement purposes. *See* SER 213-218 (identifying in the first column of challenges those to which "Exemption 7" does not apply at all, namely documents 1, 9, 11, 13, 14, 37, 43, 137-159, 285, 286, 331, 333, 334 and 386); *cf.* SER 15 ("[f]or the documents listed in Exhibit 7, the FBI fails to establish either a 'law enforcement purpose' or a 'rational nexus'").[11] Thus, the district court ordered the production of all material where the government asserted Exemption 7

[11] Plaintiffs' remaining Exemption 7 challenges addressed not whether the documents met the threshold, but whether they satisfied one of the Exemption 7 subcategories. *See* SER 213-218 (columns for "Exemption 7(A)," "Exemption 7(D)," and "Exemption 7(E)" challenges, some of which overlap with the Exemption 7 challenges to the threshold test); SER 337-342; *see also* SER 20 ("the FBI has failed to show how particular claimed subsection of Exemption 7—Exemptions 7(A), 7(D), and 7(E)—apply to withheld documents identified in Exhibit 7"). As we explain below, those Exemption 7 subcategory issues should be considered on remand, not by this Court in the first instance. *See*, *infra* Pt. III.

(around 2600 pages in the sample) and all of the unsampled 50,000 pages where Exemption 7 was cited, in the face of plaintiffs' argument on summary judgment that only around 313 pages from the sample failed to satisfy the Exemption 7 threshold. Thus, none of the nearly 50,000 pages of core law enforcement materials can be protected under Exemption 7 under the court's order in a case where plaintiffs claimed that just 313 sampled pages (around 8.7% of the sample) did not meet the threshold. *See* GER 28 ("similarly situated information that was withheld under . . . Exemption[] . . . 7 but not listed in the sampled *Vaughn* index" must be produced). It was error for the district court to rule so expansively, given the narrow scope of the dispute between the parties.

III. IF THIS COURT REJECTS THE DISTRICT COURT'S OVERBROAD EXEMPTION 7 ANALYSIS, IT SHOULD REMAND.

Plaintiffs argue that as an alternate ground for affirmance, this Court should hold that the various Exemption 7 subparts do not apply to the over 3000 pages of documents at issue here. The district court did not reach those arguments, and this Court should not do so in the first instance. The district court is most capable of reviewing the voluminous record, resolving any remaining questions with the assistance of the parties, and addressing the extensive record-dependent issues. *See Electronic Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, 639 F.3d 876, 884 (9th Cir. 2010) ("because the district court did not address Exemption 3 . . . we remand for the district court to address these claims in the first instance"). Contrary

to plaintiffs' suggestion of "only conclusory assertions" (Br. 61), that record includes, as we have explained, a nearly 600-page Vaughn index describing in detail all of the redactions to the documents, nearly all of which are based on Exemption 7, and how the various Exemption 7 subparts apply to each of the redactions on a redaction-by-redaction basis. *See, e.g.*, GER 157-276. If this Court would like to address the exemptions in the first instance, we respectfully request the opportunity for further briefing regarding those exemptions and the opportunity to submit the full Vaughn index as excerpts of record.

CONCLUSION

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

Respectfully submitted,

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SEPTEMBER 2016

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 6535 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 September 9, 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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