No. 18-15416

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENNIS JOSEPH RAIMONDO, AKA JUSTIN RAIMONDO AND
ERIC ANTHONY GARRIS,

Plaintiff-Appellants,

v.

FEDERAL BUREAU OF INVESTIGATION

Defendant-Appellee,

On Appeal from the United States District Court
for the Northern District of California
No. 3:13-CV-02295-JSC
The Honorable Jacqueline Scott Corley

APPELLANTS' REPLY BRIEF

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INTRODUCTION

At the heart of this case lies the following question: may journalists publish newsworthy, publicly-available government information without fear that their First Amendment-protected activities will trigger government investigation and expansive, indefinite collection of their publications? In passing the Privacy Act, Congress answered yes. Section (e)(7) of the Privacy Act establishes a presumption that government collection of how an individual exercises their First Amendment rights is unlawful, and permits collection only in narrow circumstances where the collection is within the *scope* of *authorized* law enforcement activity. *See* 5 U.S.C. § 552a(e)(7). As a threshold matter, the plain language of the statute places the burden on the government to show that its presumptively unlawful collection of First Amendment-related activity falls within the exception. And to meet its burden, the government must do two things. First, it must provide specific and articulable facts to demonstrate that it was actually engaged in authorized law enforcement activity, not conclusory, speculative, or self-serving *post hoc* justifications that it might have been engaged in such activity. Second, it must demonstrate that the collection of how an individual exercises First Amendment rights falls within the scope of that activity. Moreover, even if the government meets its threshold burden, further inquiry is necessary: This Court requires an individualized balancing test where the factors for and against the

maintenance of First Amendment activity are considered. *See MacPherson v. IRS*, 803 F.2d 479, 484 (9th Cir. 1986). Here, the FBI has failed to meet its initial burden, and the balance weighs in Plaintiffs' favor.

Two FBI memorandums are the subject of this appeal. On April 30, 2004 (the "April 30 Memo"), an FBI agent undisputedly collected an extensive array of information about Plaintiffs' First Amendment activity—describing news articles Plaintiffs wrote and summarizing their "idea[s]," "editorial comments," and "opinions" on topics as wide-ranging as the U.S. involvement in World War II, Israel, the Anti-War movement, and libertarianism. ER269-70. To justify the collection of these articles, the FBI relied entirely on the unsupported assertions of an FBI agent who was not personally involved in the matter and was contradicted by the memo itself: The FBI agent claimed that Plaintiffs' posting of two lists of individuals of interest to the FBI raised national security concerns, but the April 30 Memo itself negates those concerns, noting that the lists were already publicly-available and their distribution "may not be significant." ER270. The FBI agent nevertheless surmised—at odds with the document itself—that the sensitivity of the lists *might have* served as the basis of authorized law enforcement activity, and that the expansive collection of journalism on topics far afield from the subject matter of the lists *could have been* needed for "context." ER522. The declaration's rank speculation does not suffice to meet the FBI's threshold burden

of demonstrating an authorized law enforcement activity. The second memorandum dated April 5, 2006 (the "Halliburton Memo") documents FBI surveillance of core First Amendment activity—"protest[s]" of a shareholder's meeting of the Halliburton company and the websites posting information about the meeting—for which the FBI provided even less justification. The protests themselves were not criminal, and there is simply no competent evidence in the record that criminal activity was expected at those First Amendment-protected protests. ER304.

The FBI failed to establish both elements of its burden: not only did the FBI fail to show that its collection was *authorized* under applicable guidelines, it did not justify recording First Amendment activities far outside the *scope* of the purported basis for its investigation. Moreover, even if the FBI met its threshold burden, the *MacPherson* balancing test properly applied shows that the law enforcement activity exception is not warranted: Plaintiffs' significant interests in engaging in journalism outweigh any purported FBI interest in investigating the posting of publicly-available government information and non-criminal protest activity. Finally, the FBI does not seriously dispute that the district court committed legal error on discovery and evidentiary rulings. The district court held Plaintiffs to an impermissibly high standard for discovery and mistakenly applied case law from other, distinguishable contexts to this case.

ARGUMENT

I. The FBI Cannot Meet its Burden To Demonstrate Authorized Law Enforcement Activity Justifying the Expansive Collection of First Amendment Activities in the April 30 Memo and the Halliburton Memo.

The FBI cannot justify the collection of either the April 30 Memo or the Halliburton Memo. The FBI bore the burden of proof to demonstrate that its collection of First-Amendment activity fell within the law enforcement activity exception. The FBI failed to do so, proffering declarations not based on personal knowledge and riven with inadmissible hearsay. Even if the declarations were proper, the FBI's collection of a wide range of Plaintiffs' journalism in the April 30 Memo and its reference to protest activity in the Halliburton Memo—presumptively prohibited by Section (e)(7)—does not fall within the narrow law enforcement activity exception. In holding otherwise, the district court failed to hold the FBI to its burden of proof, failed to apply the balancing test required by *MacPherson*, and failed to give effect to all of Section (e)(7)'s text.

A. Section (e)(7) and *MacPherson* Require an Individualized Balancing Test.

Section (e)(7) of the Privacy Act establishes a presumption that government collection of how an individual exercises their First Amendment rights is unlawful, overcome only where the government demonstrates that an exception applies. To establish the law enforcement activity exception, the government must meet an initial two-part burden of demonstrating that the collection fell within the scope of

an authorized law enforcement activity. If the government satisfies this burden, the court must then engage in an individualized balancing test to determine if the collection was justified.

Section (e)(7) of the Privacy Act provides:

> Each agency that maintains a system of records shall . . . (7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment . . . unless pertinent to and within the scope of an authorized law enforcement activity."

5 U.S.C. § 552a(e)(7). The statutory text thus places the burden on the government to establish that the collection and maintenance of First Amendment activity falls "within the scope of an authorized law enforcement activity." *See Becker v. IRS*, 34 F.3d 398, 409 (7th Cir. 1994) (holding that IRS failed to carry "its burden" in establishing that records fell within Section (e)(7) exception); *Patterson v. FBI*, 893 F.2d 595, 603 (3d Cir. 1990) (federal agency defending maintenance of records under Section (e)(7) "must demonstrate" that records fall within law enforcement activity exception). *MacPherson* also affirms that the government be held to its burden of proof on the threshold inquiry. "Blanket allowance of such 'incidental' surveillance and recording under the guise of general investigation could permit the exception to swallow the rule." *MacPherson*, 803 F.2d at 484.[1]

[1] There, the IRS' "authorized law enforcement activity" consisted of attendance at conferences and conventions were tax protest—illegal activity—was advocated. The First Amendment activity recorded by the IRS—MacPherson's speeches—were a "significant part of the conferences and conventions . . . necessary to give

Next, assuming the government meets its initial burden to show authorized law enforcement activity and scope, this Court has interpreted Section (e)(7) to require a case-by-case balancing test to determine whether the law enforcement activity exception is warranted.

In *MacPherson*, Internal Revenue Service ("IRS") agents surveilled individuals and organizations engaged in what is euphemistically termed "tax protest," but refers to the refusal to pay taxes in violation of the law. *MacPherson*, 803 F.2d at 484. As part of this law enforcement activity, the IRS agents attended "tax protest" conferences at which MacPherson spoke. *Id.* at 480. While MacPherson did not engage in or advocate illegal conduct, the IRS purchased tapes of his speeches and maintained transcripts as part of their general "tax protest" file. *Id.* Under Section (e)(7), the IRS' collection of MacPherson's speeches—activity protected by the First Amendment—was presumptively unlawful. The district court in *MacPherson*, however, held that the law enforcement activity exception to Section (e)(7) applied because MacPherson's speeches were "relevant" to the authorized investigation. *Id.* at 482.

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the agency a complete and representative picture of the events." *Id.* at 484. The Court noted, however, that, though MacPherson's speeches and comments were permissibly included in a general IRS file on "tax protestors," recording of the activity of "other individuals . . . who did not give public speeches or [recorded] comments . . . might raise questions about the 'scope' of the law enforcement activity involved." *MacPherson*, 803 F.2d at 485 n.9.

This Court rejected the automatic application of the law enforcement activity exception, though it was undisputed that the IRS was engaged in an authorized law enforcement activity. *See id.* at 484 (plaintiff conceding IRS' right to attend tax protest seminars and collect information "regarding past illegalities, advocacy of violence and IRC violations, and the like."). Instead, this Court adopted a case-by-case balancing test that requires an assessment of the factors for and against finding the Section (e)(7) exception even when an agency establishes an authorized law enforcement activity.

First, this Court examined, but ultimately rejected, a rule interpreting "authorized law enforcement activity" in Section (e)(7) in the same manner as the "law enforcement purposes" exemption to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(7). *Id.* at 482-83. A "broad reading" of the FOIA exemption—in which the government claims the exemption merely by establishing a "rational nexus" between its law enforcement duties and the relevant document—better serves the goal of privacy because it conceals more information from public view. *Id.* at 482. In contrast, this Court noted a "narrow reading" of "law enforcement activities" in Section (e)(7) furthers privacy because it restricts the collection of information about individuals' First Amendment activities and avoids infringing on the "overall First Amendment concerns of Section (e)(7)." *Id.*

Second, this Court rejected the categorical "rules" of other circuits in which the law enforcement activity exception applies as soon as the government demonstrates an authorized law enforcement activity. *Id.* at 483. In the Sixth Circuit, for example, section (e)(7) "allows investigation with respect to the exercise of First Amendment rights if such investigation is *relevant* to an authorized criminal investigation or to an authorized intelligence or administrative one." *Id.* (quoting *Jabara v. Webster*, 691 F.2d 272, 279-80 (6th Cir. 1982)). *MacPherson* declined to "fashion a hard and fast standard," and rejected the lower court's use of "relevancy" standard. *Id.* at 484.

Third, consistent with a "narrow" reading of the law enforcement activity exception, the Court adopted a balancing test to determine whether the exception should apply:

> The strong policy concerns on both sides of the issue present close and difficult questions and may balance differently in different cases. We therefore elect to consider the *factors for and against* the maintenance of such records of First Amendment activities *on an individual, case-by-case basis*.

Id. at 484 (emphasis added). Applying the balancing test, the Court noted not only that the IRS was authorized to attend the tax protest conferences, but also MacPherson's interests in avoiding "incidental surveillance and recording of innocent people exercising their First Amendment rights." *Id.* While the Court found that the IRS's maintenance of MacPherson's writings and speeches fell

within the law enforcement activity exception, its approach confirms that the exception does not apply as soon as the government asserts an authorized law enforcement activity. *Id.*

MacPherson thus teaches two things. First, consistent with the statute's plain language, the government must establish an authorized law enforcement activity, and that collection of the information about First Amendment-protected activities occurred within the scope of that activity. Second, even if the government makes this threshold showing, the court must still engage in a case-by-case balancing of factors for and against maintenance of the information.

B. The FBI Did Not Meet its Initial Burden Under Section (e)(7) for the April 30 Memo.

The FBI did not meet its threshold burden to demonstrate that the April 30 Memo fell within the law enforcement activity exception.

1. The Campi Declaration Offered Assertions About Authorized Law Enforcement Activity Contradicted by the April 30 Memo.

The FBI presented only the declaration of Andrew Campi to meet its burden of demonstrating that the April 30 Memo fell within the law enforcement activity exception. ER518.

As an initial matter, the FBI does not dispute that the rule in FOIA litigation, where declarations may be submitted by individuals whose personal knowledge would not ordinarily suffice, is inappropriate for Plaintiffs' Privacy Act claims.

Opp. 30 n.7. The FBI concedes that the district court improperly applied the FOIA rule to reject Plaintiffs' objections to the Campi declaration. *Id.* This legal error alone is sufficient to reverse the district court's decision to admit and consider the Campi declaration.

Next, Campi did not possess personal knowledge sufficient to support the assertions made in his declaration. While a declarant's "personal knowledge can come from review of the contents of files and records," the statements contained in the declaration must actually be "described in the record." *Washington Cent. R. Co., Inc. v. Nat'l Mediation Bd.*, 830 F. Supp. 1343, 1353 (E.D. Wash. 1993); *see also Block v. City of Los Angeles*, 253 F.3d 410 (9th Cir. 2001); *Londrigan v. FBI*, 670 F.2d 1164 (D.C. Cir. 1981). In *Bright v. Ashcroft*, 259 F. Supp. 2d 494 (E.D. La. 2003), the court granted the plaintiff's motion to strike an affidavit submitted by an FBI official who, although having no personal involvement in a murder investigation, testified about the "FBI's conduct" during the years-old investigation, and the "thought processes of the agents involved." *Id.* at 498.

Despite having no personal involvement in the activity reflected in the April 30 Memo, Campi offered conjecture—based on inaccurate characterizations of the memo's contents—about thought processes and motivations of the FBI agent who prepared the memo. The FBI asks this Court to adopt a special rule for law enforcement officer declarants allowing officers without personal knowledge of or

involvement in investigations to offer testimony that is unsupported by—and at times outright contradicted by—the investigatory documents they purport to analyze. The Campi memo falls far short of satisfying the FBI's burden.

First, Campi claimed that the posting of the lists were "concerning for a number of reasons" including that "it might have led to the compromise of then ongoing investigations." ER521 ¶ 9. The April 30 Memo stated the opposite, that the spreadsheets would not compromise ongoing investigations because they were publicly available: "some material that is circulated on the Internet can compromise current active FBI investigations. The discovery of two detailed Excel spreadsheets posted on www.antiwar.com may not be significant by itself since distribution of the information on such lists are widespread." ER270.

Second, Campi claimed that the posting of the spreadsheets "might have . . . lead to the harming or harassment of innocent people." ER521-522 ¶ 9. The April 30 Memo contradicts this claim, noting that the spreadsheets were used by employers to vet potential employees and raising no concern over such use. ER270.

Third, Campi claimed that two markings on the May 22, 2002 spreadsheet—FBI suspect List and Law Enforcement Sensitive—suggested the information in the spreadsheet "was not intended for public dissemination and as such should not have been on antiwar.com." ER521 ¶ 9. The inference is that the markings are

what prompted the FBI agent who prepared the April 30 Memo to begin investigation of Antiwar.com. However, Campi's assertion is based on an inaccurate description of the contents of the April 30 Memo. Campi states that the second page of the April 30 Memo noted that the May 22, 2002 spreadsheet had the markings "FBI Suspect List" in the header and "Law Enforcement Sensitive" in the footer of each of its 22 pages. ER521 ¶ 9. Neither the second page or any other page of the Memo notes that the spreadsheet had these header and footer markings. ER263-272. Nor does the Memo express a view as to whether the spreadsheet was or was not intended for public dissemination or whether it should have been posted on the website. ER263-272. Indeed, the Memo's omission of these markings suggests that the markings did not trigger the investigation. In other words, Campi consulted information other than the Memo and imputed a presumed basis for a law enforcement inquiry in which he was not personally involved.

Since Campi lacked any personal involvement and knowledge to make assertions about law enforcement activity beyond the text of the April 30 Memo, the FBI asks this Court to find that the face of the April 30 Memo itself sets forth the authorized law enforcement activity. Opp. 36-37. The April 30 Memo does not state that the posting of the lists constituted an actual or even potential threat to national security, such that an investigation of their posting constituted an

authorized law enforcement activity. ER263-272. The memo presents only a temporal sequence of events: that the discovery of one list on Antiwar.com was followed by the FBI agent's fishing expedition into Plaintiffs' writings and publications. ER264. Further, the April 30 Memo disclaims the link between the lists and a national security threat, stating that the posting of the lists were not "significant" because they were publicly-available and widely-used. ER270.

2. The FBI Failed To Establish the Activity Reflected in the April 30 Memo Was Authorized.

The FBI commits the same error as the district court in asserting that the 2003 Attorney General's guidelines authorizing investigations of "threats to national security" serve as the authority for the FBI actions reflected in the April 30 Memo. Opp. 35. However, the FBI conflates the fact that the guidelines authorize "threat assessments" *in general* with the issue of whether the FBI activity reflected in the April 30 Memo *actually* was a threat assessment. *Id.* at 34-35. Section (e)(7) requires the government to show that the *actual* law enforcement activity that occurred was authorized, not that in some circumstances the FBI *could be authorized* to conduct activities.

Neither the April 30 Memo nor the Campi declaration state that the list discovered on Antiwar.com constituted a "threat to national security" sufficient to trigger a threat assessment authorized by the 2003 Attorney General's guidelines. Nor does the Memo or Campi declaration state that the discovery of the list caused

the FBI to believe that Plaintiffs were "individuals . . . of possible investigative interest" sufficient to lead to a threat assessment authorized by the guidelines. *Compare* ER263-272 (April 30 Memo) and ER518-523 (Campi Declaration) *with* ER551 (2003 Attorney General's guidelines). The Memo states otherwise: the lists found on Antiwar.com were not "significant" in themselves because they were publicly-available and widely-used. ER270.

Moreover, documents subsequently disclosed by the FBI further undermine Campi's assertion that Plaintiffs' posting of the lists raised national security concerns. After the district court granted summary judgment to the FBI on the Privacy Act claim related to the April 30 Memo and partial summary judgment to Plaintiffs on their FOIA claims, the FBI released additional documents to Plaintiffs. ER33. One such document revealed that the 2001 list of individuals posted on Antiwar.com had previously been posted by the Finnish Financial Supervision Authority in October 2001 on its website "on purpose." ER293. Another document revealed that the "FBI has been aware of [the 2002 list] being posted on the Internet since at least November of 2003." ER275. Thus, the record makes clear that the FBI knew, *prior* to the April 2004 Memo, that both lists had been posted on internet and were thus widely and publicly—available confirming that Plaintiffs' posting of the lists was "not significant" and thus hardly a basis for

raising national security concerns or prompting an authorized law enforcement investigation.

Thus, the record in this case fails to demonstrate that the activity reflected in the memo—a review and collection of Plaintiffs' journalism—was actually undertaken pursuant to the 2003 Attorney General's guidelines. For this reason, it was not an *authorized* law enforcement activity.

3. The FBI Cannot Establish the April 30 Memo Was Properly Limited in Scope.

Nor can the FBI establish that the expansive collection of Plaintiffs' journalism on topics far afield from the lists that purportedly triggered the investigation fell within the scope of any investigation into the posting of those lists. The collection and maintenance of articles conveying Plaintiffs' "idea[s]," "editorial comments," and "opinions" on topics as wide-ranging as the U.S. involvement in World War II, Israel, the Anti-War movement, and libertarianism are beyond the proper scope of any investigation into the posting of two lists on Antiwar.com. ER269-70. The overbroad scope of the April 30 Memo is illustrated by a memorandum prepared by a different FBI field office regarding the posting of one of the lists, which was far more limited and described only Plaintiffs' writings *as they related to that list*. ER280-98.

The district court refused to examine whether the April 30 Memo was within the "scope" of law enforcement activity, holding instead, "If the investigation itself

is pertinent to an authorized law enforcement activity, the Privacy Act does not regulate what can be done in the course of that investigation or how that authorized investigation may be documented." ER62. Indeed, the district court rejected *any* limits to the collection of First Amendment activity when it held that the FBI properly attached Plaintiffs' articles to the April 30 Memo "regardless of whether those articles ultimately shed any light on the investigation." ER62. The district court's reasoning renders Section (e)(7)'s "within the scope" language surplusage, and ignores *MacPherson*'s admonition that (e)(7)'s "within the scope" requirement must have some force. *MacPherson*, 803 F.2d at 484 ("Blanket allowance of such 'incidental' surveillance and recording under the guise of general investigation could permit the exception to swallow the rule."); *see also id.* at 485 n.9 (observing that recording of activities of other individuals "might raise additional questions about the 'scope' of the law enforcement activity involved").

The FBI urges this Court to affirm on a basis not considered by the district court—that the collection of writings was within the scope of an investigation into Plaintiffs *themselves*. Opp. 40 n.10. This is a distinction without a difference. Any investigation into Plaintiffs *themselves* was triggered by the posting of the lists on Antiwar.com, and as such any articles written by Plaintiffs could only be collected if they shed light on the posting of the lists. Adopting the FBI's rationale would allow the FBI and other federal agencies to collect and record a vast array of

articles published by newspapers and journalists on a range of topics under the guise of "understand[ing]" whether publication of publicly-available government information raised "national security concerns." Opp. 40.

C. The FBI Did Not Meet its Initial Burden Under Section (e)(7) for the Halliburton Memo.

The FBI did not meet its threshold burden under Section (e)(7) to demonstrate that the Halliburton Memo fell within the law enforcement activity exception.

1. The Bujanda Declaration not only Lacked Personal Knowledge but also Drew Upon Inadmissible Hearsay

The FBI presented only the declaration of Raul Bujanda to meet its burden of demonstrating that the Halliburton Memo fell within the law enforcement activity exception. ER247. Bujanda was first assigned to the field office that prepared the Halliburton Memo in 2016, a full ten years after the Memo was prepared, and claims no direct involvement in the investigation underlying the Memo. *Id.* The Bujanda declaration was a *post hoc* justification of the Halliburton Memo, riddled with hearsay and intended to conjure up "authorized law enforcement activity" to justify the documentation of websites publicizing an event where protest activity was expected. That protest activity was squarely protected by the First Amendment. The Bujanda declaration suffered from two fatal flaws, both disregarded by the district court.

First, Bujanda went far beyond the Halliburton Memo itself to propose what authorized law enforcement activity *might* have been undertaken by the FBI agents who prepared the memo. Though the memo said nothing about "arrests" or "public safety concerns" anticipated at the upcoming Halliburton shareholder's meeting, Bujanda claimed that the memo reflected the FBI's attempt to "protect the public safety." ER249. Though the memo referenced no communications between the FBI and local law enforcement, Bujanda claimed that the memo documented "preparation and coordination efforts" between local law enforcement and the FBI. ER249. The district court ignored the contradictions between Bujanda's declarations and the Halliburton Memo, finding that Bujanda's position as Assistant Special Agent in Charge of an FBI office provided sufficient personal knowledge to testify at odds with the document itself. ER8. In so doing, the district court misconstrued the relevant precedent, a case in which the declarants' positions as company chairman and investment banker, respectively, and *participation* in the merger negotiations discussed in their declarations provided sufficient personal knowledge. *See Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990). *Barthelemy* is inapposite given that Bujanda had no personal involvement in the activity reflected in the Halliburton Memo.

Second, the district court relied upon unsupported assertions by FBI counsel at oral argument to overlook inadmissible hearsay contained in the Bujanda

declaration. Bujanda asserted that he was "informed" (the date and source of this knowledge left unspecified) that FBI agents and local law enforcement had observed at some unknown date and locations prior to 2006 "public safety concerns" (details unspecified) at Halliburton shareholders' meetings, and that activity at the protests resulted in "multiple arrests" (again, details and actors unspecified). ER249. The district court acknowledged these as hearsay statements, but asked for and accepted FBI *counsel's* impromptu representation that the unidentified individuals who provided Bujanda this information would be available to testify at trial. ER27-28. This speculation as to witness availability, without any basis in the underlying discovery or record, cannot sustain the district court's acceptance of the hearsay statements in Bujanda's declaration. Both errors warrant reversal.

2. The FBI Failed To Establish that the Activity Reflected in the Halliburton Memo Was Authorized.

Even if the Bujanda declaration were considered, the FBI activity reflected in the Halliburton Memo was not authorized because it was not in "furtherance of foreign intelligence, national security, or criminal investigation," ER18, as required by the 2003 Attorney General's guidelines. The district court hypothesized that the FBI could in *some* circumstances investigate an event where protesters were expected, ER10-11, but the dispositive question posed by the Privacy Act is whether the FBI was *actually* engaged in authorized activity in *these*

circumstances. It was not. Neither the Halliburton Memo itself nor the Bujanda declaration explained how or why the FBI was authorized under the 2003 Attorney General's guidelines to record a list of websites containing information about the Halliburton shareholder's meeting that the FBI received from a third-party. The Halliburton Memo did not refer to national security threats, issues of foreign intelligence, violations of federal criminal law, or the threat of any arrests at all. ER304-305.

Requiring the FBI to document its authorization and basis for recording an individual's First Amendment activity is entirely consistent with the Privacy Act, the 2003 Attorney General's guidelines, the FBI's Domestic Investigations and Operations Guide ("DIOG"), and *MacPherson.* The Privacy Act was prompted by the FBI's collection of thousands of intelligence files on Americans, including journalists and those espousing ideological viewpoints, sparked the passage of the Privacy Act. *See* Opening Br. 5-6. The Privacy Act imposed an "even more rigorous" standard for the collection, use and maintenance of records describing individuals' exercise of First Amendment rights given the chilling effect of government surveillance upon the exercise of constitutionally-protected rights. Office of Mgm't & Budget Privacy Act Guidelines, 40 Fed. Reg. 28,965 (July 9, 1975). *MacPherson* recognized that, in enacting the law enforcement exception, "Congress did not intend to dilute the guarantees of the First Amendment by

authorizing the maintenance of files on 'persons who are merely exercising their constitutional rights.'" 803 F.2d at 484. The 2003 Attorney General's guidelines and the DIOG prohibit investigating or maintaining information regarding individuals solely for the purpose of monitoring activities protected by the First Amendment. ER546-47; ER229-30. Taken together, these authorities require the FBI to be held to strict documentation standards to confirm that activity such as that reflected in the Halliburton Memo—recording the plans of political protestors—was not undertaken solely to monitor First Amendment-protected activity.

Adopting the principle that the FBI advances—that contrary to intent of Privacy Act and its guidelines, the FBI need not state in writing the law enforcement activity authorizing collection of First Amendment activities—would render the protections of the Privacy Act hollow. The FBI could conduct extensive surveillance and collection of First Amendment activity in violation of the Privacy Act without maintaining contemporaneous records documenting the authorized law enforcement activity supporting that collection. If ever sued, the FBI could proffer *post hoc* arguments and declarations from witnesses without personal knowledge as to a *possible* law enforcement activity related to the collection of the First Amendment activity, and thus insulate itself from any violation of the Privacy Act.

D. The *MacPherson* Balancing Test Demonstrates that the Law Enforcement Activity Exception Is Unwarranted.

Even if the FBI met its burden under Section (e)(7) to demonstrate authorized law enforcement activity and scope, application of the *MacPherson* balancing test demonstrates that the FBI's actions cannot be excused. *MacPherson* requires a consideration of the "*factors for and against* the maintenance" of Plaintiffs' First Amendment activity on an individualized basis, recognizing that "strong policy concerns . . . may balance differently in different cases." 803 F.2d at 484 (emphasis added). Here the type of activity recorded—journalists publishing on topics of public concern, including newsworthy and unclassified government information and political protest activity—lies at the heart of rights protected by the First Amendment. Next, the FBI did not confine itself to recording articles linked to the activity allegedly investigated—posting of two lists on Antiwar.com—but used the lists to engage in "blanket . . . surveillance . . . under the guise of general investigation." *Id.* The FBI did not have strong law enforcement interests at stake because the lists posted were publicly-available, widely-used, and admittedly not "significant." ER270. The chilling effect of the FBI's potentially indefinite maintenance of Plaintiffs' articles is high. 803 F.2d at 479 (recognizing the chilling effect as a factor in the balancing test). That Plaintiffs were aware that the FBI could *view* their website does not foreclose or mitigate the chilling effect from the FBI collecting and maintaining their articles.

Id. at 483 ("Merely because [an agency] may act within its authority by *monitoring* the public or private speeches of a person in the course of a legitimate security investigation does not give it the right to *maintain* records relating to the content of these speeches where the investigation does not focus on a past or anticipated specific criminal act."). And not surprisingly, Plaintiffs suffered harm: loss of sources and reputation; a decrease in financial support from donors; layoffs of staff and reduction of benefits; and critically—self-censorship to avoid further FBI scrutiny. *See* Opening Br. 14.

The district court not only failed to apply the *MacPherson* balancing test, it embraced use of the categorical "rules" that *MacPherson* rejected for their failure to further the goals of the Privacy Act. First, the district court found that authorized law enforcement activity existed for the April 30 Memo using the "rational nexus" test: "[C]onducting the threat assessment . . . was *consistent* with the FBI's mandate to investigate matters related to national security." ER60 (emphasis added). Second, the district court found the law enforcement activity exception based only upon a "relevancy" rule taken from a district court in a different circuit: "Regardless of whether [Plaintiffs'] articles ultimately shed any light on the investigation, the threat assessment merely documented what was done in the investigation. If the investigation itself is pertinent to an authorized law enforcement activity, the Privacy Act does not regulate what can be done in the

course of that investigation or how that authorized investigation may be documented." ER62; *see Afifi v. Lynch*, 101 F. Supp. 3d 90, 106 (D.D.C. 2015) ("[T]he pertinent question is whether the investigation was valid and not whether every act take in furtherance of the investigation as valid."). The *MacPherson* balancing test requires reversal of the court below.

E. The FBI Is Required To Justify The Ongoing Maintenance of Records under Section (e)(7).

Section (e)(7), properly construed, prohibits the ongoing—and likely indefinite—maintenance of Plaintiffs' First Amendment activity absent ongoing authorized law enforcement activity. The FBI concedes that the word "maintain" in Section (e)(7) refers to both "maintenance" and "collection" of records, but flips the structure of the statute to incorrectly claim that Congress intended to *authorize* both activities. Opp. 44. A reading of the statute faithful to its structure and syntax demonstrates that Congress intended to *prohibit* both maintenance and collection of records related to First Amendment activity, unless each separately falls within the law enforcement activity exception.

Section (e)(7) states:

> (e) *Agency Requirements.* -Each agency that maintains a system of records shall . . . (7) **maintain** no record describing how any individual exercises rights guaranteed by the First Amendment . . . unless pertinent to and within the scope of an authorized law enforcement activity."

5 U.S.C. § 552a(e)(7) (emphasis added). The statute defines "maintain" as "including maintain, collect, use, or disseminate." *Id.* § 552a(a)(3). When read using the term "collect," the FBI can "*collect* no record" regarding First Amendment activities unless it falls within the law enforcement activity exception. When read using the term "maintain," the FBI can "*maintain* no record" regarding First Amendment activities unless it falls within the law enforcement activity exception.

Two principles follow from the plain reading of the statute. *First*, Congress did not authorize both collection and maintenance; it *prohibited* collection and maintenance as two distinct activities. *Second*, it prohibited collection and maintenance unless each separately fell within the law enforcement activity exception. To read the statute as the FBI suggests—where as long as the initial collection of First Amendment activity is within the law enforcement activity exception, subsequent maintenance need not be—would render "maintain" useless. Congress need only have written: an agency shall "collect no record" of First Amendment activity unless within the law enforcement activity exception. Since no separate prohibition on maintenance would exist, then a law enforcement agency would be permitted to maintain the record without problem.

The FBI cannot demonstrate that the ongoing maintenance of the April 30 Memo and the Halliburton Memo are pertinent and within the scope of authorized

law enforcement activity. The Campi and Bujanda declarations offer conclusory assertions that the memos will "inform" future investigative activity. ER250; ER523. The declarations provide no specifics as to the areas of the investigative activity, how the information in the memoranda will be helpful to such investigative activity, whether the FBI is authorized to undertake that activity, or anything more concrete than "events that *may* present *potential* safety concerns." ER250; *see Becker*, 34 F.3d at 409 (requiring justification for ongoing maintenance of records covered by Section (e)(7)).

II. The FBI Does Not Contest that the District Court Used the Wrong Legal Standards in Denying Depositions of Crucial Fact Witnesses.

The district court abused its discretion by preventing Plaintiffs from deposing the two FBI agents that undertook the activity reflected in the April 30 Memo, depositions that were key to ascertaining and challenging any purported law enforcement activity asserted by the FBI. The FBI does not dispute that Plaintiffs were entitled to take those depositions under the normal rules of discovery. *See* Opp. 18; *Lane v. Dep't of Interior*, 523 F.3d 1128,1135 (9th Cir. 2008) (substantive Privacy Act claim "initially warranted discovery," unlike FOIA claims); *MacPherson*, 803 F.2d at 480 (noting that summary judgment on Section (e)(7) claims occurred "[a]fter extensive discovery"). In finding that discovery is the exception, rather than the rule, the district court committed legal error: it shifted and flipped the burden from the FBI to Plaintiffs to show "good cause" for

the depositions to go forward. It also misinterpreted *Lane* to claim that *Lane* authorized the district court to defer the depositions, though that is not what *Lane* held. The district court fashioned a rule at odds with the presumptions of civil discovery: It required Plaintiffs to "wait and see" the FBI's defense. Left uncorrected, this rule confines a plaintiff to discovery on only the self-serving defenses proffered by a defendant, especially inappropriate in cases where the defendant has exclusive access to evidence.

Federal Rule of Civil Procedure 26 authorizes a district court "for good cause, [to] issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). The FBI does not dispute that, as the party moving for the protective order, it bore the burden to show good cause by "demonstrating harm or prejudice that will result from the discovery," *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004), and points to no evidence in the record where it proffered such evidence. Opp. 22-23. Nor does the FBI dispute that the district court failed to hold the FBI to the "good cause" standard. ER145-160. The district court's failure to apply the good cause standard alone was an abuse of discretion.

Next, the district court asked Plaintiffs to "point to" a Privacy Act case where "depositions have been allowed," and to articulate the "harm" in deferring the depositions. ER146, 149. Shifting and flipping the burden to Plaintiffs to

show "good cause" why depositions should *not* be deferred was a second error warranting reversal.

The district court's third error involved *Lane*. In *Lane*, the plaintiff sought twenty depositions in four different cities as relevant to her FOIA claim, her Privacy Act claim for right of access to her records, and her Privacy Act claim challenging the government's improper disclosure of her records to a third-party. 523 F.3d at 1134. *Lane* held that the district court was within its discretion to defer the requested depositions with respect to the plaintiff's FOIA and Privacy Act right of access claims, but that the depositions were warranted at the time they were sought as to the plaintiff's improper disclosure claim. *Id.* at 1135. *Lane* held, however, that it need not reverse the latter decision because the plaintiff failed to raise the request for depositions at the summary judgment stage. *Id. Lane* did *not* hold that the depositions could and should have been deferred on the plaintiff's improper disclosure claims. Thus, *Lane* provided no basis to the district court to defer the two depositions sought by Plaintiffs on their Section (e)(7) claims, which were analogous to *Lane*'s improper disclosure claim. *Lane* also did not hold, as the district court found, that only "limited discovery" was appropriate for Plaintiffs' Privacy Act claims. ER146. Nor was *Lane* "inconsistent" with the taking of "depositions of the agents that are involved" in the underlying investigation.

ER154. The district court's improper application of *Lane* to deny and defer depositions was an abuse of discretion.

The FBI argues that *Lane* controls as to waiver. Plaintiffs did not waive their right to the depositions by failing to make a Rule 56(d) motion, because it was inappropriate for the court to place that burden on Plaintiffs in the first instance. Under Rule 56(d), a party bears "the burden to show what specific facts it hope[d] to discover that will raise an issue of material fact." *Continental Maritime v. Pacific Coast Metal Trades*, 817 F.2d 1391, 1395 (9th Cir.1987). At oral argument, Plaintiffs explained that depositions were intended "to test the Government's proffered assertion for why the [April 30 Memo] was collected and maintained . . . to go firsthand to the FBI agents who were involved with the drafting of the memo." ER147. The district court rejected such testimony as irrelevant and unnecessary, surmising that no matter what basis the FBI agents might articulate in any depositions for the April 30 Memo, it would place the memo "smack into the [law enforcement activity] exception." ER151-152. Given the district court's reasoning, it was inappropriate for the court to require Plaintiffs to file a Rule 56(d) motion: it would not have been possible for Plaintiffs to demonstrate that "*additional discovery* would have revealed specific facts precluding summary judgment" when the district court had already opined that no

additional facts would defeat the law enforcement exception. *Tatum v. City and County of San Francisco*, 441 F.3d 1090, 1101 (9th Cir. 2006) (emphasis added).

Nor does *Lane* support waiver here. The district court in *Lane* deferred the twenty depositions sought until after summary judgment on grounds of *burden* not *relevance*. 523 F.3d at 1134. Therefore, Lane could have shown on a Rule 56(d) motion how facts obtained through such depositions would be relevant to her claims, overcoming at that point the defendants' assertions of burden. Here, the district court's rationale as to why Rule 56(d) was appropriate rested in substantial part on relevance. ER152-155. Plaintiffs could not have successfully overcome that reasoning on a Rule 56(d) motion.

CONCLUSION

For the foregoing reasons, the challenged orders of the district court should be vacated with instructions to order the FBI to cease maintaining records relating to Plaintiffs.

Dated: November 16, 2018

Respectfully submitted,
s/ Vasudha Talla

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Ninth Circuit Rule 32-1(b) because this reply brief contains 6903 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Ninth Circuit Rule 32-1(c).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 with Times New Roman 14-point font.

Dated: November 16, 2018

s/ Vasudha Talla
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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I hereby certify that on November 16, 2018 I served the following participant in the case by first-class U.S. mail:

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