No. 18-15907

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION OF ARIZONA, ET AL.,
Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court for the District of Arizona

BRIEF OF *AMICI CURIAE* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 23 MEDIA ORGANIZATIONS IN SUPPORT OF APPELLEES

Cortelyou C. Kenney
Counsel of Record
Mark H. Jackson
George El-Khoury, Law Student Intern
FIRST AMENDMENT CLINIC
CORNELL LAW SCHOOL
Myron Taylor Hall
Ithaca, NY 14853
Tel: (607) 255-8897
cck93@cornell.edu

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are the Reporters Committee for Freedom of the Press and 23 news media organizations, listed in Appendix A. The Reporters Committee is an unincorporated nonprofit association of reporters and editors dedicated to defending the newsgathering rights of the news media. Founded by journalists and media lawyers in 1970 when the nation's press faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources, the Reporters Committee today serves as a leading voice for the legal interests of journalists and news organizations.

Amici are news media organizations that produce news in all formats, including print and online publications and broadcast journalism, or organizations who advocate on behalf of the First Amendment rights of journalists or news organizations. As representatives and members of the news media, *amici* frequently rely on the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to gather information about the government and report on matters of vital public concern. *Amici* thus have a strong interest in ensuring that such laws are interpreted by courts in a manner that facilitates public access to government records and assures government accountability. *Amici* submit this brief to assist the Court in its consideration of the evidentiary burdens

[1] No party or party's counsel authored this brief in whole or in part or contributed money intended to fund preparing or submitting this brief. No person, other than the *amici*, their members, or counsel, contributed money intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

underlying FOIA and to present the media's perspective on the critical role that FOIA plays in their ability to properly discharge their role as the eyes and ears of the public.

Amici also wish to highlight the importance of the news media in bringing issues concerning the treatment of children in immigration detention facilities, including concerns of child abuse and neglect by the Department of Homeland Security (DHS) and its components, to the public's attention. For example, earlier this month, the death of a 7-year-old Guatemalan girl in the custody of U.S. Customs & Border Patrol made front-page headlines and the nightly news. *See, e.g.*, Nick Miroff & Robert Moore, *7-year-old migrant girl taken into Border Patrol custody dies of dehydration, exhaustion*, Wash. Post, Dec. 13, 2018.[2] According to the *Washington Post*, which broke the story, the child had reportedly been without access to food and water on her journey to the Southern Border and afterwards and suffered a seizure as a result. *Id.* While DHS denies fault, as does the White House, the news media has publicized accounts by family members calling for an investigation into her death. *See, e.g.*, Simon Romero, *Father of Migrant Girl Who Died in U.S. Custody Disputes Border Patrol Account*, N.Y. Times, Dec. 15, 2018.[3] News media coverage also may have helped prompt a congressional delegation to schedule a visit to the facility where she died. *See* Angela Barajas & Susannah Cullinane,

[2] https://perma.cc/FA9F-ABMM.
[3] https://perma.cc/K5M7-U84D.

Congressional delegation to visit CBP station after Guatemalan girl's death, CNN.com, Dec. 17, 2018.[4]

Disclosure of the names of border patrol agents and other DHS officials accused of child abuse will allow the news media to report on how the federal government carries out its immigration policies. Such information can be used to cover how DHS and its components have handled allegations of child abuse, thereby arming the public with information that allows them to hold the government accountable for failing to protect one of the nation's most vulnerable groups: unaccompanied immigrant children.

SUMMARY OF ARGUMENT

DHS asks this Court to drastically depart from clearly established Supreme Court and Ninth Circuit precedent and to impose an unwarranted burden on FOIA requesters seeking to shed light on investigations into government misconduct—specifically, DHS and its components' investigations of complaints made by unaccompanied immigrant children of verbal, physical, and sexual abuse in immigration detention facilities committed by border patrol agents and other DHS officials. DHS attempts to impose a heightened evidentiary burden under Exemption 7(C),[5] § 552(b)(7)(C), which would

[4] https://perma.cc/NGR8-9JZ7.

[5] The government in this case withheld the names of DHS officials under both Exemption 6 and 7(C). As the Reporters Committee has previously noted, the standards for evaluating withholdings under those two exemptions are quite different. *See* Br. of *Amicus Curiae* The Reporters Committee for Freedom of the Press in Support of Petitioners-Appellees' Petition for Rehearing En Banc, *Cameranesi v. United States*

essentially require a requester to *prove* government misconduct before a court engages in any balancing of the public and private interests under that exemption.

DHS's position should be rejected for several reasons. First, it ignores prior precedent of this Court establishing that when the government is already investigating potential misconduct by its employees, the requester need not propound *any* evidence to substantiate misconduct because there is a public interest in releasing information about how the government investigates and formulates policies dealing with existing complaints of misconduct.

Second, even if a FOIA requester is required to meet the minimal showing of the *possibility* of misconduct under Exemption 7(C), under the Supreme Court's decision in *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004) ("*Favish*"), the requester is not, as DHS argues, required to *prove* that those allegations are "substantiated." Appellants' Br. at 1. Under *Favish*, all that is required is a "meaningful evidentiary showing" to "warrant a belief by a reasonable person that the alleged Government impropriety *might* have occurred." 541 U.S. at 174 (emphasis added). The ACLU's evidence here easily meets (and indeed, far surpasses) *Favish*'s low bar.

Third, DHS's argument that the ACLU has not met its threshold evidentiary burden under *Favish* because DHS has introduced contrary evidence is without merit.

Department of Defense, No. 14-16432 (9th Cir. 2016), ECF No. 29. As the government's burden to withhold records under Exemption 7(C) is reduced compared with the standard under Exemption 6, *amici* focus on the former in this brief.

No Supreme Court or Ninth Circuit case contemplates a process for the government to submit "rebuttal" evidence in an attempt to invalidate a requester's minimal threshold showing that misconduct *might* have occurred, nor would such a procedure make sense given *Favish*'s minimal requirement of a mere "possibility" of misconduct.

Finally, DHS failed to provide adequate evidence to support its argument that border patrol agents accused of child abuse have a privacy interest in avoiding harassment that overcomes the public's interest in access. DHS provided just two paragraphs stating legal conclusions in support of its position; it failed to offer a single instance where any agent had been harassed. *See* Corrected Excerpts of Record Volume II ("ER II") at 249–50. This "showing" simply does satisfy the heavy burden that the government is required to meet to keep information hidden from the public. Accordingly, this Court should affirm the decision below.

ARGUMENT

FOIA's purpose "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). To facilitate that purpose, FOIA's exemptions are "narrowly construed," *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011) (citations and quotations omitted), and "[t]he burden is on the agency to demonstrate, not the requester to disprove, that the materials sought" may be withheld from disclosure, *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989) (citing congressional record).

When the government invokes an exemption, it has a heavy burden to overcome the "strong presumption in favor of disclosure." *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). This heavy burden "remains with the agency when it seeks to justify the redaction of identifying information in a particular document." *Id.* The government must submit evidence, typically by way of sworn affidavit or declaration, providing "reasonably detailed descriptions of the documents and allege facts sufficient to establish an exemption." *Kamman v. IRS*, 56 F.3d 46, 48 (9th Cir. 1995) (quoting *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987)). This rule makes sense: Only the government knows what disclosure would reveal. *Vaughn v. Rosen*, 484 F.2d 820, 823–25 (D.C. Cir. 1973).

The government's burden to prove the applicability of an exemption is especially important when potential misconduct is at issue because the government has every incentive to provide as little information in its affidavits to avoid public embarrassment. *See Jones v. FBI*, 41 F.3d 238, 242–43 (6th Cir. 1994). Indeed, government misconduct can "undermine the presumed veracity of [the government's] affidavits." *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 990 (9th Cir. 2009) (citing *Jones*, 41 F.3d at 249). In such situations, the Court "*must* play a more active role" to serve as a check against the government's incentives to hide misconduct and "to ensure that the agency's assertions are reliable." *Jones*, 41 F.3d at 242–43 (emphasis in original).

The specific exemptions at issue here, Exemptions 6 and 7(C), permit an agency to withhold records—in the case of 7(C), those gathered for "law enforcement

purposes"—if it proves that disclosure of the documents either could constitute a "clearly unwarranted invasion of personal privacy," § 552(b)(6), or could "reasonably be expected to constitute an unwarranted invasion of personal privacy," *id.* at (b)(7)(C). While the text and history of the two exemptions make plain they are not coterminous, *see supra* note 1, for the purposes of this case, as the ACLU argues, its evidence meets the higher standard of Exemption 7(C). Appellees' Br. at 38. *Amici*, accordingly, focus primarily on Exemption 7(C).

Under that exemption, if the records in question were compiled for law enforcement purposes: (1) the government must show the records implicate a cognizable, nontrivial, personal privacy interest; (2) if such a privacy interest exists, the burden shifts to the requester, who must demonstrate disclosure is likely to advance a significant public interest; and (3) if there is such a public interest, the court should balance it with the privacy interests in question. *See Tuffly v. DHS*, 870 F.3d 1086, 1092–93 (9th Cir. 2017).

I. There is a significant public interest in knowing how DHS and its components investigate agents accused of child abuse that is independent of any government misconduct.

While DHS relies heavily on *Favish* to withhold the names of border patrol agents and other DHS officials, this Court need not even consider the unique facts or limited holding of that case. Specifically, this Court need not determine that the ACLU has provided sufficient evidence of possible government misconduct under *Favish* because disclosure of the agents' names in question would shed light on the government's law

enforcement policies broadly, and therefore is in the public interest independent of any possible government impropriety. As the district court suggested, Excepts of Record Volume I ("ER I") at 7–8, disclosure of the names will shed light on, *inter alia*, whether the government treats potential repeat offenders differently (or the same) as offenders who have been accused of one instance of abuse.

The Supreme Court's opinion in *Favish* makes clear that it was considering an exceedingly unusual set of facts. At issue in that case were death-scene photographs from several government investigations that concluded that Vincent Foster, Jr., Deputy White House Counsel to President Clinton, had committed suicide; the materials sought under FOIA included graphic photographs depicting gunshot wounds to Mr. Foster's head. *See Favish*, 541 U.S. at 160–64. The Court's balancing of public and private interests was, accordingly, carefully set forth within those circumstances. *See id.* at 173 ("*In the case of photographic images and other data pertaining to an individual who died under mysterious circumstances*, the justification most likely to satisfy Exemption 7(C)'s public interest requirement is . . . ") (emphasis added); *Charles v. Office of the Armed Forces Med. Exam'r*, 935 F. Supp. 2d 86, 98 (D.D.C. 2013) (declining to apply the *Favish* standard to Exemption 6 withholdings because, *inter alia*, "the Supreme Court's holding in *Favish* was limited to surviving family members' right to personal privacy with respect to their close relative's *death-scene images*") (internal citations and punctuation omitted) (emphasis in original). *Favish*'s unique circumstances do not lend themselves to a rule generally applicable to all cases involving assertions of Exemption 7(C). Indeed, the Supreme

Court explicitly noted in *Favish* that it did "not in this single decision attempt to define the reasons that will suffice, or the necessary nexus between the requested information and the asserted public interest that would be advanced by disclosure." 541 U.S. at 172–73.

This Court too has stated that "[i]f the FOIA requester does not allege any government impropriety, the *Favish* reasonable belief standard may be inapplicable," following the D.C. Circuit. *Tuffly*, 870 F.3d at 1095 (quoting *Cameranesi v. United States Dep't of Def.*, 856 F.3d 626, 640 n.17 (9th Cir. 2017) (citing *Citizens for Responsibility & Ethics in Washington v. Dep't of Justice*, 746 F.3d 1082, 1094–95 (D.C. Cir. 2014) ("*CREW I*"))). In *CREW I*, the D.C. Circuit held that although a requester sought records of the investigation into political corruption related to a member of Congress who the DOJ chose not to prosecute, 746 F.3d at 1092–94, issues of law enforcement policy related to government misconduct are separate from the misconduct itself, *id.* at 1094–95. In short, investigative documents can reveal the level of care that the government practiced, and "whether the government had the evidence but nevertheless pulled its punches." *Id.* at 1093. The D.C. Circuit thus held that whenever federal law enforcement investigates its own employees, that investigation will inherently involve government misconduct at some level, and the public has the right to know "how [government agencies] carr[y] out their respective statutory duties to investigate and prosecute criminal conduct." *Id.*

Building on *CREW I*, this Court held that when the government investigates or otherwise makes policy related to government misconduct, the requester need not propound *any* evidence of misconduct at all. *See Tuffly*, 870 F.3d at 1095 ("Tuffly is not required to present any additional evidence to support an interest in evaluating the effects of the government's policy."). This is because "[d]iscovering that a government policy had deleterious consequences can be important information for the public to have, even if those consequences were unforeseeable and the government in no way acted improperly or negligently in adopting the policy." *Id.*

Of course, as in all cases, the inquiry focuses on the "usefulness of the specific information withheld," rather than on the "general public interest in the subject matter of the FOIA request." *Id.* at 1094 (internal citations and quotations omitted). In *Tuffly*, there *was* a public interest in the subject matter of the FOIA request—namely, Immigration and Customs Enforcement's ("ICE") decision to release 149 immigrant detainees, including some with criminal records—but disclosure of the detainee's names would not have "add[ed] significantly to the already available information concerning the manner in which [the agency] . . . performed its statutory duties" because the requester already had "the criminal history (if any) of each of the released detainees" and "therefore possesse[d] the relevant information that ICE had before it when it made its decisions to release them." *Id.* at 1094–95. As such, in *Tuffly,* the names literally "would [have] do[ne] nothing to further illuminate the government's decision that these [private] individuals should be released pending completion of their removal

proceedings." *Id.* And despite the general public interest, the requester in *Tuffly* also frankly admitted to this Court that "release of the names would not itself advance the public interest in understanding the impact of the government's detention and release policies," a concession this Court viewed as dispositive. *Id.* at 1098.

Here, like *Tuffly*, the Court should conclude that *Favish* does not apply in the first instance because the request seeks records related to an investigation into existing complaints of government misconduct—specifically, DHS's and its components' investigations of border patrol agents and others accused of abuse of children in immigration detention centers. In other words, whether or not the underlying claims of child abuse are true is beside the point; the requested records shed light on *how* DHS and its components investigated those complaints. *See* Appellees' Br. at 46 n.1.

However, unlike *Tuffly*, this Court should conclude that the names would "add significantly to the already available information" because they will show whether DHS investigated border patrol agents and others repeatedly accused of child abuse the same as agents accused of child abuse once. Without disclosing the names, the requested records tell the public nothing about how DHS investigates agents *repeatedly* accused of child abuse, and whether those agents are investigated in the same manner as agents with single complaints filed against them. *See* Appellees' Supplemental Exhibits of Record ("SER") at 150, 154–55; *see also* Appellees' Br. at 27–29 (noting the names will reveal abuse frequencies and other variables as well as the system by which complaints

against agents are tracked). Disclosure of the names will allow the public to assess DHS's and its components' responses to these serious accusations.

The district court correctly understood the significant public interest in such information. Dismissing DHS's argument that the ACLU could already identify DHS agents accused of child abuse more than once, it found that the "sole reason" the ACLU could identify a pattern was because the ACLU "*had* personal identifying information for" one individual: "Mala Cara" (Spanish for "Bad Face"), a nickname that DHS failed to redact from its disclosures. ER I at 7–8; *see also* SER at 104 (citing Exhibit 34); SER at 154. Disclosure of similar information would reveal not only whether there are more repeat offenders, but also would allow the public to assess the rigor of the government's investigations. The information could also demonstrate there are no or few repeat offenders. In any case, there is a real and substantial public interest in how the government investigates claims made against its employees outside of the framework of *Favish* such that it is not necessary to consider here.

II. Even assuming that *Favish* applies, the ACLU satisfied the minimal showing required.

Even assuming that *Favish* provides the correct framework for deciding the case, the ACLU's evidence more than satisfies its low evidentiary threshold of a *possibility* of misconduct. DHS's attempt to convert that low bar into a requirement that a FOIA requester *prove* misconduct before a court even consider the public's interest fails as a matter of law. Furthermore, there is no procedure under FOIA for DHS to attempt—

as it has done here—to "rebut" a requester's showing of potential misconduct. Once that threshold has been met courts are required to engage in a balancing of the public and private interests at stake.

A. The ACLU made a more than adequate threshold evidentiary showing that DHS and its components failed to properly investigate allegations of child abuse.

The ACLU offered sufficient evidence that DHS and its components may have failed to properly investigate complaints of child abuse, *i.e.*, it introduced enough evidence to warrant belief by a reasonable person that alleged government impropriety *might* have occurred, the minimal standard set forth by the Supreme Court in *Favish*. 541 U.S. at 174. DHS argues for a drastic departure from that clear precedent, asking that the ACLU *prove the truth* of the underlying complaints of child abuse. *See* Appellants' Br. at 32. Indeed, DHS uses "unsubstantiated," "substantiated," and variants thereof in its opening brief no less than thirty-nine times. *See id.* at i–39. But that standard, no matter how many times DHS repeats it, is simply not what the law requires. Under *Favish*, all that needs to be provided by a FOIA requester is "evidence that would warrant a belief by a reasonable person that the alleged Government impropriety *might* have occurred." 541 U.S. at 174 (emphasis added).

DHS's circular reasoning—that the requester must affirmatively substantiate government wrongdoing to obtain information that would show government wrongdoing—is not only inconsistent with *Favish*, it was also squarely rejected by this Court in *Dobronski v. FCC*, 17 F.3d 275, 279 (9th Cir. 1994). There, this Court held that

there was a significant public interest in disclosure of FCC employees' sick leave records even though claims of abuse of sick leave were not affirmatively substantiated but rather based on a "tip" because "a circular rule that an inquiry must be buttressed by possession of objective proof of the facts to be disclosed before the agency will be required to disclose the relevant records . . . would be antithetical to the FOIA's policy goals." *Id.*

Other courts applying *Favish* have likewise refused to impose on the requester the heavy evidentiary burden that DHS seeks here. *See, e.g.*, *Union Leader Corp. v. DHS*, 749 F.3d 45, 56 (1st Cir. 2014); *N.Y. Times Co. v. DHS*, 959 F. Supp. 2d 449, 454–55 (S.D.N.Y. 2013). In *Union Leader*, the First Circuit held that a New Hampshire newspaper that sought the names of six undocumented persons ICE arrested in 2011, 749 F.3d at 48, made a sufficient evidentiary showing by pointing out that these individuals had prior arrests dating back twenty-three years and that the government was aware of their presence in New Hampshire, *id.* at 56. The First Circuit noted that evidence of *delay* on the part of the government was "hardly conclusive" of malfeasance, but "warrant[ed] a reasonable belief 'that the alleged Government impropriety *might* have occurred'" to satisfy *Favish*. *Id.* (quoting *Favish*, 541 U.S. at 174) (emphasis in original). Indeed, "[d]isclosure of the redacted names w[ould] enable the [newspaper] to investigate public records pertaining to the arrestees' prior convictions and arrests, potentially bringing to light the reasons for ICE's apparent torpor in removing these aliens." *Id.*

In *New York Times*, the U.S. District Court for the Southern District of New York held that the *Times* made a sufficient showing to compel disclosure of the names of undocumented persons who ICE released from custody as a result of the Supreme Court's *Zadvydas* decision. 959 F. Supp. 2d at 450–51. It had submitted a sworn declaration of a *Boston Globe* reporter detailing how she "was able to learn through diligent reporting despite the secrecy imposed by DHS of several questionable exercises of DHS's discretion under *Zadvydas*." *Id.* at 455; Declaration of Maria Sacchetti, *N.Y. Times Co. v. DHS*, 959 F. Supp. 2d 449 (S.D.N.Y. 2013) (1:12-CV-8100), ECF No. 9. *The Times* argued, and the district court agreed, that the names "would permit [it] to obtain information that would shed further light on critical aspects of the government's handling of its removal duties." *N.Y. Times*, 959 F. Supp. 2d at 454–56 (citations and quotation marks omitted).

Here, the ACLU has produced evidence of hundreds of complaints of child abuse that the government ignored, closed because of delay, or closed with little explanation, allowing offenders to remain on the job without discipline and free to abuse again. Appellees' Br. at 26, 32–33, 49–51; ER II at 46–81; SER at 28–66; SER at 148–58; SER 95–107; SER 89–91. That evidence *far exceeds* the minimal threshold showing described by the Supreme Court in *Favish*, and is more than sufficient for a court to both consider the public interest and find it persuasive, as the district court did here.

B. The government cannot "rebut" the threshold evidence of government misconduct provided by the ACLU.

While DHS devotes a significant portion of its brief to attempting to rebut the ACLU's evidence of government misconduct, *see* Appellants' Br. at 25–32, there is simply no such procedure authorized or set forth in FOIA, *Favish*, or other cases in this Circuit that have considered it. *Favish* only requires the FOIA requester, as an initial matter, to introduce evidence that would "warrant a belief by a reasonable person that the alleged government impropriety might have occurred," 541 U.S. at 174; if such showing is met, the court must then proceed to a balancing of the interests at stake.

While courts have discussed government investigations in Exemption 7(C) cases, they have *not* been held to "rebut" a requester's threshold showing of the possibility of government misconduct. Take *Favish*, for example; the death of Deputy White House Counsel Vince Foster Jr. prompted five investigations, all of which concluded that he had committed suicide. *Id.* at 175. There, the government submitted the report of Independent Counsel Kenneth Starr, which spanned over 100 pages and provided a robust analysis.[6] But the outcome of the case did *not*, contrary to the suggestion of DHS, rest on these facts. *See* Appellants' Br. at 36. Rather, it rested on the fact that the requester *himself* had "*not produced any evidence*" at all that Vince Foster Jr. had died other than by his own hand, *or* that the government investigations into his death were, in the

[6] *Amici* are happy to provide the Court with copies of this report and other material from prior cases not available on PACER upon request.

requester's words, "grossly incomplete and untrustworthy." *Favish*, 541 U.S. at 174–75 (emphasis added); *see also id.* at 161. Nowhere in the Court's holding, or in the rationale supporting that holding, did the Court contemplate that a government agency can negate a requester's threshold showing of government misconduct if the requester *has* met this threshold burden. As the Supreme Court unequivocally stated:

> We hold that, where there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.

Id. at 174.

Another government investigation is referenced in *Lahr*, which involved a "multi-agency analysis" of a single plane crash, with a unanimous conclusion that the crash was an accident. 569 F.3d at 970. While the government submitted evidence of its investigations, this Court did *not* rely on those investigations in reaching its holding under Exemption 7(C). *Id.* at 975–77. Instead, this Court focused on an intervening decision concerning privacy interests of government officials and private citizens who had *not* been accused of misconduct, not whether the requester had met the threshold burden under *Favish*. *See id.* at 975–79.

Forest Service Employees, which the government relies heavily on in its brief, *see* Appellants' Br. at 35–36, is notably an Exemption 6 case not under *Favish*. It therefore has no bearing on this case because there the requester introduced no evidence of

government misconduct, and thus provides no mechanism for the government to rebut the requester's own evidence that misconduct might have occurred. Furthermore, even were it applicable, *Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, which was about a forest fire resulting in the deaths of numerous individuals, turned on the fact, like in *Tuffly*, that the sought-after "identities of the employees alone [would have] shed no new light on the Forest Service's performance of its duties beyond that which [was] publicly known," *not* on whether the government's investigations showed there was no wrongdoing by its fire fighters. 524 F.3d 1021, 1027 (9th Cir. 2008). The Court went on to hold, much like *Tuffly*, that "[a]s a result of the substantial information already in the public domain," disclosure of the names there "would not appreciably further the public's important interest in monitoring the agency's performance" of its duties. *Id.* at 1028. For the reasons articulated in Section I, such is obviously not the case here.

In sum, the government cites no case, and *amici* are unaware of any, that stands for the proposition that when a requester *has* met its threshold burden of showing the possibility of misconduct under *Favish* in an Exemption 7(C) case, the government may introduce its own rebuttal evidence in an attempt to show a lack of a possibility of misconduct. This Court should not accept DHS's attempt to provide such when the Supreme Court's holding in *Favish* is clear.

III. DHS failed to meet its burden of proof that agents accused of child abuse have a nontrivial, personal privacy interest in the nondisclosure of their names that overcomes the public's powerful interest in disclosure.

Finally, DHS has submitted inadequate evidence of a privacy interest that would justify withholding the names of the government employees in question. A court must consider privacy interests "in light of the consequences that would follow," *Favish*, 541 U.S. at 170, because "[d]isclosure does not, literally by itself, constitute a harm[.]" *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 878 (D.C. Cir. 1989). The consequences of disclosure must threaten a privacy interest that is nontrivial and more than *de minimis*. *Ray*, 502 U.S. at 173; *cf. Favish*, 541 U.S. at 170 (holding the family's interests in privacy were "weighty"). The threat must be "more palpable than mere possibilities," *Dep't of Air Force v. Rose*, 425 U.S. 352, 380 n.19 (1976) (discussing legislative history and privacy interests under Exemption 6), and more than "conceivable on some generalized, conjectural level," *Cameranesi*, 856 F.3d at 639 (quoting *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 694 (9th Cir. 2012) (discussing the privacy interests an agency must establish to justify invoking Exemption 6), *overruled on other grounds by Animal Legal Def. Fund v. Food & Drug Admin.*, 836 F.3d 987 (9th Cir. 2016)).

Here, DHS makes a general statement, not unique to government officials, in only two paragraphs of an affidavit, that border patrol agents and others accused of abusing children in detention facilities have an interest in avoiding "harassment." ER II at 249–51. DHS's "evidence" is flatly inferior to evidence required by other cases,

which make clear that the court must engage in a fact-specific inquiry dependent on the particulars of the individual with the privacy interest. *Favish*, 541 U.S. at 171; *Ray*, 502 U.S. at 177. And crucially, that fact-specific inquiry must recognize that the privacy interests of government employees are different from that of non-governmental persons, whose privacy interests are at the "apex" of FOIA. *Lahr*, 569 F.3d at 975–77.

For example, in *Ray*, the Supreme Court held that Haitian deportees, who the United States government interviewed, had a privacy interest under Exemption 6 in avoiding disclosure of their names. 502 U.S. at 176. Indeed, "this group of interviewees occupie[d] a special status: They left their homeland in violation of Haitian law and [were] protected from prosecution by their government's assurance to the State Department." *Id.* The Court relied on a sworn declaration from the government detailing the personal privacy interests of the individuals who the United States interviewed. *Id.* at 168–69, 169 n.5, 175 n.11, 175–76.

In *Tuffly*, this Court found that undocumented, private persons who ICE released from detention pending a final determination in their removal proceedings had a cognizable privacy interest in their names not being revealed because an ICE FOIA officer submitted a sworn declaration detailing the possible repercussions of releasing the names of those vulnerable individuals. *See* 870 F.3d at 1091, 1096. "There [was] no question, as the government point[ed] out, that undocumented immigrants face a serious risk of harassment, embarrassment, and even physical violence and reprisal by citizens and law enforcement." *Id.* at 1096 (internal quotation marks omitted). This

Court proceeded to cite numerous, well-documented instances where undocumented persons were subject to harassment and reprisal by law enforcement and private persons. *Id.*

In short, *Ray* and *Tuffly* involved especially vulnerable populations of persons and even in those cases the government made a stronger showing for not disclosing their names than the government did here.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the District Court for the District of Arizona.

Dated: December 21, 2018

Respectfully submitted,

s/ Cortelyou C. Kenney
Cortelyou C. Kenney
Counsel of Record
Mark H. Jackson
George El-Khoury, Law Student Intern
FIRST AMENDMENT CLINIC[7]
CORNELL LAW SCHOOL
Myron Taylor Hall
Ithaca, NY 14853
607-255-8897
cck93@cornell.edu

[7] This brief was prepared by the First Amendment Clinic at Cornell Law School. The brief does not purport to express the school's institutional views, if any.

APPENDIX A

List of Additional *Amici Curiae*:

American Society of News Editors
Associated Press Media Editors
Association of Alternative Newsmedia
Courthouse News Service
The E.W. Scripps Company
First Look Media Works, Inc.
Freedom of the Press Foundation
Gannett Co., Inc.
International Documentary Assn.
Investigative Reporting Workshop at American University
The McClatchy Company
The Media Institute
MPA – The Association of Magazine Media
National Press Photographers Association
The New York Times Company
Online News Association
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FOR THE NINTH CIRCUIT

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