No. 18-15416

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DENNIS JOSEPH RAIMONDO AND ERIC ANTHONY GARRIS,

Plaintiffs-Appellants,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant-Appellee.

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

BRIEF FOR APPELLEE

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The district court entered final judgment on January 12, 2018. ER 205 (Dkt. No. 123). Plaintiffs timely appealed on March 13, 2018. ER 206 (Dkt. No. 130); *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court properly exercised its discretion in deferring consideration of plaintiffs' request to compel the deposition of two retired agents of the Federal Bureau of Investigation, and in relying on agency declarations in granting summary judgment to the government.

2. Whether the district court correctly held that the Federal Bureau of Investigation lawfully created and retained records including descriptions of plaintiffs' exercise of their First Amendment rights, because those records came within the law-enforcement activities exception of the Privacy Act.

PERTINENT STATUTE

A provision of the Privacy Act directs agencies that "maintain[] a system of records" to "maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. § 552a(e)(7).

STATEMENT OF THE CASE

I. Nature of the Case

This appeal concerns a limited set of issues involving two records arising from a case that involved multiple claims under the Freedom of Information Act (FOIA) and Privacy Act. Plaintiffs filed suit against the Federal Bureau of Investigation (FBI) seeking records regarding a 2004 threat assessment conducted by the FBI's Newark Field Office (2004 Memo), concerning a website with which plaintiffs are affiliated, and plaintiffs themselves. ER 40. After the suit was filed, the FBI released some responsive records and asserted statutory exemptions as to others. ER 47. The parties filed cross-motions for summary judgment concerning the FOIA claims, which the district court denied without prejudice, finding an inadequate factual basis for decision. ER 55.

Plaintiffs also sought expungement under the Privacy Act of certain records related to the exercise of their First Amendment rights. ER 40. As relevant here, the district court granted the FBI summary judgment with respect to plaintiffs' claim concerning the 2004 Memo and its attachments, which implicated plaintiffs' activity protected by the First Amendment. ER 59, 526. Plaintiffs argued that the FBI's creation and retention of the records violated a Privacy Act provision generally prohibiting the maintenance of such records. ER 57-58. In granting the FBI's motion for summary judgment on that claim, the district court concluded that the 2004 Memo came within the law-enforcement activities exception to the prohibition

against the maintenance of records implicating an individual's exercise of First Amendment rights. ER 58-65.

After the district court issued its summary judgment decision, the FBI released further documents to plaintiffs, and the parties stipulated to the dismissal of plaintiffs' FOIA claims. ER 1. The district court permitted plaintiffs to raise an additional First Amendment Privacy Act challenge to one of the newly released documents, a 2006 memorandum prepared by the FBI's Oklahoma City Field Office (2006 Memo), which also implicated plaintiffs' exercise of First Amendment rights. ER 3. In a second order, the district court granted summary judgment to the FBI, concluding that the 2006 Memo, like the 2004 Memo, came within the law-enforcement activities exception. ER 11.

At issue in this appeal are the district court's grant of summary judgment to the FBI concerning plaintiffs' First Amendment Privacy Act claims related to the 2004 and 2006 Memos, and some discovery and evidentiary decisions the district court made during the proceedings.

II. Statutory Background

The Privacy Act generally prohibits agencies from "maintain[ing a] record describing how any individual exercises rights guaranteed by the First Amendment." 5 U.S.C. § 552a(e)(7); *see id.* § 552a(a)(3) (defining the term "maintain" to "include[] maintain, collect, use, or disseminate"). Congress enacted that prohibition to "prevent[] collection of protected information not immediately needed, about law-

abiding Americans, on the off-chance that [the] Government or the particular agency might possibly have to deal with them in the future." S. Rep. No. 93-1183, at 57 (1974). Congress also enacted exceptions to that prohibition for the maintenance of records implicating the exercise of First Amendment rights that is "expressly authorized by statute or by the individual about whom the record is maintained" or records that are "pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. § 552a(e)(7). The last exception is commonly referred to as "the law enforcement activities exception." *MacPherson v. IRS*, 803 F.2d 479, 482 (9th Cir. 1986). Whether the maintenance of a record comes within the exception requires "an individual, case-by-case" analysis. *Id.* at 484.

III. Factual Background

A. In March 2004, the Terrorism Watch and Warning Unit of the FBI's Counterterrorism Division sent a notice to all FBI field offices "advis[ing] that the post-9/11 'watch list,' 'Project Lookout,' was posted on the Internet and may contain the names of individuals of active investigative interest." ER 526. "While conducting research on the Internet," an agent of the FBI's Newark Field Office discovered on the website www.antiwar.com "an untitled spreadsheet, dated 10/03/2001" that "contained the names, [dates of birth], [social security account numbers], addresses and other columns." ER 526. That spreadsheet was "a possible [FBI] 'watch list.'" ER 521. The agent's discovery prompted further investigation of the website, which uncovered a second spreadsheet, dated May 22, 2002; written in Italian; labeled "FBI

SUSPECT LIST"; and containing the header "Law Enforcement Sensitive," a "dissemination control marking used to protect information that may be used in, or is related to a criminal investigation or prosecution." ER 521 & n.3; *see* ER 526. The second spreadsheet similarly contained personally identifying information.[1] ER 528. In light of these discoveries, the Newark Field Office undertook a threat assessment of the website, and of plaintiffs, who were listed on the website as Managing Editor and Editorial Director. ER 526.

A "threat assessment" "is the lowest level investigative activity authorized by" *The Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection* (Oct. 31, 2003) (the *2003 AG Guidelines*), which governed the 2004 threat assessment. ER 520; *see* ER 550. The purpose of a threat assessment is "to investigate or collect information relating to threats to the national security, including information on individuals, groups, and organizations of possible investigative interest, and information concerning possible targets of international terrorism, espionage, foreign computer intrusion, or other threats to the national security." ER 551. In conducting a threat assessment, the *2003 AG Guidelines* authorize the FBI, among other things, to "[o]btain publicly available information"; "[a]ccess and examine FBI and other Department of Justice records"; "[c]heck records maintained

[1] To preserve the integrity of its investigations and in the interest of national security, the FBI has not confirmed or denied the authenticity of the purported FBI watch list or the other purported list of suspects that are at issue in this case.

by, and request information from, other federal, state, and local governments"; and "[u]se online services and resources (whether non-profit or commercial)." ER 551; *see* ER 521.

A threat assessment may progress to the next level of investigative activity, a "preliminary investigation," if "there is information or an allegation indicating that a threat to the national security may exist." ER 542. And a preliminary investigation may develop into a "full investigation," the highest level of investigation, "when there are specific and articulable facts giving reason to believe that a threat to the national security may exist." ER 543. A national-security investigation thus may terminate at the threat-assessment stage, if no discovered information or allegation supports the conclusion that a threat to the national security may exist.

Pursuant to the *2003 AG Guidelines*, the Newark Field Office sought information about plaintiffs and their website by reviewing FBI records (ER 527-28), searching state records (ER 529), and using internet resources to gather public and commercial information (ER 531-32). The 2004 Memo "captures the threat assessment investigative activity" undertaken by the Newark Field Office. ER 522. The memorandum included as attachments the two spreadsheets that provoked the threat-assessment investigation, a commercial business summary concerning plaintiffs' website, five news articles, and three internet postings. ER 526.

As a result of the threat assessment, the Newark Field Office recommended that the San Francisco Field Office, the field office for the region where plaintiffs and

their website were located, undertake a preliminary investigation to determine whether plaintiffs "are engaging in, or have engaged in, activities which constitute a threat to National Security on behalf of a foreign power." ER 534. The author of the 2004 Memo commented that "[t]he rights of individuals to post information and to express personal views on the Internet should be honored and protected." ER 532. In addition, the discovery of the two spreadsheets on plaintiffs' website "may not be significant by itself since distribution of the information on such lists are wide spread." *Id.* But, the analyst continued, "it is unclear whether * * * there is material posted that is singular in nature and not suitable for public release." *Id.* The comment noted "several unanswered questions" about plaintiffs and their website, and explained that "[m]any individuals worldwide do view this website including individuals who are currently under investigation." ER 533.

The San Francisco Field Office reviewed the Newark Field Office's referral and plaintiffs' website, and concluded that the information contained on the website "is public source information and not a clear threat to National Security." ER 416. Nor did the San Francisco Field Office find "any direct nexus to terrorism nor the threat of compromising current FBI investigations." *Id.* Instead, the San Francisco Field Office concluded, the website is an expression of plaintiffs' "constitutional right to free speech." *Id.* For those reasons, the San Francisco Field Office "declined initiation of [a] preliminary investigation[]." ER 415.

B. In 2006, the FBI's Oklahoma City Field Office memorialized information about an upcoming event that might raise security and public safety concerns. ER 252-53. The 2006 Memo explained that Halliburton planned to hold its annual shareholders' meeting soon in Duncan, Oklahoma, one of Halliburton's places of business. *Id.* Halliburton's annual meeting had in the past been the target of multiple protest groups (ER 252), and activity at those protests had led to multiple arrests (ER 249). To prepare for the event, the Oklahoma City Field Office coordinated with local law enforcement. ER 249. The FBI field office was informed that local police would transport certain "VIPs" by motorcade from the airport to their hotel. ER 253. The field office was also informed about the events surrounding the shareholders' meeting, and the expected number of people attending those events. *Id.* Finally, a third party gave the field office the internet addresses of eleven websites that had posted information about the meeting. *Id.* The 2006 Memo's inclusion of the websites was to "convey[] the level of public awareness of the event," and so to "assist law enforcement in their preparedness." ER 249. Plaintiffs' website was among those listed. That listing is the only mention of plaintiffs' website, and plaintiffs themselves are not identified in the 2006 Memo.

IV. Prior Proceedings[2]

In 2011, plaintiffs discovered a "heavily redacted" version of the 2004 Memo. ER 41. A few months later, they each filed FOIA and Privacy Act requests with the FBI, seeking disclosure of various records. *Id.* The FBI initially responded that it was unable to identify responsive records in the FBI's Central Records System. *Id.* After correspondence between plaintiffs' counsel and the FBI, the FBI continued its search. ER 41-42. Having not received records from the FBI, in 2013 plaintiffs filed suit under FOIA and the Privacy Act, seeking disclosure of documents. ER 42. The FBI released various documents to plaintiffs, including a less redacted version of the 2004 Memo. ER 43. Separately, plaintiffs filed a request with the FBI seeking expungement of all records maintained by the FBI that describe plaintiffs' exercise of their First Amendment rights. *Id.* The FBI denied that request, stating that it was properly maintaining the records under the Privacy Act. *Id.*

Plaintiffs administratively exhausted their expungement requests, and they amended their complaint to add additional claims, alleging that the FBI was maintaining records about plaintiffs' First Amendment activity in violation of 5 U.S.C. § 552a(e)(7).[3] ER 42. After the district court deferred consideration of plaintiffs'

[2] This section describes the prior proceedings only as they are relevant to this appeal.

[3] The two claims involved two different records, only one of which remains at issue in this appeal: the 2004 Memo.

motion to compel two retired FBI agents to submit to depositions (*see* ER 144-60), the parties filed cross-motions for summary judgment, which the district court denied with respect to plaintiffs' FOIA claims, because it found the record to provide an inadequate basis for decision (ER 55, 67). The district court granted summary judgment to the FBI on plaintiffs' expungement claims, however. ER 67.

With respect to the 2004 Memo, the district court noted that the FBI did not dispute that the memorandum describes plaintiffs' exercise of their First Amendment rights. But it held that the memorandum comes within the Privacy Act's law-enforcement activities exception. This Court's *MacPherson* decision, the district court explained, recognized competing policy interests informing the application of the law-enforcement activities exception. ER 58 (discussing *MacPherson v. IRS*, 803 F.2d 479, 484 (9th Cir. 1986)). On the one hand, compilation of records describing the exercise of First Amendment rights can have a chilling effect, and an overly broad application of the exception could swallow the rule generally prohibiting the maintenance of records describing First Amendment activity. *Id.* On the other hand, legitimate investigation "inevitably involves observation and recording" of innocent behavior, including First Amendment Activity. *Id.* (quoting *MacPherson*, 803 F.2d at 484). An overly narrow application of the law-enforcement activities exception "could thwart agency investigations and seriously undermine agency enforcement operations." ER 58-59 (quoting *MacPherson*, 803 F. 2d at 484).

The district court concluded that the FBI's creation and retention of the 2004 Memo is directly analogous to the IRS records that came within the law-enforcement activities exception in *MacPherson*. ER 60-61. In that case, in the course of investigating the tax-protester movement, the IRS took notes on a public speech MacPherson gave, and it purchased recorded copies of his prior speeches. ER 60 (discussing *MacPherson*, 803 F. 2d at 480). This Court held that the IRS's creation and retention of the records came within the law-enforcement activities exception because the speeches were publicly given, and the records were "necessary to give the agency a complete and representative picture of the events." *Id.* (quoting *MacPherson*, 803 F. 2d at 484). Similarly, the FBI created the 2004 Memo by drawing on plaintiffs' publicly available articles and postings, among other things. ER 61. The court held that the FBI's documentation of its investigation in the 2004 Memo, which attached some of plaintiffs' writings, was necessary to give the FBI a complete picture of how and why the possible watch-list spreadsheets appeared on plaintiffs' website. *Id.*

The district court rejected plaintiffs' argument that the FBI properly could review and analyze their public postings, including the spreadsheets, but could not memorialize its investigation. ER 61. That rule would put the FBI in "an untenable position"—permitting national-security investigations but prohibiting any documentation that might implicate First Amendment activity. *Id.* The court found such a rule irreconcilable with *MacPherson*, which recognized that the law-enforcement activities exception specifically permits investigative agencies to create and maintain

some documents that describe the exercise of First Amendment rights. *Id.* Consequently, the district court found no genuine dispute about whether the FBI's written threat assessment is pertinent to an authorized law-enforcement activity, and it granted summary judgment to the FBI on plaintiffs' Privacy Act claim concerning the 2004 Memo. In granting summary judgment to the FBI, over plaintiffs' objections, the district court relied on a declaration of Andrew Campi, an Assistant Special Agent in Charge of the Newark Field Office (Campi Declaration). *See* ER 518-23.

The district court also relied on decisions of the D.C. and Seventh Circuits in rejecting plaintiffs' argument that the Privacy Act requires the expungement of the 2004 Memo because it is "not pertinent to any *ongoing* law enforcement activity." ER 63; see ER 63-65 (discussing *J. Roderick MacArthur Found. v. FBI*, 102 F.3d 600 (D.C. Cir. 1996) and *Bassiouni v. FBI*, 436 F.3d 712 (7th Cir. 2006)).

After the district court issued its summary judgment order, the FBI released further documents to plaintiffs, and the parties stipulated to the dismissal of plaintiffs' FOIA claims. ER 1. Plaintiffs filed a motion for reconsideration of the district court's summary judgment order, which the court denied as to the 2004 Memo, but granted to permit plaintiffs to seek expungement of the 2006 Memo, which the FBI had released to plaintiffs in a less-redacted form after the court entered its summary judgment order. *See* ER 32-38. The parties filed new cross-motions for summary judgment; the district court granted the FBI's motion. ER 1-12. Plaintiffs conceded that the 2006 Memo was prepared for law-enforcement activity concerning the

Halliburton shareholders' meeting. ER 9. They argued, however, that the Privacy Act prohibited the FBI from identifying and recording websites that referenced the Halliburton meeting. *Id.* The district court rejected that contention, holding that "[i]nformation as to how broadly information regarding the meeting was shared, and how it was shared, is relevant to determining what law enforcement might expect to occur at the meeting and how it should prepare in advance." ER 10. Accordingly, the court concluded, the 2006 Memo "falls squarely within the authorized law enforcement activity exception to (e)(7)." *Id.*; see *id.* ("No other inference is reasonable from the record."). In so ruling, the district court relied on the declaration of Raul Bujanda (Bujanda Declaration), an Assistant Special Agent in Charge of the Oklahoma City Field Office, again over plaintiffs' objection. *See* ER 247-50.

SUMMARY OF ARGUMENT

I. The district court correctly ruled on plaintiffs' discovery requests and evidentiary challenges.

A. Plaintiffs object to the district court's decision to defer consideration of their request to compel two retired FBI agents to submit to depositions until after the FBI filed its summary judgment motion. The district court explained that it deferred that discovery because it was not yet clear on what rationale and evidence the FBI would rely in its summary judgment motion, and thus it was unclear whether the plaintiffs needed the depositions. When the FBI filed its summary judgment motion, plaintiffs did not renew their request to depose the retired agents, though Federal

Rule of Civil Procedure 56(d) specifically provides for additional discovery if that is needed to oppose a summary judgment motion. Instead, plaintiffs filed a cross-motion for summary judgment, stating that there remained no genuine issue of material fact. As this Court has recognized, a district court properly exercises its discretion in deferring discovery in a Privacy Act case until after summary judgment where, as here, the party seeking discovery fails to avail himself of the Rule 56(d) procedure. *Lane v. Department of Interior,* 523 F.3d 1128, 1135 (9th Cir. 2008).

B. Plaintiffs further contend that the district court erred in relying on declarations by FBI agents in granting summary judgment to the FBI because, plaintiffs say, the declarations were not based on personal knowledge, as required by Federal Rule of Civil Procedure 56(c)(4). An FBI agent is competent to testify not only to matters within his personal experience, but also as to his own observations concerning relevant documents, and as to agency investigative procedures and practices about which he has personal knowledge. *Londrigan v. FBI*, 670 F.2d 1164, 1174 (D.C. Cir. 1981).

The Campi Declaration was based on Campi's observations concerning the 2004 Memo and its attachments, Campi's review of the authority provided by the *2003 AG Guidelines*, and Campi's experience with FBI investigations during the period in question. Campi's declaration was therefore based on his personal knowledge, within the meaning of Rule 56(c)(4). With one exception, the Bujanda Declaration was similarly based on Bujanda's review of relevant documents and authorities and his

experience with FBI investigative procedures during the period in question. The exception is a hearsay statement contained in the declaration. But a district court may consider hearsay at summary judgment if the underlying evidence could be provided at trial in an admissible form. *JL Beverage Co. v. Jim Beam Brands, Co.*, 828 F.3d 1098, 1110 (9th Cir. 2016). The FBI informed the district court that it could provide live witnesses with direct knowledge to testify about the matter addressed in the hearsay statement. Accordingly, the district court properly relied on both the Campi and Bujanda Declarations in ruling on the FBI's summary judgment motion.

II. The district court properly granted summary judgment to the FBI on plaintiffs' First Amendment Privacy Act challenge to the 2004 and 2006 Memos because those memoranda are "pertinent to and within the scope of an authorized law enforcement activity," under the "individual, case-by-case" analysis employed by this Court to evaluate such claims. 5 U.S.C. § 552a(e)(7); *MacPherson v. IRS*, 803 F.2d 479, 484 (9th Cir. 1986).

A. The 2004 Memo documents a threat assessment undertaken by the FBI's Newark Field Office concerning plaintiffs and their website. The field office undertook that assessment after receiving a notice from the FBI's Counterterrorism Division that a post-9/11 watch list had been posted on the internet, and after finding a possible copy of the watch list on plaintiffs' website. Further investigation of the website disclosed a second spreadsheet containing personally identifiable information about individuals who might have been under FBI investigation. In light of these

discoveries, the Newark Field Office undertook a threat assessment, the lowest level of investigative activity, to determine whether plaintiffs or their web might pose "threats to the national security" and so might be "individuals * * * of possible investigative interest." ER 551.

The field office's threat assessment employed procedures and reviewed sources expressly authorized by the *2003 AG Guidelines*. The 2004 Memo documented that investigation and attached public documents, including some of plaintiffs' writings. Those writings were "necessary to give the agency a complete and representative picture of the events" under investigation—whether plaintiffs might pose a national-security threat. *MacPherson*, 803 F.2d at 484. The 2004 Memo and its attachments are therefore "pertinent to and within the scope of an authorized law enforcement activity" (5 U.S.C. § 552a(e)(7)), and therefore fall within the law-enforcement activities exception.

B. The 2006 Memo likewise falls within the law-enforcement activities exception. That memorandum referred to plaintiffs' website only once, as part of a list of websites that had publicized the annual Halliburton shareholders' meeting. Plaintiffs do not contest the propriety of the FBI investigation into the possible law-enforcement needs related to an annual meeting at which there had been past arrests. Instead, plaintiffs contend that FBI policy required the memorandum itself to specifically identify the law-enforcement purpose for which it was prepared. But nothing in the Privacy Act requires a record to explicitly identify the authorized law-

enforcement activity to which it relates. Indeed, that is why courts permit the FBI to submit declarations explaining the record and how it relates to such activity. And, in any event, plaintiffs misinterpret the applicable FBI policy, which nowhere suggests that every document prepared by the FBI expressly identify the law-enforcement purpose for which it was prepared. Such a requirement would defy common sense.

C. Finally, the district court properly determined that the FBI is authorized to retain the 2004 and 2006 Memos and their attachments after the termination of the relevant investigations. The unambiguous text of the Privacy Act authorizes an agency to "maintain" records falling within the law-enforcement activities exception, and it defines "maintain" to include "maintain" and "collect." 5 U.S.C. § 552a(a)(3), (e)(7). The text of the statute thus authorizes maintenance of records in addition to collection. The only courts of appeals to have addressed the issue have also recognized that an agency may retain records touching on the exercise of First Amendment rights but created for an authorized law-enforcement activity. The D.C. Circuit has held that the law-enforcement activities exception activities always allows an agency to retain otherwise properly collected records. *J. Roderick MacArthur Found. v. FBI*, 102 F.3d 600, 605 (D.C. Cir. 1996). The Seventh Circuit requires the agency to "reasonably demonstrate" that the records "will be pertinent in its efforts to evaluate the significance of future situations." *Bassiouni v. FBI*, 436 F.3d 712, 725 (7th Cir. 2006)). This Court need not decide which standard governs, because the FBI declarations in the record make the showing the Seventh Circuit requires.

STANDARD OF REVIEW

This Court reviews a district court's discovery and evidentiary rulings for a "clear abuse of discretion." *Cheffins v. Stewart*, 825 F.3d 588, 596 (9th Cir. 2016) (evidentiary rulings); *Lane v. Department of Interior*, 523 F.3d 1128, 1134 (9th Cir. 2008) (discovery rulings). It reviews "*de novo* a grant of summary judgment in Privacy Act claims." *Lane*, 523 F.3d at 1138.

ARGUMENT

I. The District Court's Discovery and Evidentiary Decisions Were a Proper Exercise of Discretion

A. By Choosing Not to Renew Their Request to Compel the Depositions of the Retired Agents, Plaintiffs Waived Any Challenge to the District Court's Discovery Decision

1. This Court has distinguished, for discovery purposes, between Privacy Act claims seeking access to documents, and those seeking other relief under the Privacy Act. For right-of-access claims, it generally is proper for a district court to defer discovery until after ruling on the government's motion for summary judgment. *See Lane v. Department of Interior*, 523 F.3d 1128, 1134 (9th Cir. 2008) (Because "the underlying case revolves around the propriety of revealing certain document" for right-of-access claims, "courts may allow the government to move for summary judgment before the plaintiff conducts discovery."). Other types of Privacy Act claims, by contrast, "might * * * initially warrant[] discovery" because those claims "d[o] not revolve around the propriety of disclosing certain documents." *Id.* at 1135.

This Court has emphasized, however, that even for other Privacy Act claims, a district court properly exercises its discretion in "delay[ing] [a plaintiff's] discovery until after the government file[s] its summary judgment motion" if the plaintiff does not "follow the proper procedures" and fails to "request[] additional discovery to respond to that motion under Fed. R. Civ. P. [56(d)]."[4] *Id.*; *see* Fed. R. Civ. P. 56(d) (authorizing a court to "allow time to obtain affidavits or declarations or to take discovery" if "a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition").

In this case, plaintiffs sought to depose two retired FBI agents not parties to this suit, who made the recommendation in the 2004 Memo to open the preliminary investigation. ER 145. The FBI sought a protective order to quash plaintiffs' deposition subpoenas. *Id.* The district court granted the FBI's motion for a protective order "without prejudice to Plaintiffs' renewal of their request for additional targeted discovery" (ER 142; *see* ER 155), so that plaintiffs could review the FBI's motion for summary judgment and supporting declarations to consider "if there's particular discovery, additional depositions that" plaintiffs believed necessary (ER 154). If plaintiffs did decide that additional depositions were necessary, the district court explained, they could file a motion under Rule 56(d). ER 156. After the

[4] *Lane* referred to Federal Rule of Civil Procedure 56(f). In the 2010 amendments to Rule 56, "[s]ubdivision (d) carrie[d] forward without substantial change the provisions of former subdivision (f)." Fed. R. Civ. P. 56(d) advisory committee's note to 2010 amendment.

FBI filed its motion for summary judgment, plaintiffs did not renew their request to depose the retired FBI agents. Instead, they opposed the government's motion for summary judgment and filed their own cross-motion for summary judgment. ER 201 (Dkt. No. 82).

Lane directly controls plaintiffs' objection to the district court's discovery decision. Because plaintiffs "failed to follow the proper procedures, it was within the district court's discretion to rule" on plaintiffs' Privacy Act claims "at summary judgment." 523 F.3d at 1135; *see id.* ("The [plaintiff] can hardly argue at this late date that the district court abused its discretion in ruling on the summary judgment motion in light of the fact that [the plaintiff] failed to pursue the procedural remedy which the Federal Rules so clearly provided.") (quoting *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 954 (9th Cir. 1978)).

Moreover, plaintiffs' decision not to renew their request for the depositions was a deliberate litigation choice. Plaintiffs' counsel informed the district court that, although plaintiffs would prefer to have the agents' depositions "upfront," "if we would have the ability, once the Government files its motion [for summary judgment], to revert to this issue and take the depositions then, possibly that could be workable." ER 150. Plaintiffs' counsel further represented to the court that, "if we decide that the Rule 56 motion isn't necessary," then "we could just stick to the [summary judgment] schedule." ER 157. Because plaintiffs deliberately chose not to renew their request for the retired agents' depositions and instead chose to file a motion for

summary judgment, plaintiffs have no basis to second-guess the district court's discovery decision. *See Ackermann v. United States*, 340 U.S. 193, 198 (1950) ("Petitioner cannot be relieved of such a [litigation] choice because hindsight seems to indicate to him that his decision * * * was probably wrong.").

2. Plaintiffs concede that they "did not reapply to the district court to take the agents' depositions after the FBI filed its summary judgment motion." Br. 36 n.10. They seek to excuse that omission because, they assert, "the FBI did not submit declarations from the former agents or any other evidence that would have impacted the district court's rationale for granting the protective order." *Id.* That characterization is incorrect.

The district court asked whether "the government [is] going to rely on declarations from these agents in support of summary judgment." ER 147. But the district court's rationale for issuing the protective order was based on the more general point that it was unduly burdensome to require retired FBI agents to sit for depositions when it was not then clear on what evidence the FBI would rely in support of its motion for summary judgment. *See, e.g.*, ER 149 ("[W]hat's the harm in waiting to see what the Government's proffer is, what their motion for summary judgment is? * * * [A]t least then we're dealing with something that's precise, as opposed to a hypothetical."); ER 148 ("[W]e don't know what [any declaration submitted by the FBI is] going to look like or what it's going to say; [] at [that] point you see if you need that discovery or not."). The district court unambiguously

informed plaintiffs that, once the FBI filed its motion for summary judgment, plaintiffs "can figure out if there's particular discovery, additional depositions that you think you need." ER 154. Thus, plaintiffs cannot credibly contend that they should be excused from their failure to file a Rule 56(d) motion because such a motion would have been futile.

Moreover, by cross-moving for summary judgment on their Privacy Act claims, plaintiffs represented to the district court that "there is no genuine dispute as to any material fact." Dkt. No. 82, at 4 (quoting Fed. R. Civ. P. 56(a)). Accordingly, for this additional reason, plaintiffs have waived any argument that the depositions they sought were essential to oppose the FBI's motion for summary judgment.

Plaintiffs further argue that the district court erred in granting the FBI's motion for a protective order because there was no good cause for such an order. Br. 32-36; *see* Fed. R. Civ. P. 26(c)(1) ("The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."). But "Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). Plaintiffs argued that they needed the retired agents' depositions to "test" the FBI's argument that the 2004 Memo comes within the Privacy Act's law-enforcement activities exception. ER 147. As noted, the court observed that, because the FBI had yet to file a motion for summary judgment or to submit any supporting declarations, it was not yet clear *what* argument the FBI

would make to support its invocation of the law-enforcement activities exception. ER 148.

Weighing plaintiffs' minimal interest in obtaining the declaration prior to the FBI's filing of a summary judgment motion against the "common sense" burden imposed on non-party declarants in testifying about "work for the Government ten years ago" concerning a matter they "may or may not remember," and which "could just be a complete waste of time" depending on the FBI's summary judgment evidence and arguments, the district court deferred consideration of plaintiffs' request to compel the retired agents to submit to depositions. ER 148, 149; *see* ER 148 (in response to district court's observation that the depositions would be burdensome to the retired agents, plaintiffs' counsel remarked that "[y]our point is well taken"). Even if plaintiffs had not waived the issue, the district court acted well within its discretion to issue a protective order, deferring discovery until after the FBI filed its summary judgment motion, at which time plaintiffs could "see if [they] need that discovery or not" to oppose the FBI's motion.[5] ER 148.

[5] Because the district court only deferred consideration of plaintiffs' request to take the retired agents' depositions, plaintiffs mistakenly rely on *Blankenship v. Hearst Corp.* for the proposition that "a strong showing is required before a party will be *denied entirely* the right to take a deposition." Br. 33 (quoting 519 F.2d 418, 429 (9th Cir. 1975)) (emphasis added).

B. The District Court Properly Relied on Agency Declarations in Considering the Applicability of the Law-Enforcement Activities Exception

1. Federal Rule of Civil Procedure 56(c)(4) provides that "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Personal knowledge is not limited to activities in which the declarant has personally participated. In the law-enforcement context, an FBI agent is "competent to testify to," among other things, "his own observations upon review of the documents" and "the agency's procedures with respect to investigations during his own tenure therewith and earlier practices of which he possesses personal knowledge." *Londrigan v. FBI*, 670 F.2d 1164, 1174 (D.C. Cir. 1981).[6]

a. As explained below, the district court properly relied on the Campi Declaration in holding that the 2004 Memo comes within the law-enforcement activities exception. But this Court need not address the propriety of the district court's reliance on that declaration in ruling on the FBI's summary judgment motion. The district court correctly concluded that the 2004 Memo on its face disclosed that

[6] *Londrigan* referred to Federal Rule of Civil Procedure 56(e). In the 2010 amendments to Rule 56, "[s]ubdivision (c)(4) carrie[d] forward some of the provisions of former subdivision (e)(1)," including the provision quoted in the text above. Fed. R. Civ. P. 56(c)(4) advisory committee's note to 2010 amendment.

the information it assembled was for the purpose of a national-security threat assessment, as a review of the document discloses. ER 61-62; ER 525-34.

In any event, the Campi Declaration was based on personal knowledge. The declaration explained that Campi currently is an Assistant Special Agent in Charge of the FBI's Newark Field Office, having held that position since 2013. ER 518. Prior to that, Campi was a Supervisory Special Agent at the Newark Field Office from 2007 to 2013. *Id.* Campi has been employed as an FBI Special Agent since 1997. *Id.* While working in the Newark Field Office, Campi has managed "investigative activities related to criminal, intelligence and national security matters." ER 518.

Based on Campi's FBI "experience and review of information provided to [him] in the course of [his] official duties, including the April 30, 2004 [Memo] and the attachments thereto," Campi provided an explanation for "why the information in the April 30, 2004 [Memo] was * * * 'pertinent to and within the scope of an authorized law enforcement activity,' and why that record (including its attachments) should continue to be maintained." ER 519 (quoting 5 U.S.C. 552a(e)(7)). Campi explained that

- the *2003 AG Guidelines* authorize the FBI's investigation of national-security threats, which usually are both intelligence and criminal investigations (ER 519-20) (discussing ER 540-41);

- the 2004 Memo documented a threat assessment authorized by the 2003 guidelines (ER 521-22) (discussing ER 526, 551);

- the FBI's Counterterrorism Division had advised that "the post-9/11 watch list" that "might contain the names of individuals of active investigative interest" had been "posted on the internet" (ER 521) (quotation marks omitted) (discussing ER 526);

- the Newark Field Office's threat-assessment investigation was initiated after a member of the office discovered on plaintiffs' website a possible "watch list" (ER 521) (discussing ER 526);

- the 2004 Memo attached "a selection of publicly available articles regarding plaintiffs" and their website, "[t]o provide context for the information assembled" in the 2004 Memo (ER 522) (discussing ER 531-32); and that

- the 2004 Memo recommended that the FBI San Francisco Field Office elevate the national-security investigation to a preliminary investigation, to determine if plaintiffs "are engaging in, or have engaged in, activities which constitute a threat to National Security on behalf of a foreign power" (ER 522) (quoting ER 534).

All of these statements were Campi's observations based upon his review of the *2003 AG Guidelines* and the 2004 Memo with its attachments, and Campi's experience with FBI investigations during the period in question. Accordingly, Campi's declaration was based upon his personal knowledge, within the meaning of Rule 56(c)(4). *See Londrigan*, 670 F.2d at 1174. The district court therefore properly relied on the Campi Declaration in holding that the 2004 Memo comes within the Privacy Act's law-enforcement activities exception. *See* ER 59-62.

b. Similarly, the district court properly relied on the Bujanda Declaration in holding that the 2006 Memo comes within the law-enforcement activities exception. Bujanda explained in his declaration that he has been the Assistant Special Agent in

Charge for National Security for the FBI's Oklahoma City Field Office since 2016. ER 247. Bujanda previously was a Supervisory Special Agent from 2011 to 2016, and he became an FBI Special Agent in 2002. *Id.* Among Bujanda's responsibilities is to "ensure [the Oklahoma City Field Office's] analytic and operational efforts are leveraged effectively in the best interests of public safety." ER 248.

Bujanda explained that an FBI field office is responsible for maintaining "domain awareness," which includes understanding "national security and criminal threats and vulnerabilities" in the field office's area of responsibility. ER 248 (quoting ER 258 (FBI, *Domestic Investigations and Operations Guide* (Oct. 15, 2011) (*Investigations Guide*))). As part of that task, "to prepare for events that present potential security concerns," an FBI field office and local law enforcement "coordinate and advise one another of their advance preparations." *Id.* Bujanda stated that the 2006 Memo documented a "potential security and public safety concern" related to an upcoming Halliburton annual shareholders' meeting. ER 248-49. Past Halliburton meetings, Bujanda explained, had been the target of protest groups, and "activity at the protests resulted in multiple arrests." ER 249. In light of that history, "local law enforcement and the FBI" sought to coordinate to prepare for the event. *Id.* Bujanda stated that the 2006 Memo identifies plaintiffs' website, along with others, that, according to a third party, had posted information about the Halliburton meeting. *Id.*; *see* ER 253. The purpose of including such information in the memorandum was to gauge "the

level of public awareness of the event," which can help the FBI and local law enforcement prepare for potential security threats. ER 249.

With the exception of the history of security concerns, Bujanda's representations were based on his understanding of FBI procedure in general, and procedures in the Oklahoma City Field Office in particular, and on his observations concerning the 2006 Memo. ER 248. Those matters come within Bujanda's personal knowledge. *See Londrigan*, 670 F.2d at 1174; *see also Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990) (per curiam) (affiants' "personal knowledge and competence to testify" may be "reasonably inferred," in part, "from their positions").

With respect to the history of security concerns, Bujanda stated that he was informed by others that "FBI agents and local law enforcement had observed public safety concerns at Halliburton annual shareholders' meetings, and that activity at the protests resulted in multiple arrests." ER 249. Such hearsay ordinarily would not be admissible evidence. *See* Fed. R. Evid. 802. But "at summary judgment a district court may consider hearsay evidence submitted in an inadmissible form, so long as the underlying evidence could be provided in an admissible form at trial, such as by live testimony." *JL Beverage Co. v. Jim Beam Brands Co.*, 828 F.3d 1098, 1110 (9th Cir. 2016). Here, the FBI affirmed that it could provide witnesses with direct knowledge who could offer testimony about the history of public safety concerns. ER 9, 27. For that reason, the district court properly accepted Bujanda's representation concerning that matter in holding that the 2006 Memo comes within the law-enforcement activities

exception. *See Fraser v. Goodale*, 342 F.3d 1032, 1036-37 (9th Cir. 2003) (holding that court may consider contents of a diary, which are hearsay, for summary judgment purposes where author of the diary could present the same information in testimony at trial).

2. Plaintiffs' contrary arguments lack merit. As an initial matter, we note that in the district court, plaintiffs offered no evidence contradicting the representations made in the declarations, and they do not now identify any specific assertion in the declarations about which there was a factual dispute. Instead, they only argue that the court erred in relying on the declarations because they were inadmissible.

Plaintiffs generally argue that a declarant must have "participat[ed] in the facts that occurred" to have personal knowledge of the facts within the meaning of Rule 56(c)(4). Br. 38. That is not the law. *See Londrigan*, 670 F.2d at 1174 (An FBI agent is "competent to testify to," among other things, "his own observations upon review of the documents" and "the agency's procedures with respect to investigations during his own tenure therewith and earlier practices of which he possesses personal knowledge."); Br. 38 (conceding that an FBI agent has personal knowledge of observations based on review of agency records).

With respect to the Campi Declaration, plaintiffs contend that Campi lacked personal knowledge of the reason that the 2004 Memo included publicly available information about plaintiffs and their website. Br. 38-39. Campi explained that the inclusion of such information was "[t]o provide context for the information

assembled" in the 2004 Memo, including the discussion of the website's posting of a possible post-9/11 watch list. ER 521-22. The collection of "publicly available information," he further explained, is specifically authorized by the *2003 AG Guidelines* as part of "threat assessment investigative activity." ER 522 (citing ER 551); *see* ER 521 (listing the various information sources authorized by the *2003 AG Guidelines*).

Based on his review of the 2004 Memo, the *2003 AG Guidelines*, and his understanding of FBI investigative practices, Campi had personal knowledge of the reason the memorandum included publicly available information about plaintiffs and their website. *Londrigan*, 670 F.2d at 1174. That conclusion is fortified by the fact that Campi explained (ER 522) that the 2004 Memo generally sought to obtain various information authorized by the *2003 AG Guidelines* and relevant to the threat assessment. *See* ER 527-29, 551 (FBI files); ER 529, 531, 551 (other government records); ER 530-32, 551 (online resources). The Campi Declaration was therefore based on Campi's personal knowledge for purposes of Rule 56(c)(4).[7] *See Londrigan*, 670 F.2d at 1174.

[7] In ruling on the adequacy of the government's search for documents or the applicability of an exemption in FOIA cases, courts may rely entirely on agency affidavits from persons with knowledge of agency procedures and the documents sought. *See Lane*, 523 F.3d at 1135 (exemptions); *Lahr v. National Transp. Safety Bd.*, 569 F.3d 964, 986 (9th Cir. 2009) (adequacy of search). Plaintiffs fault the district court for allegedly applying that standard in the first summary judgment opinion to their First Amendment Privacy Act claims. Br. 37-38; *see* ER 44. However, that

Plaintiffs further argue that the district court improperly relied in the Bujanda Declaration because "his experience at the FBI's Oklahoma City Field Office" was an insufficient basis on which "to opine on what might have or would have happened years before he was employed there." Br. 39; *see* ER 8-9. But that conclusory assertion is unsupported by the record. Bujanda's declaration stated that, as Assistant Special Agent in Charge of the field office, Bujanda's responsibilities include "ensur[ing] [that the field office's] analytical and operational efforts are leveraged effectively in the best interest of public safety." ER 248. And included within that responsibility is the maintenance of "domain awareness," which involves an understanding of, among other things, "criminal threats and vulnerabilities" within the field office's purview. *Id.* Plaintiffs provide no reason to doubt those representations. The scope of responsibility Bujanda describes is an adequate basis on which Bujanda could form his observations about the purposes of the 2006 Memo. *Barthelemy*, 897 F.2d at 1018.

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opinion also addressed plaintiffs' access-to-records claims under the Privacy Act, which were then at issue. *See, e.g.*, ER 41. The FOIA personal-knowledge standard applies to such claims. *Lane*, 523 F.3d at 1139. The court did not separately address the personal-knowledge standard applicable to other types of Privacy Act claims until the second summary judgment opinion, where plaintiffs' challenge to the FBI's invocation of the law-enforcement activities exception was the only issue remaining. ER 7-9. There, the court recognized that where a declarant testifies to "the purpose for [a] historical document," and not just agency procedures, Rule 56 requires more. ER 7-8. For the reasons provided above, the district court's failure to explicitly discuss, in the first summary judgment opinion, the different standard applicable to the FBI's invocation of the law-enforcement activities exception is, at most, harmless error.

Finally, plaintiffs object to the district court's reliance on the hearsay evidence in Bujanda's declaration, despite FBI counsel's representation that the FBI could provide witnesses with direct knowledge who would testify at trial to the facts at issue. Br. 40. Plaintiffs assert that it was error for the court to "rely on statements by counsel to eliminate the parties' factual dispute." *Id.* However, plaintiffs' counsel conceded in the district court that plaintiffs could offer no evidence to contradict the hearsay statements concerning the history of arrests at the prior Halliburton events. ER 18, 28. And plaintiffs provide no reason to doubt the government's representation that witnesses with direct knowledge were available to testify.

II. The District Court Properly Granted the FBI Summary Judgment on Plaintiffs' Privacy Act Challenges to the 2004 and 2006 Memos

The district court correctly determined that the 2004 and 2006 Memos memorialized investigations that were "authorized law enforcement activit[ies]," and that the records relating to plaintiffs' exercise of First Amendment rights were "pertinent to and within the scope" of those investigations. 5 U.S.C. § 552a(e)(7). Moreover, the court correctly determined that the FBI may retain those records after the termination of the investigations for which they were prepared, because the FBI provided a legitimate law-enforcement reason for the documents' maintenance. Accordingly, the district court properly granted summary judgment to the FBI on plaintiffs' First Amendment Privacy Act claims.

A. The 2004 Memo Comes Within the Privacy Act's Law-Enforcement Activities Exception

1. This Court has held that the Privacy Act's law-enforcement activities exception should be given a narrower interpretation than the FOIA's law-enforcement purposes exemption. *MacPherson v. IRS*, 803 F.2d 479, 482 (9th Cir. 1986). The FOIA law-enforcement purposes exemption applies when an agency "establishes a rational nexus between its law enforcement duties and the document for which the exemption is claimed." *Id.* (quotation marks omitted). By contrast, whether a record comes with the Privacy Act's law-enforcement activities exception depends on "an individual, case-by-case" analysis, balancing the competing considerations of avoiding the creation of a chilling effect on the exercise of First Amendment rights, while ensuring that legitimate law-enforcement investigation that "inevitably involves observation and recording" of First Amendment activities is not unduly curtailed. *Id.* at 484; *see id.* ("[T]he very presence of the exception recognizes that some recording of First Amendment activities will take place.").

In considering the proper balance, this Court has held that the law-enforcement activities exception applies to more than "surveillance and recording" of information related to the investigation of "a specific offense or a specific person," because limiting the exception to that context "could thwart agency investigations and seriously undermine agency enforcement operations." *MacPherson*, 803 F.3d at 484. Moreover, the creation and retention of a record may come within the exception if

that is "necessary to give the agency a complete and representative picture of the events" under investigation. *Id.*

Here, shortly after receiving notice from the FBI's Counterterrorism Division that the FBI's post-9/11 watch list had been posted on the internet "and may contain the names of individuals of active investigative interest," an agent at the FBI's Newark Field Office found on plaintiffs' website a spreadsheet that was a possible copy of the post-9/11 watch list. ER 526. Further investigation of the website disclosed a second spreadsheet, labeled as an FBI suspect list and containing the personal identifying information of individuals whom the FBI might be criminally investigating or prosecuting. ER 521 & n.3, 526. The public release of these spreadsheets, whether authentic or not, "might have led to the compromise of then ongoing investigations." ER 521-22 (discussing second spreadsheet). Moreover, the Newark Field Office determined that plaintiffs' website was viewed by "individuals who are currently under investigation." ER 533. In light of these discoveries, the Newark Field Office undertook a threat assessment, searching for information indicating that plaintiffs or their website pose a threat to national security, thus justifying a preliminary investigation, the next level of investigative activity. ER 522, 526.

The threat assessment was authorized by the *2003 AG Guidelines* to undertake an investigation into whether plaintiffs (or their website) might pose "threats to the national security" and so might be "individuals * * * of possible investigative

interest." ER 551.[8] Moreover, the methods the Newark Field Office used to investigate this potential threat—obtaining publicly available information, consulting FBI records, checking the records of state governments, and using online resources—also are expressly authorized by the *2003 AG Guidelines*. *Id.*; *see* ER 527-32 (memorializing the results of those searches).

Plaintiffs allege that the Newark Field Office's creation of the 2004 Memo had a chilling effect on the exercise of their First Amendment Rights.[9] Br. 13-14. But while plaintiffs' decision to post the possible watch list and list of other FBI suspects was undoubtedly protected by the First Amendment, plaintiffs had to know—like the plaintiff in *MacPherson*, *see* 803 F.3d at 484—that by publicly posting such potentially sensitive information on their website, federal law enforcement would have a

[8] The *2003 AG Guidelines* are themselves authorized by Executive Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981). ER 540 (invoking executive order). And that executive order is, in turn, authorized by "the National Security Act of 1947, as amended" and the President's inherent constitutional authority. 46 Fed. Reg. at 59,941 (invoking those authorities).

[9] Plaintiffs further claim that the "[r]elease of the [2003] Memo led to a loss of [plaintiffs'] reputation" and a loss of financial support, among other harms. Br. 13; *see* Br. 13-14. But plaintiffs' First Amendment Privacy Act claim is about the FBI's creation and retention of a record, not about the release of any record. Improper disclosure claims are governed by a different provision of the Privacy Act. *See* 5 U.S.C. § 552a(b); *Lane*, 523 F.3d at 1440 ("[S]ection 552a(b) of the Privacy Act * * * prohibits disclosure of personnel files unless certain exceptions apply."). Plaintiffs' First Amended Complaint did not assert a claim under Section 552a(b). *See* Dkt. No. 28. Moreover, plaintiffs' claims about the alleged harms following the release of the 2003 Memo is seriously undercut by plaintiffs' decision to publicize the memorandum on their own website. See *Id.* ¶ 15.

legitimate concern about plaintiffs' intentions and about whether plaintiffs might pose a national-security threat. Indeed, plaintiffs acknowledge that the FBI was "free to look at the content of their website" as part of an investigation based on those concerns. Br. 51. They maintain, however, that the Privacy Act forbade the creation of any record that described plaintiffs' First Amendment activity "outside the scope of any national security concern." *Id.* But the selection of plaintiffs' public writings and postings that were attached to the 2004 Memo was indeed part of the FBI's national security concern. ER 522. Collecting select public writings by plaintiffs was plainly necessary to give the FBI a fuller understanding of plaintiffs' motives in an investigation into whether the plaintiffs themselves might present a national-security threat. The inclusion of some of plaintiffs' writings in the record of the FBI's investigation was therefore "necessary to give the agency a complete and representative picture of the events" under investigation. *MacPherson*, 803 F.2d at 484.

For those reasons, upon balancing the competing policy considerations, the 2004 Memo and its attachments are "pertinent to and within the scope of an authorized law enforcement activity" (5 U.S.C. § 552a(e)(7)), and so come within the law-enforcement activities exception.

2. Plaintiffs' various arguments to the contrary lack merit. Plaintiffs renew their objection to the district court's reliance on the Campi Declaration. Br. 44. For the reasons provided above, *see supra* pp. 24-26, the court properly considered the declaration. But, in any event, the 2004 Memo discloses on its face that it was

pertinent to, and within the scope of, an authorized national-security investigation, as the court held. ER 61-62. Plaintiffs dispute that determination. Indeed, they contend that the court "refused to consider * * * whether records describing First Amendment activity were pertinent to and within the scope of an authorized law enforcement activity." Br. 52. That is incorrect.

First, contrary to the district court's determination (ER 61-62), plaintiffs argue that the 2004 Memo and its attached documents were not *pertinent* to the FBI's threat assessment. They contend that the FBI's investigation was "solely for the purpose of monitoring activities protected by the First Amendment," something prohibited by the *2003 AG Guidelines*. Br. 45 (quoting ER 547). They note that posting government documents not intended for public release is not illegal and is protected by the First Amendment. *Id.* For these reasons, plaintiffs argue that the records are "not pertinent to any * * * national security inquiry mentioned in the April 30 Memo or alleged by the FBI's declarant." Br. 50. Plaintiffs' argument thus turns on the premise that the only purpose of the Newark Field Office's investigation was to monitor plaintiffs' First Amendment activity. Plaintiffs identify no evidence in the record to support their conclusory allegation.

The 2004 Memo, and the Campi Declaration explaining it, make clear that the Newark Field Office's threat assessment was not undertaken "solely for the purpose of monitoring" plaintiffs' First Amendment activity. *See* ER 532 (recognizing that "[t]he rights of individuals to post information and to express personal views on the

Internet should be honored and protected"). Rather, the field office determined that plaintiffs were "of possible investigative interest" (ER 551) in light of, among other things, the notice from the FBI Counterterrorism Division about the public posting of "the post-9/11 'watch list'" (ER 526); the discovery of a potential watch list on plaintiffs' website, as well as a purported list of other FBI suspects, that could "compromise current active FBI investigations" (ER 532); and the fact that "individuals who are currently under investigation" had view plaintiffs' website (ER 533). Although plaintiffs may disagree with the Newark Field Office's determination that a threat assessment was justified on these facts, it cannot be reasonably disputed that the records associated with the 2004 Memo are pertinent to that assessment. *See Pertinent*, Oxford English Dictionary (3d ed. updated 2005) (as relevant to this context, defining "pertinent" as "referring or relating to; relevant; to the point; apposite").

Second, plaintiffs contend that, because the FBI's mission is to investigate violations of criminal law, the 2004 Memo was not pertinent to an *authorized* law-enforcement activity. Br. 46; *cf.* ER 62-63 (holding to the contrary). They observe that while the *2003 AG Guidelines* "authorize FBI agents to access and evaluate online material, FBI agents may not record descriptions of individuals' First Amendment protected activity unless doing so is related to a threat to national security." Br. 45; *see* Br. 51 (same). Because the 2004 Memo does not contain "a documented national security concern or allegations of illegal conduct," plaintiffs maintain, the Newark Field Office's investigation was not authorized. Br. 47.

Plaintiffs misunderstand the purpose of a threat assessment. A threat assessment is undertaken to "investigate or collect information relating to threats to the national security, including information on individuals * * * of *possible* investigative interest." ER 551 (emphasis added); *see* ER 542 (In conducting threat assessments, "the FBI must proactively draw on available sources of information to identify terrorist threats and activities."). "[A]llegations of illegal conduct" (Br. 47) can justify the next level of investigation, preliminary investigations, but they are not required for threat assessments. ER 542 ("Preliminary investigations are authorized, generally speaking, when there is information or an allegation indicating that a threat to the national security may exist."). And "a documented national security concern" (Br. 47) is not even required for a preliminary investigation. Rather, such a concern would be a reason to elevate a preliminary investigation into a full investigation. ER 543 ("Full investigations are authorized, generally speaking, when there are specific and articulable facts giving reason to believe that a threat to the national security may exist."). As the district court correctly concluded (ER 60), the Newark Field Office's investigation was authorized by the *2003 AG Guidelines*.

Third, plaintiffs argue that the FBI's collection of records that describe plaintiffs' First Amendment activities was outside the *scope* of the FBI investigation, even assuming it was authorized. Br. 48-52. In their view, the records documenting plaintiffs' writings were outside the scope of the Newark Field Office's investigation

because those writings "were unrelated to the posting of" the possible watch and suspect lists. Br. 48.

But the focus of the investigation was broader than the presence of the lists on plaintiffs' website. While the threat assessment addressed the posting of the lists, the assessment more broadly sought to determine whether plaintiffs and their website might pose a threat to national security. ER 522, 526. Collecting some of plaintiffs' writings was within the scope of the field office's investigation into whether plaintiffs themselves posed a national-security threat. Moreover, even accepting plaintiffs' narrower description of the threat assessment, "[t]he FBI's review of [plaintiffs'] articles * * * gave [the agency] 'a complete picture of' Plaintiffs and thus potentially how and why the spreadsheets were on" plaintiffs' website, as the district court concluded. ER 61 (quoting *MacPherson*, 803 F.2d at 484-85).

In other words, even if a person's posting of the spreadsheets is protected First Amendment activity, the reasons why a person posted potentially sensitive law-enforcement information could give rise to legitimate national-security concerns. And collecting a selection of plaintiffs' public writings was necessary to help the FBI understand whether such concerns were merited.[10] The Newark Field Office thought

[10] Because the district court concluded that the FBI's collection of plaintiffs' writings was within the scope of an investigation concerning the presence of the spreadsheets on plaintiffs' website, the court did not consider whether collecting plaintiffs' writings was within the scope of the broader investigation into plaintiffs. This Court may affirm on either ground. *See Pike v. Hester*, 891 F.3d 1131, 1137 (9th

they might be. ER 534. But the San Francisco Field Office declined to elevate the investigation to the next level of a preliminary investigation, and so the investigation ended at the threat-assessment stage. ER 415-16.

Finally, plaintiffs fault the district court for "disclaim[ing] authority to scrutinize the scope of the investigation itself—as opposed to the agency record at issue." Br. 51. But the Privacy Act does not empower courts to assess the breadth of a law-enforcement investigation. The Privacy Act governs only an agency's disclosure and retention of records within a system of records, and individuals' access to such records. *See* 5 U.S.C. § 552a(b), (d), (e).

B. The 2006 Memo Likewise Comes Within the Law-Enforcement Activities Exception

Plaintiffs also challenge the district court's grant of summary judgment concerning the 2006 Memo prepared by the Oklahoma City Field Office as part of an evaluation of law-enforcement needs related to the annual Halliburton shareholders' meeting. That memorandum referred to plaintiffs' website only once, as part of a list of websites that had publicized the annual meeting. ER 252-53.

Plaintiffs' only argument is that the 2006 Memo does not fall within the law-enforcement activities exception because it does not sufficiently document the authorized law-enforcement activity for which it was prepared. Br. 53-55. In the

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Cir. 2018) ("We may affirm a grant of summary judgment on any basis supported by the record.").

district court, plaintiffs did not contest that the FBI has authority under the *Investigations Guide* to undertake an assessment of the possible law-enforcement needs related to the Halliburton shareholders' annual meeting, in light of protests and arrests at prior shareholders' meetings. ER 18. Instead, plaintiffs rely on a statement in the *Investigations Guide* that "[t]he authorized purpose" of every domestic FBI investigation "must be well-founded and well-documented." Br. 54 (quoting ER 225). From this requirement, plaintiffs argue here (Br. 54-55), as they did in the district court (*see, e.g.*, ER 17-18), that every record related to a domestic FBI investigation must expressly document the authorized law-enforcement purpose to which the record relates.

The 2006 Memo does not expressly state that it was prepared in connection with potential criminal activity related to the upcoming Halliburton meeting. ER 252-53. The memorandum does reference plaintiffs' website as among those that posted information about the meeting. ER 253. Thus, plaintiffs assert, the 2006 Memo documents First Amendment activity without adequately explaining how that is related to an authorized law-enforcement activity. Br. 54-55. Consequently, plaintiffs conclude, the 2006 Memo does not come within the Privacy Act's law-enforcement activities exception. *Id.* As the district court correctly observed (ER 19), however, the Privacy Act does not require that every record relating to an authorized law-enforcement activity expressly identify the authorized law-enforcement activity. Agencies properly establish that a record falls within the law-enforcement activities exception by submitting declarations or affidavits explaining the nature of the record

and how it relates to an authorized law-enforcement activity. *See, e.g.*, *Bassiouni v. FBI*, 436 F.3d 712, 720 (7th Cir. 2006) (considering agency declaration for that purpose); *Maydak v. United States*, 363 F.3d 512, 517 (D.C. Cir. 2004) (same); *Patterson v. FBI*, 893 F.2d 595, 603 (3d Cir. 1990) (same); *Clarkson v. IRS*, 811 F.2d 1396, 1397 (11th Cir. 1987) (per curiam) (same).

Moreover, plaintiffs' argument is based on a misreading of the *Investigations Guide*. The Guide states that "[t]he authorized purpose" of every domestic investigation "must be well-founded and well-documented." ER 225. But nothing in the Guide states or even suggests that every record relating to an authorized investigation must expressly document the authorized law-enforcement purpose to which the record relates, a requirement that would defy common sense. And plaintiffs stated in the district court that "to the extent there were * * * other documents" detailing the law-enforcement purpose to which the 2006 Memo related, "then potentially the FBI was engaged in proper law enforcement activity." ER 21. Thus, plaintiffs themselves conceded that not every law enforcement-document must expressly identify the authorized law-enforcement purpose for which the document was prepared. Plaintiffs provide no good reason to question the district court's grant of summary judgment to the FBI concerning plaintiffs' challenge to the 2006 Memo.

C. The FBI Properly Retained the Records After the Termination of the Investigations for Which They Were Prepared

1. Finally, the district court properly held that the FBI is authorized under the Privacy Act to retain the 2004 and 2006 Memos, despite the conclusion of the investigations to which they relate. *See* ER 63-65.

First, the text of the statute makes clear that the FBI may retain any records that come within the law-enforcement activities exception. The law-enforcement activities exception authorizes an agency that "maintains a system of records" to "maintain" a record "describing how any individual exercises rights guaranteed by the First Amendment," if the record is "pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. § 552a(e)(7). The Privacy Act defines the term "maintain" to "include[] maintain, collect, use, or disseminate." *Id.* § 552a(a)(3). By defining "maintain" to include both "maintain" and "collect," Congress intended to authorize different activities. *See Board of Trs. of Leland Stanford Junior University v. Roche Molecular Sys., Inc.*, 563 U.S. 776, 788 (2011) (quotation marks omitted; alteration in original) (noting the Court's "general reluctan[ce] to treat statutory terms as surplusage"); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) ("[T]he Court will avoid a reading [of a definition] which renders some words altogether redundant.").

As relevant to this context, the common definition of the verb "collect" is "[t]o gather together in one place or group; to gather, get together." *Collect*, Oxford English

Dictionary (3d ed. updated 2005). Similarly, as relevant here, the definition of the verb "maintain" is "[t]o (cause to) continue, keep up, preserve." *Maintain*, Oxford English Dictionary (3d ed. updated 2005). The law-enforcement activities exception thus authorizes an agency to "gather together" records describing First Amendment activity, if those records pertain to and are within the scope of an authorized law-enforcement activity, and to "keep up" and "preserve" such records. Had Congress intended agencies to maintain records related to First Amendment activity only while an investigation was pending, it could have clearly said so by providing that such records could be maintained so long as they are "pertinent to and within the scope of a *current (or ongoing)* authorized law enforcement activity." The text of the law-enforcement activities exception does not contain such a temporal limitation. *See Bassiouni*, 436 F.3d at 725 (making similar point).

Second, the two courts of appeals to have addressed the issue have held that the law-enforcement activities exception authorizes an agency to retain records after the termination of the law-enforcement activity for which the records were collected. In *Bassiouni*, the Seventh Circuit expressly rejected the argument, advanced by plaintiffs here, that "the FBI must be *currently* involved in a law enforcement investigation" to retain records that were collected in connection with an earlier investigation. 436 F.3d at 725 (quotation marks omitted). "[N]o court that has considered the meaning of law enforcement activity in (e)(7) has interpreted the term so narrowly," the Seventh Circuit observed. *Id.* The court found no "indication that

Congress intended law enforcement agencies to begin from scratch with every investigation. Nor [did the court] believe that Congress meant to deprive such agencies of the benefit of historical analysis." *Id.*

The D.C. Circuit similarly has held that an agency properly may retain records collected under the law-enforcement activities exception because "information that was once collected as part of a now-closed investigation may yet play a role in a new or reopened investigation." *J. Roderick MacArthur Found. v. FBI*, 102 F.3d 600, 604 (D.C. Cir. 1996); *see id.* ("If the earlier record had been purged, however, then the agency's later investigation could not be informed by the earlier event(s)."); *see also Patterson*, 893 F.2d at 603 ("Continued maintenance of [records authorized by the law-enforcement activities exception] also will not violate any provision of the Privacy Act.").

The D.C. Circuit held that the law-enforcement activities exception always allows an agency to retain otherwise properly collected records. *J. Roderick MacArthur Found.*, 102 F.3d at 603 (explaining that the law-enforcement activities exception, "as written" cannot "be read to require that the maintenance of a record, as opposed to the record itself, must be pertinent to an authorized law enforcement activity"); *see id.* at 605. The Seventh Circuit requires the agency to "reasonably demonstrate" that the records "will be pertinent in its efforts to evaluate the significance of future situations." *Bassiouni*, 436 F.3d at 725. Because the FBI provided the demonstration

the Seventh Circuit requires, this Court may assume without deciding that the more restrictive standard applies.

The 2004 Memo was prepared for a threat assessment that was concerned, in part, with the disclosure on the internet of a "post-9/11 'watch list.'" ER 521; *see* ER 526. The Campi Declaration explained that "the investigative links between closed and open investigations captured in the [2004 Memo] would also serve to inform ongoing and future investigative activity." ER 523. In addition, the Newark Field Office's threat assessment, and the San Francisco Field Office's decision not to elevate the investigation to the next level, "would serve to inform others should future investigative activity be considered related to those mentioned" in the memorandum. ER 522-23. While the 2004 Memo redacts the names of many individuals, a fair inference from the surrounding discussion is that many of "those mentioned" in the memorandum are individuals other than plaintiffs. *See, e.g.*, ER 528-29.

The 2006 Memo was compiled to enable the FBI to coordinate with local law enforcement to prepare for an annual meeting at which arrests had been made in the past. ER 249. The Bujanda Declaration explained that maintenance of that memorandum would "serve[] to inform preparations in the future, not only for the recurring annual shareholder[s'] meeting, but [for] other events that may present potential safety concerns within" the Oklahoma City Field Office's area of responsibility. ER 250.

For both sets of records, the FBI has made the showing the Seventh Circuit requires for continued retention of the records.

2. Plaintiffs offer no sound reason for this Court to hold otherwise. Plaintiffs observe that in Section 552a(e)(7), "Congress prohibited maintenance specifically, not simply the original collection of records." Br. 56. They note that "[t]he plain meaning of the word 'maintain' confirms that Congress intended to address agency retention of records over time." Br. 57. And they further contend that "the Privacy Act imposes not only a requirement that the initial 'collect[ion]' within a record of First Amendment-protected [activity] be justified by an authorized law enforcement activity, but also the ongoing 'main[enance]' of such a record be so justified." *Id.* (first and third alteration in original). But the question is not whether the ongoing maintenance of records must "be justified by an authorized law enforcement activity." It is whether the law-enforcement activity itself must be ongoing.

Plaintiffs further argue that the FBI's justification for the continued retention of the 2004 Memo is "boilerplate language" that "cannot be sufficient to justify maintaining records of First Amendment activities." Br. 59. In making that argument, plaintiffs rely (*id.*) on an earlier Seventh Circuit case, *Becker v. IRS*, in which the court held that a bare assertion that an agency is retaining records of First Amendment activity "for possible future uses" was not enough to justify the continued maintenance of the records, 34 F.3d 398, 409 (1994). But *Becker* recognized that even that explanation, "[u]nder some circumstances, * * * may be a legitimate

justification for maintaining documents in a file." *Id.* However, the court "examined the material" and found "untenable" the "thought that it could be helpful in future enforcement activity." *Id.* For that reason, the Seventh Circuit held that the agency failed to justify continued retention of the records. *Id.*

Here, as in *Bassiouni*, the agency "has articulated a law enforcement purpose for maintaining the material." 436 F.3d at 725. The Campi Declaration explained that, among other things, the 2004 Memo will assist the FBI in any future investigations into those mentioned in the memorandum, as well as "ongoing and future investigative activity," which would include investigation of the public disclosure of any possible post-9/11 watch list. ER 521, 523. Far from being boilerplate, the 2004 and 2006 Memos describe precisely how the records "will be pertinent in its efforts to evaluate the significance of future situations." *Bassiouni*, 436 F.3d at 725.[11]

[11] Plaintiffs do not separately explain their objection to the Bujanda Declaration's explanation for the FBI's continued retention of the 2006 Memo. But for the reasons stated above, the FBI has "reasonably demonstrate[d]" the pertinence of that record to possible future investigative activity related to the annual Halliburton shareholders' meeting. *Bassiouni*, 436 F.3d at 725.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's judgment.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellee knows of no related case pending in this Court.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Ninth Circuit Rule 32-1(a) because it contains 12,184 words, excluding those portions of the brief required by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2018, 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. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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