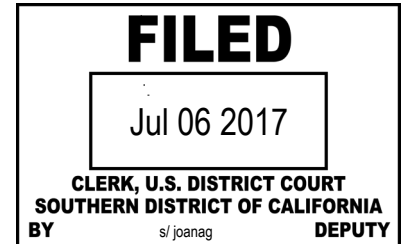


**UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**



**IN RE AMERICAN CIVIL LIBERTIES
UNION FREEDOM OF INFORMATION
ACT REQUESTS REGARDING
EXECUTIVE ORDER 13769**

**MDL NO. 2786
17cv0733-L-JLB**

**NOTICE OF FILING PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS'
MOTION TO STAY PROCEEDINGS IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

Attached hereto as Exhibit A is "PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS" filed by the ACLU of Michigan in the United States District Court for the Eastern District of Michigan on June 2, 2017. As indicated in the previously filed MEMORANDUM OF PLAINTIFFS, 42 AMERICAN CIVIL LIBERTIES UNION AFFILIATES, IN OPPOSITION TO DEFENDANTS' MOTION FOR TRANSFER TO THE DISTRICT OF COLUMBIA FOR CONSOLIDATION, in footnote 12, the ACLU of Michigan indicated it would file a copy of this response with this Panel.

Date: June 5, 2017

Respectfully submitted,

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EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

AMERICAN CIVIL LIBERTIES UNION OF
MICHIGAN,

Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND
SECURITY and U.S. CUSTOMS AND
BORDER PROTECTION,

Defendants.

Case No. 5:17-CV-11149-JEL-EAS

Hon. Judith E. Levy
Mag. Elizabeth A. Stafford

**PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS'
MOTION TO STAY PROCEEDINGS**

ISSUE PRESENTED

1. Whether a stay of proceedings pending the decision by the Judicial Panel on Multidistrict Litigation on Defendants' motion to transfer this and twelve other local actions brought by ACLU affiliates in thirteen unique districts is warranted where a stay would not advance judicial economy, Plaintiff would be severely prejudiced by further delay of its time-sensitive FOIA requests, and Defendants would suffer no hardship if the action is not stayed?

Plaintiff answers "No."

MOST APPROPRIATE AUTHORITIES

1. The Freedom of Information Act, 5 U.S.C. § 552
2. *In re iPhone Application. Litig.*, No. 10-cv-5878-LHK, 2011 WL 2149102 (N.D. Cal. May 31, 2011)
3. *Smith v. City of Inkster*, No. 12-15440, 2016 WL 6277181 (E.D. Mich. Oct. 27, 2016)

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>555 M Mfg., Inc. v. Calvin Klein, Inc.</i> , 13 F. Supp. 2d 719 (N.D. Ill. 1998).....	18
<i>ACLU v. DOD</i> , 2006 WL 1469418 (N.D. Cal. May 25, 2006).....	12
<i>Arab American Civil Rights League v. Trump</i> , No. 17-10310 (E.D. Mich. Feb. 2, 2017) (Roberts, J.).....	4
<i>Barber v. BP, PLC</i> , 2010 WL 2266760 (S.D. Ala. June 4, 2010).....	17
<i>Bearup v. Pfizer, Inc.</i> , No. 15CV13995, 2015 WL 9266908 (E.D. Mich. Dec. 16, 2015) (Levy, J.).....	14
<i>Donald J. Trump, et al., v. IRAP, et al.</i> (June 1, 2016), available at https://www.documentcloud.org/documents/3765441-16A-Trump-v-IRAP-CA4-Stay-Application-amp-Addendum.html	13
<i>Donham v. U.S. Dep't of Energy</i> , 192 F. Supp. 2d 877 (S.D. Ill. 2002).....	3
<i>EPIC v. DOJ</i> , 416 F. Supp. 2d 30 (D.D.C. 2006).....	12
<i>Ferguson v. FBI</i> , 722 F. Supp. 1137 (S.D.N.Y. 1989)	3, 12
<i>Freedom Commc'ns Inc. v. FDIC</i> , 157 F.R.D. 485 (C.D. Cal. 1994).....	3
<i>Gerstein v. CIA</i> , 2006 WL 3462658 (N.D. Cal. Nov. 29, 2005)	12

<i>Gilmore v. Dep't of Energy</i> , 33 F. Supp. 2d 1184 (N.D. Cal. 1998).....	2
<i>Grove Fresh Distributors, Inc. v. Everfresh Juice Co.</i> , 24 F. 3d 893 (7th Cir. 1994)	13
<i>Hamlin v. Kelley</i> , 433 F. Supp. 180 (N.D. Ill. 1977).....	13
<i>In re iPhone Application. Litig.</i> , No. 10-cv-5878-LHK, 2011 WL 2149102 (N.D. Cal. 2011).....	11
<i>Keys v. Dep't of Homeland Sec.</i> , 570 F. Supp. 2d 59 (D.D.C. 2008).....	16
<i>Landis v. N. Am. Co.</i> , 299 U.S. 248 (1936).....	15
<i>Long v. IRS</i> , 693 F.2d 907 (9th Cir. 1982)	13
<i>In re Maxwell Techs., Inc.</i> , 2014 WL 2919297 (S.D. Cal. June 26, 2014)	16
<i>Nebraska Press Ass'n v. Stuart</i> , 423 U.S. 1327 (1975).....	14
<i>Ramos v. Capital One</i> , 2017 WL 895635 (N.D. Cal. Mar. 7, 2017)	16
<i>Schroder v. Hess Industries, Inc.</i> , No. 1:12-CV-668, 2013 WL 2389489 (E.D. Mich. May 30, 2013).....	15
<i>Sehler v. Prospect Mortgage, LLC</i> , 2013 WL 5184216 (E.D. Va. Sept. 16, 2013)	17
<i>Smith v. City of Inkster</i> , No. 12-15440, 2016 WL 6277181, at *2 (E.D. Mich. Oct. 27, 2016).....	11
<i>St. Joe Co. v. Transocean Offshore Deepwater Drilling Inc.</i> , 774 F. Supp. 2d 596 (D. Del. 2011).....	17

<i>Sullivan v. Cottrell, Inc.</i> , 2012 WL 694825 (W.D.N.Y. Feb. 29, 2012)	17
--	----

STATUTES

5 U.S.C. § 552(a)(4)(A)(ii)(II)	8
5 U.S.C. § 552(a)(4)(A)(iii)	7, 8
5 U.S.C. § 552(a)(4)(C)	3
5 U.S.C. § 552(a)(6)(A)(i)	2
5 U.S.C. § 552 (a)(6)(B)	10
5 U.S.C. § 552(a)(6)(E)(v)(II).....	2, 7, 8
28 U.S.C. § 1657(a)	3
FOIA	<i>passim</i>
Freedom of Information Act	2

OTHER AUTHORITIES

6 C.F.R. § 5.3(a)(1).....	15
H.R. Rep. 98-985, 4, 1984 U.S.C.C.A.N. 5779.....	3
H.R. Rep. 98-985, 5-6, 1984 U.S.C.C.A.N. 5779	12
U.S., THE GUARDIAN (Nov. 15, 2016 7:33 PM), https://www.theguardian.com/us-news/2015/nov/15/michigan-muslim-majority-city-council-hamtramck-detroit	5

I. INTRODUCTION

Defendants U.S. Department of Homeland Security (“DHS”) and U.S. Customs and Border Patrol (“CBP”) (collectively, “Defendants” or the “Agencies”) filed a Motion to Stay Proceedings (the “Motion” or “Motion to Stay”) in order to impose a prejudicial delay on Plaintiff American Civil Liberties Union of Michigan (“ACLU of Michigan” or “Plaintiff”) and suspend its access to documents of immediate public concern. The Agencies ultimately seek to undermine FOIA’s central purpose, which is to inform the American public and keep the government accountable. Granting the Motion to Stay would provide the Agencies with nothing but more time to stall.

The ACLU of Michigan initiated this action in order to obtain governmental records from the Detroit CBP Field Office concerning the *local* implementation of President Trump’s January 27, 2017 and March 6, 2017 Executive Orders at Michigan’s airports and land borders with Canada. Nearly four months have elapsed since the ACLU of Michigan submitted its two FOIA requests on February 2 and February 10, 2017. The Agencies have nevertheless refused to produce *any* substantive response. Indeed, while the Agencies have granted Plaintiff’s request for expedited processing, they have failed to produce a single document.

The Agencies argue that the Court should stay this proceeding until the Judicial Panel on Multidistrict Litigation (“JPML”) rules on a motion to consolidate

this litigation in Washington, D.C. with other FOIA lawsuits seeking *different* local records from *different* local CBP field offices. The Agencies however fail to acknowledge that a ruling by the JPML would have no dispositive effect on the requests in this action. Indeed, Plaintiff only seeks records held by the Detroit CBP Field Office, and its FOIA requests are in no way affected by litigations in other jurisdictions. And, regardless of whether this action is consolidated with other litigations, the Agencies will nevertheless need to answer the Complaint and submit a production schedule. The Court should therefore not delay this action any further but should instead require that the Agencies respond to the pending Complaint. The Motion to Stay should be denied.

II. BACKGROUND

A. The Freedom of Information Act

Congress enacted FOIA in order to limit the ability of federal agencies to unilaterally dictate how and, crucially here, *when* to respond to requests for public records. “Congress intentionally set harsh time limits for agencies to respond to FOIA requests because it recognized that information is often useful only if it is timely.” *Gilmore v. Dep’t of Energy*, 33 F. Supp. 2d 1184, 1189 (N.D. Cal. 1998). Accordingly, FOIA requires a federal agency to respond to any request within twenty (20) days, 5 U.S.C. § 552(a)(6)(A)(i), and, in cases of heightened public interest like this, it creates an enforceable right to expedited disclosure. 5 U.S.C.

§ 552(a)(6)(E)(v)(II). To prevent attempts by agencies to circumvent these standard, expedited deadlines, Congress has narrowed the circumstances under which agencies may extend the time limitations, and courts routinely deny stays requested by agencies seeking to suspend those deadlines. *See Donham v. U.S. Dep't of Energy*, 192 F. Supp. 2d 877, 882 (S.D. Ill. 2002) (collecting cases and holding that agency backlogs do not justify stays or suspend expedited processing).

Further, to prevent crowded dockets or inefficient case management from undermining these provisions, FOIA mandates prompt judicial review in adjudicating FOIA disputes. *See, e.g., Ferguson v. FBI*, 722 F. Supp. 1137, 1144 (S.D.N.Y. 1989) (“Prompt review . . . is critical to FOIA users and to the purposes of the Act”). For example, FOIA provides the United States only thirty (30) days to respond to a complaint under the act, 5 U.S.C. § 552(a)(4)(C). Similarly, the Priorities Act requires courts to expedite deadlines and the processing of responsive records in FOIA actions where the FOIA claims are non-frivolous and involve time-sensitive records. 28 U.S.C. § 1657(a); *Ferguson*, 722 F. Supp. At 1144; *Freedom Commc'ns Inc. v. FDIC*, 157 F.R.D. 485, 486 (C.D. Cal. 1994) (The “special designation makes FOIA actions first among equals.”); *see also* H.R. Rep. 98-985, 4, 1984 U.S.C.C.A.N. 5779, 5782-84 (expedited treatment is necessary where “there is a special public or private interest in expeditious treatment of their case” or where “failure to expedite would result in mootness or deprive the relief requested of much

of its value”).

B. CBP’s Local Implementation of the Executive Orders

On January 27, 2017, President Trump signed an Executive Order entitled “Protecting the Nation From Foreign Terrorist Entry Into the United States.” (Compl. (Dkt. No. 1) at ¶ 2.) Among other things, the Executive Order purported to halt refugee admissions and bar entrants from several predominantly Muslim countries from entering the United States. (*Id.* at ¶ 5.) News reports described Defendants’ implementation of the Executive Order as “chaotic” and “total[ly] lack[ing] ... clarity and direction.” (*Id.* ¶ 4.) On March 6, 2017, President Trump issued another identically titled Executive Order after at least five lawsuits resulted in emergency court orders enjoining implementation of various sections of the first Executive Order, (*id.* at ¶¶ 2, 7), including a nationwide injunction issued in the Eastern District of Michigan barring application of the Executive Order to lawful permanent residents in a suit brought by Michiganders who were stranded or whose loved ones were stranded outside the country. *See Arab American Civil Rights League v. Trump*, No. 17-10310 (E.D. Mich. Feb. 2, 2017) (Roberts, J.).

The Agencies’ implementation of the two Executive Orders was the subject of significant public concern, as reflected by mass protests around the country, substantial news coverage and multiple lawsuits following the President’s signing of each Executive Order. (*Id.* ¶ 6.) Federal officials issued conflicting and

contradictory interpretations of the Executive Order. (*Id.* ¶ 9.) The unprecedented nature of and lack of clarity in the Executive Order, along with the continually evolving and contradictory interpretations by Federal officials created uncertainty among travelers, lawful permanent residents, dual-citizens and immigration attorneys. *See* Exs. 1, 2, 3.

The impact the Executive Orders had was felt particularly strongly in Michigan due to the state's demographic composition and shared border with Canada. Of the major metropolitan areas in the United States, Detroit has the highest number of residents per capita from the countries barred under the Executive Orders. (Compl. ¶ 19.) The large Muslim population is particularly concentrated in some areas near the Michigan-Canada border. For example, Dearborn, Michigan has the highest percentage of Muslims in the country. Nearby cities, such as Hamtramck, Livonia, Sterling Heights, and Warren, also have a large number of Muslim residents.¹ Michigan also ranks fourth among states resettling refugees, having welcomed more than 4,250 individuals in fiscal year 2016. (Compl. ¶ 16.) Michigan residents were therefore among the most severely impacted by the Executive Orders, with confusion surrounding the Order evident at both Michigan airports and

¹ *See* Ryan Felton, *Michigan Town Said to Have First Majority Muslim City Council in the U.S.*, THE GUARDIAN (Nov. 15, 2016 7:33 PM), <https://www.theguardian.com/us-news/2015/nov/15/michigan-muslim-majority-city-council-hamtramck-detroit>.

Michigan's land borders. (Compl. ¶¶ 11, 14, 16.)

In the wake of the issuance of the Executive Order, CBP detained, interrogated, and adjudicated people at Michigan's airports and land borders. (Compl. at ¶¶ 11-15.) While the total number of individuals is unknown (and indeed is a subject of the FOIA requests), information on specific incidents gives some sense of the chaos at Michigan's borders. For example, both a U.S. citizen and her husband, a U.S. permanent legal resident and Canadian citizen, were detained shortly after the issuance of the first Executive Order. *See* Ex. 1. The couple was detained for several hours during which time agents were unresponsive regarding their status and unable to give any concrete answers about when they could be let go. *See id.* CBP agents in fact told travelers that they did not know what was going on, "this [was] above our pay grade," and they were waiting for further clarification. *See id.*

C. The Airport Request

In light of such confusion and the pressing public concern about the implementation of the first Executive Order, on February 2, 2017 (six days after the Order was issued), the ACLU of Michigan submitted a FOIA request (the "Airport Request") seeking records related to CBP's local interpretation and enforcement of the Executive Order at Detroit Metropolitan Airport and the Detroit Metropolitan Airport Land Border Office. (Compl. at ¶¶ 24-25.) The Airport Request focused on

the CBP's Detroit Field Office and expressly *did not* seek information held in the records of CBP Headquarters. (*Id.* at ¶¶ 25-26.)

The Airport Request included an application for expedited processing citing the “compelling need” for these records under 5 U.S.C. § 552(a)(6)(E)(v)(II) because the information requested is “urgen[tly]” needed by an organization primarily engaged in disseminating information “to inform the public concerning actual or alleged Federal Government activity.”² (*Id.* at ¶ 28.)

The CBP Detroit Field Office received the Airport Request on February 7, 2017 and the CBP Headquarters FOIA Officer received the Airport Request on February 9, 2017. (*Id.* at ¶ 33.) CBP's Detroit Field Office acknowledged receipt of the Airport Request in a letter dated February 16, 2017. (Compl. at ¶ 34.) The letter did not otherwise comment on Plaintiff's requests expedited processing. (Compl., Ex. E.) In its acknowledgement of receipt, CBP did not provide a determination as to whether, or when, CBP would comply with the Airport Request. *Id.*

² The Airport Request also included an application for a fee waiver or limitation under 5 U.S.C. § 552(a)(4)(A)(iii) on the grounds that disclosure of the requested records was in the public interest and was “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” (*Id.* at ¶ 31.)

D. The Land Border Request

On February 10, 2017, the ACLU of Michigan submitted a second FOIA request (the “Land Border Request”) seeking records related to CBP’s local interpretation and enforcement of the Executive Order at certain land border offices, including at the Detroit-Windsor Tunnel, Detroit, the Ambassador Bridge, Detroit, the International Bridge, and the Blue Water Bridge, Port Huron (“Land Border Offices”). (Compl. at ¶¶ 36-37.) The Land Border Request focused on information held at the CBP’s Detroit Field Office and expressly *did not* seek information held in the records of CBP Headquarters. (*Id.* at ¶ 37.)

The Land Border Request also included an application for expedited processing, on the grounds that there was a “compelling need” for these records under 5 U.S.C. § 552(a)(6)(E)(v)(II) because the information requested was “urgen[tly]” needed by an organization primarily engaged in disseminating information “to inform the public concerning actual or alleged Federal Government activity.”³ (*Id.* at ¶ 39; Compl. Ex. B at 8.)

³ The Land Border Request further included an application for a fee waiver or limitation under 5 U.S.C. § 552(a)(4)(A)(iii) on the grounds that disclosure of the requested records was in the public interest and was “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” (Compl. at ¶ 42.) The Land Border Request also applied for a waiver of search fees under 5 U.S.C. § 552(a)(4)(A)(ii)(II) on the grounds that Plaintiff qualifies as “representatives of the news media” and the records are not sought for commercial use. (*Id.* at ¶ 43.)

The CBP Detroit Field Office received the Land Border Request on February 13, 2017 and the CBP Headquarters FOIA Officer received the Land Border Request on February 17, 2017. (*Id.* at ¶ 44.) The CBP's Detroit Field Office acknowledged receipt of the Land Border Request in a letter dated February 16, 2017. (Compl., Ex. F.) This acknowledgement of receipt did not provide a determination as to whether the CBP will respond to the Request, nor did it acknowledge ACLU's request for an expedited response. (*Id.*)

III. PROCEDURAL BACKGROUND

On April 12, 2017—after receiving no substantive response to its FOIA requests for more than two months—the ACLU of Michigan filed its Complaint before this Court. The ACLU of Michigan alleges that Defendants violated FOIA by failing to (1) provide a determination whether they would comply with the request within 20 business days; (2) promptly make available the records sought by Plaintiff; and (3) respond to the ACLU of Michigan's request for expedited processing within ten days. (Compl. at ¶¶ 52-53, 56-57, 61-62.)

The Agencies responded by filing a motion with the Judicial Panel on Multidistrict Litigation ("JPML") on May 8, 2017, seeking to transfer this case to the United States District Court for the District of Columbia in order to coordinate pretrial proceedings with twelve other FOIA lawsuits. (Dkt. No. 14.) The other litigations were filed by ACLU affiliates in other jurisdictions, each involving

different FOIA requests for *different local* records held by *different regional* CBP offices. None of the other suits involve the records at issue in this lawsuit, *i.e.*, the records held by the Detroit CBP Field Office. Notably, this Complaint is the only pleading that seeks records in two separate FOIA requests. Unlike any of the other cases, the ACLU of Michigan is seeking records not just for the local airports, but also records for land border crossings between Michigan and Canada.

On May 19, 2017, the Agencies filed with this Court a Motion to Stay Proceedings Pending Decision on Motion to Transfer. (Dkt. No. 16.) The Agencies' Motion for Stay is the only motion currently pending.

On May 26, 2017, the Director of FOIA Appeals and Litigation, Kevin L. Tyrrell, sent a letter to the various ACLU affiliates involved in pending litigation regarding the eighteen FOIA requests received on February 2, 2017 and the Michigan Land Border Request received on February 10, 2017. Mr. Tyrrell invoked a ten-day extension pursuant to 5 U.S.C. § 552 (a)(6)(B). The letter granted the request for expedited processing, thereby acknowledging the time sensitivity of release of these records.⁴ To date, Defendants have yet to provide a single record responsive to the ACLU of Michigan's FOIA requests. In addition, to the best of the ACLU of Michigan's knowledge, CBP's Detroit Field Office has not publicly

⁴ The letter also assigned the pending requests a single reference number and granted a fee waiver. However, the letter did not provide a determination as to whether the waiver of search fees was to be granted.

disclosed any of the instructions its local officials were provided with respect to the Executive Order nor any records explaining its interpretation of the order.

IV. ARGUMENT

When filing a motion to stay, a party must plead the following factors: “(1) conserving judicial resources and avoiding duplicative litigation; (2) hardship and inequity to the moving party if the action is not stayed; and (3) potential prejudice to the non-moving party.” *See In re iPhone Application. Litig.*, No. 10-cv-5878-LHK, 2011 WL 2149102, at *2 (N.D. Cal. May 31, 2011) (denying motion to stay for failure to sufficiently allege elements); *see also Smith v. City of Inkster*, No. 12-15440, 2016 WL 6277181, at *2 (E.D. Mich. Oct. 27, 2016) (denying motion to stay where movant’s alleged hardship was speculative). No one factor is determinative, and courts instead consider and balance all of the factors. *See Smith*, 2016 WL 6277181 at *2.

The Agencies have failed to demonstrate that *any* of these factors favor a stay, likely because each element weighs strongly *against* further delaying these proceedings. Instead, the Agencies argue that “[a] stay of proceedings, for the sole purpose and duration necessary for the JPML to decide Defendants’ motion” is appropriate. (Mot. at 4.) Not so. What’s more, the Agencies overlook well-settled provisions of FOIA, through which any further delays in the adjudication of Defendants’ continuing noncompliance would prejudice Plaintiff’s right of timely

access to critical information regarding a matter of significant public concern.

A. The ACLU of Michigan Will Be Prejudiced By A Stay In The Proceedings

The ACLU of Michigan (and the public it represents) would be severely prejudiced by any additional delay in these proceedings, given the nature of the FOIA requests and the information in question. Indeed, the Motion to Stay inherently prejudices the very rights that FOIA guarantees. *Ferguson v. FBI*, 722 F. Supp. 1137, 1144 (S.D.N.Y. 1989) (“Prompt review of decision denying access to government information is critical to FOIA users and to the purposes of the Act.”); *see also* H.R. Rep. 98-985, 5-6, 1984 U.S.C.C.A.N. 5779, 5783-84 (“[T]he value of disclosed information is transitory. If this information is not released in a timely manner, it may be of no value at all.”). Indeed, like other cases involving “great public and media attention” to controversial actions of government, the public’s interest in transparency is particularly vulnerable to delays. *EPIC v. DOJ*, 416 F. Supp. 2d 30, 42 (D.D.C. 2006); *see also ACLU v. DOD*, 2006 WL 1469418, at *7-8 (N.D. Cal. May 25, 2006) (“Getting the requested information quickly might be valuable to would-be protestors and opposition groups” to “help them decide how to express their political viewpoints”); *Gerstein v. CIA*, 2006 WL 3462658, at *6 (N.D. Cal. Nov. 29, 2005) (requiring expedited processing about “an issue that is not only newsworthy, but was the subject of an ongoing national debate”).

The ACLU of Michigan has waited nearly four months since submitting the

Airport and Land Border Requests. And yet, today, the Agencies are able to provide nothing more than further delay. In the Motion to Stay, the Agencies claim that this action should be stayed until the JPML rules on its motion to consolidate at the end of July—nearly six months after the FOIA requests were issued. This is precisely the prejudice that FOIA seeks to prevent.⁵ See *Long v. IRS*, 693 F.2d 907, 910 (9th Cir. 1982) (“[U]nreasonable delays in disclosing non-exempt documents violate the intent and purpose of FOIA, and the courts have a duty to prevent these abuses.”); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (“[T]o delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.”).

As discussed above, FOIA was enacted to guarantee the very accountability that the Agencies ask this Court to suspend. *Hamlin v. Kelley*, 433 F. Supp. 180, 182 (N.D. Ill. 1977) (“Congress established strict time limits to prevent the present practices of defendants, and it is Congress’ decision in law and not the agencies in

⁵ Ironically, on June 1, 2017, the Department of Justice filed a petition for a writ of certiorari in *Trump v. International Refugee Assistance Project* seeking reversal of an injunction against implementation of the travel ban, accompanied by a request to expedite briefing before the Supreme Court given “the exceptionally important issues presented”. See Application for Stay Pending Disposition of a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and for Expedited Briefing and Consideration at 41, *Donald J. Trump, et al., v. IRAP, et al.* (June 1, 2016), available at <https://www.documentcloud.org/documents/3765441-16A-Trump-v-IRAP-CA4-Stay-Application-amp-Addendum.html>.

delay which governs this case.”). In addition, by arguing that “Plaintiffs would not be prejudiced by the limited stay that Defendants have requested,” the Agencies in fact fail to cite a single FOIA case.⁶ (Mot. at 8 (citing *Davis v. Pfizer, Inc.*, 2014 WL 1599005, at *1 (N.D. Cal. Apr. 21, 2014) (products liability action) and *American Seafood, Inc. v. Magnolia Processing, Inc.*, 1992 WL 102762, at *1 (E.D. Pa. May 7, 1992) (antitrust lawsuit against catfish producer)).)

The Agencies do not refute the continuing harm caused by their noncompliance. Instead, Defendants suggest that it should be excused because they “anticipate” that the MDL Panel will hold argument on their Motion to Consolidate at the end of July, and, expecting a quick ruling, claim that the stay “would likely be of limited duration.” (Mot. at 8.) However, where access to information is unlawfully restricted, “each passing day” works irreparable harm to the public conversation that relies on it, as “suppressed information grows older” and “[o]ther events crowd upon it.” *Nebraska Press Ass’n v. Stuart*, 423 U.S. 1327, 1329 (1975) (“Delay itself is a final decision.”).

B. The Agencies Will Not Suffer Any Hardship If A Stay Is Denied

Defendants have failed to carry their burden of demonstrating a “clear case of

⁶ Defendants’ reliance on this Court’s decision in *Bearup v. Pfizer, Inc.*, No. 15CV13995, 2015 WL 9266908 (E.D. Mich. Dec. 16, 2015) (Levy, J.) is not controlling here and can be distinguished. In *Bearup*, a products liability and not a FOIA case, the MDL had already issued an order temporarily consolidating the cases at issue. No such order has been entered here.

hardship or inequity in being required to go forward. *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936); *see also Schroder v. Hess Industries, Inc.*, No. 1:12-CV-668, 2013 WL 2389489, at *1 (E.D. Mich. May 30, 2013) (quoting *Landis*). Instead, the Agencies complain that they would be required to respond to thirteen “materially identical” complaints, without acknowledging that each complaint presents location- and fact-specific questions. Defendants further speculate about what might happen as a result of a JPML ruling to consolidate that they wrongly treat as inevitable. Mot. at 7. As set out in the ACLU Affiliates’ Opposition to Defendants’ Motion for Transfer to the District of Columbia for Consolidation, Ex. 4 (Dkt. No. 19, Ex. 1), there are strong arguments against transfer. Moreover, as the Opposition explains, the Michigan litigation is unlike any of the other cases because it seeks land border records, and therefore should not be consolidated even if the JPML decides to consolidate the other actions.

The Agencies submit that a stay would avoid “competing demands on the same agency personnel—yet such a procedure for processing the Michigan FOIA requests would subvert DHS and CBP policy for responding to FOIA requests, which describes a “decentralized system for responding to FOIA requests” and direct requesters to make requests to local offices for the “quickest possible response.” 6 C.F.R. § 5.3(a)(1). Moreover, Defendants’ cannot be allowed to manufacture a

hardship,⁷ when they will be required to search locally for documents relevant to each action.

In reality, the only concrete hardship the Agencies identify is that they might be forced to defend this action on a normal schedule—notwithstanding that Plaintiff already agreed to extend their deadline for answering the Complaint by a month. Mot. at 6-7. Defendants’ conclusory, speculative statements of harm cannot justify the imposition of a stay, especially not in light of the time-sensitive nature of FOIA litigation. *See, e.g., Ramos v. Capital One*, 2017 WL 895635, at *3 (N.D. Cal. Mar. 7, 2017) (“Aside from conclusory assertions, Defendants have not provided any detail as to why simultaneous litigation of this case and [another] case that have substantial overlap in their factual and legal issues would cause a significant burden.”); *In re Maxwell Techs., Inc.*, 2014 WL 2919297, at *1 (S.D. Cal. June 26, 2014) (denying stay because moving party’s claim of hardship was “speculative”). Complying with the requirements of FOIA is not a hardship, and the Agencies cannot rely on speculation about what might happen before the MDL to avoid their responsibilities.

⁷ It is improper to delay referral from local CBP field offices to CBP Headquarters until after a lawsuit for noncompliance has been initiated. *See, e.g., Keys v. Dep’t of Homeland Sec.*, 570 F. Supp. 2d 59, 70 (D.D.C. 2008) (referral was not prompt and significantly delayed resolution of FOIA request).

In *Barber v. BP, PLC*, 2010 WL 2266760, at *2 (S.D. Ala. June 4, 2010), the court denied a stay while an MDL action was pending, stating that the motion to stay was “premature” and that its only effect would be to give the defendants a months-long “reprieve” before answering the Complaint. The court reasoned that such a delay, which Defendants likewise seek to impose here, would be “unnecessary and unwarranted,” and that “there is no reason in the world why defendants cannot file responsive pleadings prior to the MDL’s determination on the pending transfer and consolidation issues, because regardless of the MDL’s decision, “defendants will need to file answers or responsive pleadings.” *Id.* Here, this Court should deny a stay for precisely the same reasons, as Defendants have delayed responding to Plaintiff’s FOIA requests for months already, the Agencies have already been granted an extension of their answer deadline by Plaintiff, and Defendants will have to answer Plaintiff’s Complaint regardless of what court this action proceeds in.

C. A Stay Will Not Promote Judicial Economy

Contrary to the Agencies’ assertions, courts do not grant motions to stay while MDL proceedings are pending as a matter of course. *See, e.g., Sehler v. Prospect Mortgage, LLC*, 2013 WL 5184216, at *3 (E.D. Va. Sept. 16, 2013); *Sullivan v. Cottrell, Inc.*, 2012 WL 694825, at *4 (W.D.N.Y. Feb. 29, 2012); *St. Joe Co. v. Transocean Offshore Deepwater Drilling Inc.*, 774 F. Supp. 2d 596, 601 (D. Del. 2011); *Barber v. BP, PLC*, 2010 WL 2266760, at *2 (S.D. Ala. June 4, 2010).

Rather, judicial economy only favors a stay where “adjudication of the claim would be a waste of judicial effort.” *555 M Mfg., Inc. v. Calvin Klein, Inc.*, 13 F. Supp. 2d 719, 724 (N.D. Ill. 1998). No matter what court this action proceeds in, Defendants will have to answer the Complaint and conduct records searches specific to the local CBP field offices and Plaintiff’s two FOIA requests, and judicial economy is not advanced by suspending these responsibilities until at least the end of July. Judicial economy is in fact advanced by compliance with FOIA’s requirements, and the parties only find themselves before this Court because Defendants have refused to carry out their statutory responsibilities.

Despite the Agencies’ claims, the records requested by the ACLU of Michigan from the Detroit CBP field office are wholly different from the records requested by other ACLU affiliates from other CBP field offices in other cases, a fact that is especially clear because the ACLU of Michigan was the only affiliate to submit an additional FOIA request for information regarding the land border crossings. Indeed, the ACLU of Michigan is prepared to negotiate a production schedule under which the documents regarding the implementation of the Executive Order at the Canadian/Michigan border would be released first, meaning it is likely that the JPML will rule before production of the Detroit Metropolitan Airport documents (which again require a local search) would even be due. Because the ACLU of Michigan is not seeking agency-wide records, and is only seeking non-

overlapping, locally maintained records, Defendants' unilateral decision to coordinate a centralized search through its headquarters is improper and only serves to *harm* judicial economy. The adequacy of a centralized search for locally-specific records will be subject to challenge by every ACLU plaintiff, and it would be more efficient to have each local tribunal adjudicate these context-specific disputes rather than educate a single tribunal about facts specific to nearly every state in the country. A stay would only harm the ability to resolve conflicts in this litigation while the MDL ruling is pending for months.

CONCLUSION

The Agencies have failed to meet their burden to show that a stay of proceedings is warranted. As such, the Court should deny the stay.

Dated: June 2, 2017

Respectfully submitted,

By: /s/ Gabriel E. Bedoya

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served on the attorneys of record in this matter by efileing on June 2, 2017.

The statement above is true to the best of my knowledge, information and belief.

/s/ Gabriel E. Bedoya

Gabriel E. Bedoya

INDEX OF EXHIBITS

- Exhibit 1: Declaration of Farah Al-Khersan
- Exhibit 2: Declaration of Ruby Robinson
- Exhibit 3: Declaration of Ahmed Shalabi, MD
- Exhibit 4: Memorandum of Plaintiffs, 42 American Civil Liberties Union Affiliates, In Opposition to Defendants' Motion for Transfer to the District of Columbia for Consolidation

EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

AMERICAN CIVIL LIBERTIES UNION OF
MICHIGAN,

Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND
SECURITY and U.S. CUSTOMS AND
BORDER PROTECTION,

Defendants.

Case No. 2:17-CV-11149-JEL-EAS

Judge Judith E. Levy

Magistrate Judge Elizabeth A. Stafford

DECLARATION OF FARAH AL-KHERSAN

I, Farah Al-Khersan, hereby declare and state as follows:

1. I am over the age of eighteen (18) and am competent to attest to this Declaration. I have personal knowledge of the facts set forth herein, and if called to testify, I could and would competently testify hereto.
2. I am an attorney licensed in the State of Michigan with Attorney Number: P80152.
3. I am an Iraqi-born, naturalized United States citizen.
4. My family and I immigrated to the United States in 1998, and I became a naturalized United States citizen in 2013 during my first year of law school.
5. My husband, Osama Fadel, is an Iraqi-born Canadian citizen and lawful permanent resident of the United States.
6. My husband and I currently live in West Bloomfield, Michigan.
7. I am a practicing attorney with the law firm, Law Office of Michael Carlin PLLC, which focuses on immigration law.

8. I have practiced immigration and nationality law on a full-time basis as a licensed attorney since November of 2015. Prior to graduating law school, I worked with Wayne State University Law School's Asylum and Immigration Clinic as well as the Immigration Court in Detroit.
9. I have also worked with Justice for Our Neighbors of Southeastern Michigan, serving as an appointment coordinator and translator for immigrants.
10. My husband and I were in Canada on Friday, January 27, 2017, the day President Trump signed his Executive Order banning individuals from seven countries. We had driven to Sarnia, Canada, which is located minutes from the U.S.-Canada border, to visit my husband's parents. Originally, my husband and I had planned to stay the night in Sarnia.
11. As an immigration attorney, I had read the Order, but I was unprepared for the far-reaching consequences and chaos that ensued shortly after it was put into effect. I believed that my husband would not be affected by the Order.
12. As the night progressed at my in-law's house, I began to receive numerous messages and alerts from other attorneys, colleagues, and organizations I had worked with expressing concern about the Order. These messages expressed the worry that the Order was a lot more far-reaching than originally thought. There was an overwhelming concern that anyone from any of the seven countries designated in the Order, including anybody who had green cards and was born in one of those countries, or even non-immigrant visas, such as student visas, were going to be affected.
13. Due to these concerns, I woke up my sleeping husband and headed for the border around 11:00 p.m. in order to beat the morning rush. We arrived at the U.S.-Canada border about half an hour later to my best recollection.
14. Once we arrived at the Port Huron crossing at the U.S.-Canada border, we were stopped. We were told by Customs and Border Protection (CBP) agents to get out of the car and go inside an office due to the order and that it would not take long. Agents took our car keys, my

U.S. passport card, my husband's Canadian passport and U.S. green card. The officers kept saying that due to the Order, we had to wait, but that they were not sure for how long.

15. One of the officers proceeded to ask me and my husband a long range of questions about when we left Iraq. These included such questions as where did we go, how did I naturalize, how did my husband get here, who did we know in Iraq, and when was the last time we were in Iraq.
16. This was concerning because although my husband and I had been born in Iraq, we had not been back there since the 1990's when our families fled from persecution.
17. Agents asked when I had become a naturalized citizen and why we were in Canada. Agents also searched our car but were unable to give any concrete answers about when we could be let go, telling us that they didn't know what was going on, that "this is above our pay grade" and that they were waiting for further clarification.
18. At this point on Friday night, the situation for dual nationals, specifically a national of one of the seven affected countries and an additional country not on the list, such as my husband, was unclear.
19. Eventually, I was told that while I was free to go, my husband was required to stay.
20. The Agents stated we could call someone, but we never got the chance. My husband and I later found out that around that same time, my husband's parents, also born in Iraq and Canadian citizens, were worried about us because we had not called them. They subsequently were allowed to cross into the United States despite the fact that my husband, who has a green card, was not allowed to.
21. As an immigration attorney, I was aware of stories of people being forced to relinquish their green cards by border agents, and I was worried that this would happen to my husband. I stayed with my husband.
22. We were held at the border for several hours and finally were told to just go back to Canada and try to cross into the United States the next day when they would have more answers. My husband and I

reluctantly agreed because we had already been there for several hours.

23. A few hours later, I told the Agents that we would go back to Canada but also told them that we needed our immigration documents back. Even though we had agreed to return to Canada, the agents made us wait another hour once I asked for our immigration documents.
24. At this time, we were filled with uncertainty. The agents were unresponsive regarding our status and the news reports kept changing. It was very unclear how the Order affected dual-citizens, and whether lawful permanent residents would be admitted, or whether they would be admitted only on a case-by-case basis.
25. To my best recollection, at around 3:00 am to 3:30 a.m. on Saturday, agents returned our documents and let my husband and I pass through the border. After hours of waiting, I was and remain unsure about what prompted this decision. They told my husband to not return to Canada until the situation became clearer. We were overwhelmed with emotion.
26. After re-entering the United States, my husband and I rented a hotel in Port Huron. We continued to follow any new developments relating to the Executive Order and the confusion surrounding it.
27. On Saturday, January 28, 2017, the Department of Homeland Security said the ban covered green card holders. This was concerning because, many green card holders, like my husband, have been living in the U.S. for years. In particular, Secretary of Homeland Security John Kelly stated that, "In applying the provisions of the president's executive order, I hereby deem the entry of lawful permanent residents to be in the national interest. Accordingly, absent the receipt of significant derogatory information indicating a serious threat to public safety and welfare, lawful permanent resident status will be a dispositive factor in our case-by-case determinations." Available at: <https://www.dhs.gov/news/2017/01/29/statement-secretary-john-kelly-entr-v-lawful-permanent-residents-united-states>, visited February 7, 2017.

28. Secretary Kelly's statement did not explain what "significant derogatory information" means, nor is that term defined anywhere in the immigration laws.
29. This was contradicted on Sunday, January 29, 2017, when White House Chief of Staff Reince Priebus said that the executive order "doesn't affect" green card holders. However, minutes later Priebus reversed this position said "of course" it affected them.
30. The confusion surrounding this issue was further enhanced due to reports that on Saturday night, Canadian Prime Minister Justin Trudeau was told by National Security Adviser Michael Flynn that Canadian citizens and Canadians who are dual nationals with countries on the list will be allowed into the U.S.
31. A "fact sheet" published January 29, 2017, by the Department of Homeland Security reiterated that, "The Congress provided the President of the United States, in section 212(f) of the Immigration and Nationality Act (INA), with the authority to suspend the entry of any class of aliens the president deems detrimental to the national interest." Lawful Permanent Residents (LPRs), such as green card holders, are aliens. The fact sheet also stated that, "Lawful Permanent Residents of the United States traveling on a valid 1-551 will be allowed to board U.S. bound aircraft and will be assessed for exceptions at arrival ports of entry, as appropriate. The entry of these individuals, subject to national security checks, is in the national interest. Therefore, we expect swift entry for these individuals." Available at: <https://www.dhs.gov/news/2017/01/29/protecting-nation-foreign-terrorist-entry-united-states>, visited February 7, 2017.
32. On February 1, 2017, the White House Counsel issued a Memorandum to the Acting Secretary of State, the Acting Attorney General, and the Secretary Of Homeland Security from Donald F. McGahn II, Counsel to the President (Feb. 1, 2017). The Memorandum does not contain any legal analysis but states that Section 3(c) and 3(e) to not apply to LPRs. The Memorandum does not discuss the test of the Executive Order, nor does it clarify how this latest statement intersects with the earlier statement by Secretary Kelly regarding barring entry for LPRs with "significant derogatory information" of the Department of Homeland Security fact sheet statement that LPRs will be eligible for "exceptions" from the ban.

33. After my husband and I were released, I posted about the experience on Facebook, and it has been shared nearly 1,000 times. In addition, I have spoken to news organizations such as local Fox News, Detroit Free Press, Michigan Radio, Associated Press, Newsweek, and Reuters about this experience.
34. Since this incident, I have not travelled abroad except once alone to Windsor. My husband has remained in the United States. My husband and I do not plan to travel outside the U.S. in the near future to ensure we do not get held at the border again.
35. Our inability to travel abroad is severely limiting. My husband and I live near the U.S.-Canada border; the Port Huron crossing is only 70 miles from our home. We frequently travel to Canada to meet with friends and family. My husband's family lives in Canada and we travel to Canada about once a month, and sometimes travel multiple times a month.
36. Professionally, the Executive Order has impacted the manner in which I advise my immigration clients. Based on the unprecedented nature of and lack of clarity in the Executive Order, the continually evolving nature of the subsequent executive agency actions, the unresolved litigation, and the many qualifications in Department of Homeland Security statements, it is my opinion as an immigration practitioner that I cannot issue a general statement that any Lawful Permanent Residents, but particularly those from the designated countries in the order, may safely travel and expect to be readmitted to the United States.
37. Because of the extreme brevity of the government's statements on Lawful Permanent Residents, the initial confusion about the meaning of "immigrant visa" in the implementation of the Executive Order, the ongoing developments in litigation nationwide as the Department of Justice seeks to defend the Executive Order, and the uncertainty about the meaning of "significant derogatory information" or the standards for determining whether Lawful Permanent Residents are eligible for "exceptions" to the ban, I have continued to advise Lawful Permanent Residents from countries affected by the ban to be cautious against travel as there is no certainty they will be allowed to reenter the United States.

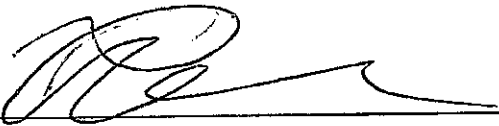
5:17-cv-00733-L-JLB Document 35 Filed 06/06/17 Page 40 of 81

38. As a practitioner, I am awaiting additional legal developments that will allow me to provide clearer communication to affected immigrant community members and organizations.
39. As an Iraqi-born United States citizen and wife of an Iraqi-born Canadian citizen and lawful permanent resident of the United States, I remain uncertain as to the effects the Order will have on our family's ability to travel. I understand that the federal government now claims that the Executive Order does not apply to lawful permanent residents. However, given how much confusion there has been about the Executive Order and how many different positions the government has taken so far, I am concerned that the government may again change its position and leave me or my husband stranded abroad if we were to engage in international travel.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: May 3, 2017

West Bloomfield, Michigan



Farah Al-Khersan

EXHIBIT 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

American Civil Liberties Union of Michigan,

Plaintiff,

vs.

Case No. CaseNumber

U.S. Department of Homeland Security and U.S.
Customs and Border Protection

/

DECLARATION OF RUBY ROBINSON

1. I am an attorney licensed in the State of Michigan with Attorney Number P75244. I am a citizen of the United States.
2. I am a supervising attorney at the Michigan Immigrant Rights Center (MIRC), a division of the Michigan Advocacy Program (MAP), a nonprofit civil legal services group established more than 50 years ago. MIRC was founded as a project of MAP in early 2009 to serve as a resource center for nonprofit immigration legal services programs and other advocates providing support and technical assistance throughout the state. I started working at MIRC in December 2012.
3. I have practiced immigration and nationality law on a full time basis as a licensed attorney since 2011. I have attached my resume to this declaration.
4. I currently serve as a co-chair on the advocate education subcommittee of the Michigan Coalition on Immigrant and Refugee Rights (MCIRR), a nonprofit membership organization of more than 40 nonprofit, faith, and educational groups founded in 1989 with many members focused on nonprofit immigration legal services. In that role, I help develop and disseminate critical legal materials to an e-mail list of 3,000 immigration advocates and contacts. Further, I serve as the pro bono liaison for the Michigan chapter of the American Immigration Lawyers Association (AILA).
5. On January 27, 2017, the day that the Executive Order entitled, "Protecting the Nation from Foreign Terrorist Entry Into the United States," was signed, our office began communicating via e-mail and social media (Facebook and Twitter) with our

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advocacy community and the public. There was significant delay between the signing of the Executive Order and the posting of the final text of what was signed to any government website. So, we were initially forced to rely, until we received a copy on January 28 from a refugee services agency, on quotes from the Department of Homeland Security given to reporters.

6. On Saturday, January 28, 2017, numerous media sources quoted the Department of Homeland Security as stating that the seven country ban would apply to lawful permanent residents (LPRs, aka green card holders) but I had not turned on the news yet that day.
7. I learned about this development on an urgent and unexpected phone call from my managing attorney, Susan Reed, that permanent residents were being denied entry and/or detained at ports of entry. The call came in at 2:24 PM. Susan knows that I do not work on Saturdays for religious purposes and for her to call me indicated that something was definitely awry.
8. Thankfully, I was eating lunch at a friend's apartment in downtown Detroit and could investigate what was happening at the closest port of entry, the Detroit-Windsor Tunnel.
9. Within minutes, I had parked my car near the tunnel and approached the entrance on foot. I was met by two men with large guns asking about my business.
10. I introduced myself, stated my title and organization, and asked whether I could speak with a supervisor about reports of permanent residents being denied entry into the United States. They led me to the office.
11. Inside the office, I waited for a supervisor whose name, unfortunately, I do not recall. I again introduced myself, my position, and the reports that I heard. I asked whether he could confirm this so that we could share this information with other attorneys and advocates to disseminate to their communities to minimize risks with travel.
12. The supervisor said that he could not provide answers to this question. I asked if he had received guidance or direction from headquarters on whether LPRs would be permitted to enter. Again, the supervisor said that he could not provide this

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information to me and instructed that I speak with the public affairs liaison at a 202 area. I left the port of entry.

13. I updated Susan Reed about what I learned and called a few fellow advocates to see if they had additional information. No one had further information.
14. I then drove to the Ambassador Bridge, parked my car, and approached on foot toward the inspection area. Again, I was met by two officers/agents with large guns who asked about my business. I informed these men with my name, purpose, and provided them a business card. They radioed for a supervisor.
15. I met with the supervisor outside and asked him about whether he or his officers/agents had information or received guidance on whether LPRs were being denied entry into the United States at ports of entry. He said that he could not provide me with this information and, like the other supervisor at the Detroit-Windsor Tunnel, indicated that I should speak with the public information officer. He provided me the phone number and e-mail address for Chief Ken Hammond at CBP. I left Chief Hammond a message which went unanswered.
16. My house is very close to the bridge so I returned home and started to collect information from other immigration attorneys and advocates about what they were seeing. This is when I first read the executive order and was shocked that LPRs were being denied entry based on the language in the order and that the Immigration and Nationality Act did not provide a mechanism for this to happen. Normally, LPRs are always to be admitted and Section 212(f) of the INA does not apply to them, rather, it would be Section 101(a)(13) See, e.g. *Matter of Benno Rovens*, 25 I&N Dec. 623 (BIA 2011) which states that the Department bears the burden of proving that an LPR falls into one of those categories by clear and convincing evidence.
17. Despite my analysis that the enforcement of the executive order in this scenario was unlawful to deny entry to LPRs, it was critical that we share this information widely so as to limit the risks of permanent residents being unnecessarily separated from family, friends, school, and community.
18. We shared our updates via e-mail and social media. I remained in regular touch with Susan Reed in coordinating these efforts based on piecemeal information received. We fielded calls and e-mails from concerned advocates that

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afternoon/evening and prepared for the following day. We were also in regular contact with local print, radio, and television media to share this information and update them as we learned more.

19. MIRC's initial Facebook post about this development, which we did not pay to promote, was shared 177 times and viewed by 28,051 people within a short period of time. I worked all day on January 29, 2017 to coordinate and disseminate community legal education information warning permanent residents not to travel outside of the United States.
20. Late in the evening on Saturday, January 28, 2017, our office learned of a Michigan doctor who was an LPR from a country affected by the ban who had traveled to Toronto, Ontario, Canada for the weekend to visit with friends and was fearful of not being permitted to re-enter. I discussed the case with Susan Reed. She decided to travel to Canada to escort him to the United States to see what was happening at the border. By that time, media reports were indicating that LPRs might be allowed to return home on a "case by case" basis, so we gathered materials to show that he client was a surgeon who had lived in the U.S. for 20 years, was the son of a U.S. citizen mother, and worked in a medically underserved area, among other positive attributes. Because it was unclear whether my client would be allowed to enter the U.S., he had put his practice on notice that he might be unavailable for several surgeries he had scheduled for Monday, January 30, 2017.
21. He was permitted to enter the United States at the Detroit-Windsor Tunnel after secondary inspection which took approximately 90 minutes.
22. When we returned to the office on Monday, January 30, the onslaught of phone calls, e-mails, Facebook messages, and other inquiries really started. Over the next few days, we worked twelve and fourteen hour days fielding hundreds of inquiries from affected persons and organizations seeking assistance.
23. The lack of clear information on the implementation of the executive order greatly inhibited our ability to fully advise our clients and communities about the risks involved in traveling outside the United States if a person is or was a national from one of the seven affected countries.

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24. On January 29, 2017, we reviewed the Secretary of Homeland Security John Kelly's formal statement that, "In applying the provisions of the president's executive order, I hereby deem the entry of lawful permanent residents to be in the national interest. Accordingly, absent the receipt of significant derogatory information indicating a serious threat to public safety and welfare, lawful permanent resident status will be a dispositive factor in our case-by-case determinations." Available at: <https://www.dhs.gov/news/2017/01/29/statement-secretary-john-kelly-entry-lawful-permanent-residents-united-states>, visited February 7, 2017.
25. This statement, in addition to the fact sheet published that same day and the White House Counsel's memorandum of February 1, 2017 did not mollify our concerns, especially as they related to permanent residents. Specifically, that memorandum did not provide analysis for Sections 3(c), but simply stated that it did not apply to LPRs. The White House counsel is not the arbiter of whether and how the executive order should be implemented/understood. Nor did the memorandum clarify how this affects Secretary Kelly's earlier statement barring entry for LPRs with "significant derogatory information."
26. As a result of this incomplete/inconsistent information, the only prudent thing from a public information perspective was for us to advise the community about the significant risks in traveling or attempting to travel based on being a national from one of the seven affected countries, regardless of one's immigration status.
27. Therefore, on the front page of our website, we added clear, unambiguous language about these concerns: WARNING: DO NOT TRAVEL OUTSIDE THE UNITED STATES IF YOU ARE FROM AN AFFECTED COUNTRY President Trump issued an Executive Order on Friday, January 27, 2017, that says that people who are citizens of Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen may not enter the U.S. for at least 90 days. This includes people with Lawful Permanent Resident or "Green Card" status as well as any other visas. Citizens of those countries SHOULD NOT TRAVEL OUTSIDE THE UNITED STATES for any reason. This includes travel to Canada.
28. This remained on the main page of our website for several weeks until there was a little more clarity from courts interpreting and enjoining several sections of the Executive Orders.

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29. Following the promulgations of the Executive Order, I could not fully perform my role as a counselor dispensing legal advice beyond "don't travel" because of the inconsistent manner in which this Order was administered and limited information that was provided to the public. In essence, I could not risk my clients being denied entry, detained, and/or having their green cards revoked unless they were willing to endure time-consuming and difficult litigation to enforce their rights.
30. As an attorney, one of the most critical functions I perform is providing legal advice so that my clients can weigh the risks and benefits of their actions (e.g. applying for citizenship, petitioning for a spouse, traveling). Put another way, what I do is help manage expectations based on my deep knowledge of the subject matter and applying my client's own personal circumstances. When our office cannot fully rely on precedent or established practice to predict the likely consequences for certain actions, we cannot manage expectations and therefore, cannot advise or inform the public about the consequences for certain behavior, like travel, that until a few days earlier, would have gone unquestioned.
31. Despite multiple courts having issued injunctions against this section of the Executive Order and the revised version in March 2017, I am still wary about LPRs from the (now) six affected nations regularly traveling in and out of the United States based on the inconsistent interpretations and enforcement schemes that followed the first order in January 2017.
32. As a practitioner, I am awaiting additional legal developments that will allow me to provide clearer communication to affected immigrant community members and organizations.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct and was executed on May 25, 2017, in Detroit, Michigan



Ruby Robinson

EXHIBIT 3

18. Over the weekend after the Executive Order was issued, Ms. Reed helped me to figure out whether and how I could reenter the United States.
19. Ms. Reed helped me to compile documents related to my time in the United States, my U.S. citizen mother, and my medical career. Ms. Reed informed me that we would likely have to argue for my admission and that these documents would be necessary to convince the Customs and Border Protection officers to allow me to return to my home and practice.
20. On Sunday, January 29, 2017, I presented myself at the border crossing at the Windsor Tunnel with Ms. Reed present as my attorney. I was sent to secondary inspection where I was separated from Ms. Reed by officers, who refused to allow her to represent me in my interview. I spent a total of about an hour and a half with agents in secondary inspection before they finally allowed me to enter the country.
21. Since re-entering the country, I have not travelled abroad. Prior to the Executive Order I had planned a vacation to Egypt in February 2017, and a vacation to the United Arab Emirates in March 2017. In order to ensure surgical coverage at my hospital, I have to request time off in advance for these two trips. Unfortunately, I was forced to cancel these plans (without being able to reschedule my time off) because it was unclear whether the Executive Order would again be applied to lawful permanent residents.
22. Since re-entering the country, I have not traveled abroad. Prior to the Executive Order I had planned a vacation to Egypt in February 2017, and a vacation to the United Arab Emirates in March 2017. In order to ensure surgical coverage at my hospital, I have to request time off in advance for these two trips. Unfortunately, I was forced to cancel these plans (without being able to reschedule my time off) because it was unclear whether the Executive Order would again be applied to lawful permanent residents.
23. My inability to travel abroad is severely limiting. I live near the U.S.-Canada border. I frequently travel to Canada to meet with friends and also go occasionally for professional meetings and conferences. I travel to Canada about once a month, and sometimes travel multiple times a month.
24. If the injunction barring application of the Executive Order to lawful permanent residents remains in effect, I will be able to travel to Canada knowing that I will be allowed back in the country. However, if the injunction is dissolved, I will be very reluctant to travel abroad based on the fear that the

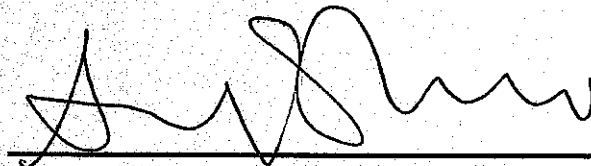
fear that the government will again change its interpretation of the Executive Order and I will be prohibited from reentering.

25. I understand that the federal government now claims that the Executive Order does not apply to lawful permanent residents. However, given how much confusion there has been about the Executive Order and how many different positions the government has taken so far, I am concerned that the government may again change its position and leave me stranded abroad if I were to engage in international travel.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: June 2, 2017

_____, Michigan

A handwritten signature in black ink, appearing to read 'Ahmed Shalabi', is written over a horizontal line.

AHMED SHALABI, MD

EXHIBIT 4

UNITED STATES JUDICIAL PANEL

ON MULTIDISTRICT LITIGATION

**IN RE AMERICAN CIVIL LIBERTIES
UNION FREEDOM OF INFORMATION
ACT REQUESTS REGARDING
EXECUTIVE ORDER 13769**

MDL NO. 2786

**MEMORANDUM OF PLAINTIFFS, 42 AMERICAN CIVIL LIBERTIES UNION
AFFILIATES, IN OPPOSITION TO DEFENDANTS' MOTION FOR TRANSFER
TO THE DISTRICT OF COLUMBIA FOR CONSOLIDATION**

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. BACKGROUND	2
A. Underlying Facts.....	2
B. Procedural Background and Pending Proceedings	4
III. LEGAL STANDARD.....	4
A. MDL Is Designed For Complex Or Fact-Intensive Cases.....	4
B. FOIA Litigation Must Be Promptly Resolved.....	6
IV. THESE CASES DO NOT MEET THE DEMANDING STANDARD FOR MDL TREATMENT	7
A. Common Questions Of Fact, If Any Even Exist, Do Not Predominate Over Questions Of Law And Unique Questions Of Fact.	7
B. Any Common Legal Questions Are Illusory And Irrelevant.....	12
C. Transfer Would Impair, Not Advance, Convenience, Justice And Efficiency.....	14
D. Alternatives to Centralization Exist.....	17
E. If This Motion Is Granted, The Michigan Border Crossing Case Should Not Be Consolidated With The Other Actions.	18
F. If this Motion Is Granted, The Cases Should Be Consolidated in the Eastern District of Virginia, District of Maine or the Western District of Washington.	19
V. CONCLUSION.....	20

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>ACLU v. DOD</i> , 2006 WL 1469418 (N.D. Cal. May 25, 2006)	7
<i>Caldo Oil Co. v. Gulf Oil Co. (In re Petroleum Prods. Antitrust Litig.)</i> , 476 F. Supp. 455, 457 (J.P.M.L. 1979).....	15
<i>Dept. of the Air Force v. Rose</i> , 425 U.S. 352 (1976).....	12
<i>Edmonds v. F.B.I.</i> , Case No. 02-1294, 2002 WL 32539613 (D.D.C. Dec. 03, 2002).....	7
<i>Edmonds v. FBI</i> , 417 F.3d 1319 (D.C. Cir. 2005)	7
<i>Elec. Privacy Info. Ctr. v. DOJ</i> , 416 F. Supp. 2d 30 (D.D.C. 2006)	7, 16
<i>Ferguson v. FBI</i> , 722 F. Supp. 1137 (S.D.N.Y. 1989).....	7
<i>Gilmore v. Dep't of Energy</i> , 33 F. Supp. 2d 1184 (N.D. Cal. 1998)	6
<i>In re Airline "Age of Employee" Emp't Practices Litig.</i> , 483 F. Supp. 814 (J.P.M.L. 1980).....	8
<i>In re American Home Products Corp "Released Value" Claims Litigation</i> , No. 333, 448 F. Supp. 276 (J.P.M.L. 1978).....	11
<i>In re Ameritrust Mtg. Co. Lending Practices Litig.</i> , 408 F. Supp. 2d 1354 (J.P.M.L. 2005).....	20
<i>In re Asbestos & Asbestos Insul. Mat. Prods. Liab. Litig.</i> , 431 F. Supp. 906 (J.P.M.L. 1977).....	11, 16
<i>In re Best Buy Co., Inc., Cal. Song-Beverly Credit Card Act Litig.</i> , 804 F. Supp. 2d 1376 (J.P.M.L. 2011).....	5
<i>In re BMW Reverse Trans. Prod. Liab. Litig.</i> , 543 F. Supp. 2d 1382 (J.P.M.L. 2008).....	17

<i>In re Cessna Aircraft Distributorship Antitrust Litig.,</i> 460 F. Supp. 159 (J.P.M.L. 1978).....	14
<i>In re Church of Scientology Flag Serv. Org./IRS FOIA Litig.,</i> No. 892 (J.P.M.L. Sept. 4, 1991)	11, 14
<i>In re Classicstar Mare Lease Litig.,</i> 528 F. Supp. 2d 1345 (J.P.M.L. 2007).....	19
<i>In re Clean Water Rule,</i> 140 F. Supp. 3d 1340 (J.P.M.L. 2015).....	12
<i>In re Concrete Pipe,</i> 302 F. Supp. 244 (J.P.M.L. 1969).....	5, 19
<i>In re Cybil Fisher Litig.,</i> 987 F. Supp. 1376 (J.P.M.L. 2013).....	14
<i>In re: Cymbalta (Duloxetine) Prod. Liab. Litig. (No. II),</i> 138 F. Supp. 3d 1375 (J.P.M.L. 2015).....	17
<i>In re Falstaff Brewing Corp. Antitrust Litig.,</i> 434 F. Supp. 1225 (J.P.M.L. 1977).....	5
<i>In re Freedom Magazine/IRS FOIA Litig.,</i> No. 910 (J.P.M.L. Feb. 12, 1992)	11, 12
<i>In re G.D. Searle & Co. "Copper 7" IUD Prods. Liab. Litig.,</i> 483 F. Supp. 1343 (J.P.M.L. 1980).....	5
<i>In re Garrison Diversion Unit Litig.,</i> 458 F. Supp. 223 (J.P.M.L. 1978).....	8
<i>In re: Home Depot U.S.A., Inc. Wage and Hour Litigation,</i> 818 F. Supp. 2d 1376 (JPML 2011).....	14
<i>In re Lumber Liquidators Chinese-Mfd. Flooring Prods. Mktg., Sales Practices &</i> <i>Prods. Liab. Litig.,</i> 109 F. Supp. 3d 1382 (J.P.M.L. 2015).....	20
<i>In Re: Nat'l Ass'n for the Adv. of Multijurisdictional Practice Litig.,</i> 52 F. Supp. 3d 1377 (J.P.M.L. 2014).....	12
<i>In re Ok. Ins. Holding Co. Act Litig.,</i> 464 F. Supp. 961 (J.P.M.L. 1979).....	12
<i>In re Pharmacy Benefit Plan Administrator Pricing Litig.,</i> 206 F. Supp. 2d 1362 (J.P.M.L. 2002).....	11

<i>In re: Proton-Pump Inhibitor Prod. Liab. Litig.,</i> No. 2757 (J.P.M.L Feb 2, 2017)	16
<i>In re: Raymond Lee Org., Inc. Sec. Litig.,</i> 446 F. Supp. 1266 (JPML 1978).....	14
<i>In re Rite Aid Corp. and Wage & Hour Emp't Practices Litig.,</i> 655 F. Supp. 2d 1376 (J.P.M.L. 2009).....	15
<i>In Re: Samsung Galaxy Smartphone Mktg. & Sales Prac. Litig.,</i> MDL No. 2771.....	16
<i>In re Shoulder Pain Pump-Chondrolysis Prods. Liab. Litig.,</i> 571 F. Supp. 2d 1367 (J.P.M.L. 2008).....	17
<i>In re Sugar Indus. Antitrust Litig.,</i> 405 F. Supp. 1404 (J.P.M.L. 1975).....	17
<i>In Re: Townsend Farms Organic Anti-Oxidant Blend Prod. Liab. Litig.,</i> 24 F. Supp. 3d 1372 (J.P.M.L. 2014).....	8
<i>In re: Transocean Ltd. Sec. Litig. (No. II),</i> 753 F. Supp. 2d 1373 (J.P.M.L. 2010).....	16
<i>Int'l Refugee Assis. Proj. v. Trump,</i> -- F.3d --, 2017 WL 2273306 (4th Cir. May 25, 2017).....	2
<i>Keys v. Dep't of Homeland Sec.,</i> 570 F. Supp. 2d 59 (D.D.C. 2008).....	15
<i>Long v. IRS,</i> 693 F.2d 907 (9th Cir. 1982)	6
<i>Martins v. USCIS,</i> 962 F. Supp. 2d 1106 (N.D. Cal. 2013).....	6
<i>McGehee v. CIA,</i> 697 F.2d 1095 (D.C. Cir. 1983).....	15
<i>Mobley v. CIA,</i> 806 F.3d 568 (D.C. Cir. 2015).....	10
<i>Smith v. Bayer Corp.,</i> 131 S. Ct. 2368 (2011).....	14
<i>Taylor v. Sturgell,</i> 553 U.S. 880 (2008).....	13

<i>United States v. Philip Morris, Inc. (In re Tobacco/Gov't Health Care Litig.),</i> 76 F. Supp. 2d 5 (D.D.C. 1999).....	5, 14
<i>Washington v. Trump,</i> 847 F.3d 1151 (9th Cir. 2017)	2
<i>Weisberg v. U.S. Dep't of Justice,</i> 705 F.2d 1344 (D.C. Cir. 1983).....	10
<i>Yonemoto v. VA,</i> 686 F.3d 681 (9th Cir. 2012).....	6

STATUTES

5 U.S.C.	
§ 552(a)(4)(b).....	12, 19
§ 552(a)(6)(A)(i)	6, 16
§ 552(a)(6)(E)(i).....	7
§ 552(a)(6)(E)(v)(II)	3
§ 552(a)(8)(A)(i).....	6
§ 552(b)(1)(A)-(9).....	12
28 U.S.C.	
§ 1407.....	passim
§ 1657(a).....	7

OTHER AUTHORITIES

19 C.F.R. § 103.5(d)(2), (g)	10
15 Charles A. Wright, <i>et al.</i> , FEDERAL PRACTICE & PROCEDURE: JURISDICTION & RELATED MATTERS § 3862, 380, 407, 413 (2007).....	5
House Report No. 1130, 90th Cong., 2d Sess. 4, reprinted in 1968 U.S. Code Cong. & Admin. News at 1898, 1901.....	4, 5, 14

Plaintiffs, affiliates of the American Civil Liberties Union (the “Affiliates”), *oppose* the “Motion for Transfer of Actions Pursuant to 28 U.S.C. § 1407 for Coordination or Consolidated Pretrial Proceedings” (“**Transfer Motion**”), filed by U.S. Customs and Border Protection (“Defendants” or “**CBP**”), a component of the U.S. Department of Homeland Security (“**DHS**”).

I. INTRODUCTION

Plaintiffs in these 13 actions are ACLU Affiliates who submitted requests to obtain records from CBP under the Freedom of Information Act (“**FOIA**”). The requests were directed to CBP field offices and limited to *local records*, that exist within each separate district, related to implementation of President Trump’s January 27, 2017 Executive Order titled “Protecting the Nation From Foreign Terrorist Entry Into the United States,” Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017) (the “E.O.”). Because each request expressly disclaimed any request for documents held in the District of Columbia, if there are any factual disputes – and the Affiliates do not anticipate any – those disputes will revolve around compliance within each *local* CBP field office, and whether it thoroughly searched for and produced relevant, non-exempt documents. If any case requires discovery – which is exceedingly rare in FOIA litigation – that discovery will occur after summary judgment (and only if Defendants fail to prove their searches were adequate) concerning *local* compliance obligations. Any facts related to CBP’s decision to coordinate records searches through agency headquarters – the only allegedly common facts CBP invokes (Memo. at 9-10) – are not likely to be disputed, but if they are, those disputes will not be complex.

Granting consolidation and transfer would promote forum-shopping and delay, not justice. Indeed, Defendants’ decision to flout their FOIA obligations – refusing to produce a single document in every action except one or even suggest a production schedule, and delaying

these FOIA cases by *months* through this Motion and concurrently-filed stay motions – suggests delay and obstruction is their motive.¹ Across the Nation, federal judges have scrambled to resolve issues raised by the E.O., citizens have protested, and attorneys have offered services free of charge. *E.g.*, *Int'l Refugee Assis. Proj. v. Trump*, -- F.3d --, 2017 WL 2273306 (4th Cir. May 25, 2017); *Washington v. Trump*, 847 F.3d 1151, 1156 (9th Cir. 2017). Yet, the government cannot be bothered to produce even the most non-controversial documents and, so far as the Affiliates can tell, has not even begun to search in most jurisdictions, despite FOIA's mandate of prompt production. These actions are not complex, but they are exceedingly important. This Court should reject Defendants' attempt to derail them through this misfit of a Motion.

The multiple ACLU Affiliates seeking local records are committed to collaborating and cooperating to reduce any duplication between the cases. However, if the Panel is inclined to grant the Motion, they request that the cases be transferred to the Eastern District of Virginia, the District of Maine or the Western District of Washington, in which an ACLU Affiliate lawsuit for local records is pending and which have court dockets with capacity to promptly resolve these cases. Transfer to any one would help expedite these matters, a requirement in FOIA litigation.

II. BACKGROUND

A. Underlying Facts

President Trump signed the E.O. on January 27, 2017. *See* Compl. ¶ 2.² Among other things, the E.O. purported to halt refugee admissions and bar entrants to the United States from

¹ In Texas, the CBP produced a "final" answer on April 18, 2017, consisting of *two* pages of highly redacted records. If CBP in fact only has two pages of responsive documents in Texas, and other jurisdictions are similar, plainly, these cases are not complex, and the compliance burden on the government will be minimal. For other jurisdictions, CBP sent a form letter on May 26, 2017, stating that CBP agrees to expeditious treatment and is searching for records, but not committing to, or even suggesting, a production schedule.

² For general background information, the ACLU Affiliates refer to the first-filed Complaint, from the Northern District of California ("Compl."). The other Complaints are referenced by their jurisdiction, *e.g.*, "W.D. Wash. Compl."

seven predominantly Muslim countries. Compl. ¶ 4. News reports described Defendants' implementation of the E.O. as "chaotic" and "total[ly] lack[ing] ... clarity and direction." *Id.* ¶ 7 & n.3. Demonstrators and pro bono attorneys appeared in airports across the country by the thousands. As discussed below, different enforcement issues arose as local CBP officials in the various airports and border crossings struggled to implement the E.O. with no advance notice and little guidance. *E.g.*, Compl. ¶ 8; *see* Section IV. A, *infra*. Within days, various judicial orders were entered barring implementation of portions of the E.O. Compl. ¶ 6.

Although the E.O. and a revised version issued March 6, 2017, remain enjoined, the public is still largely in the dark about CBP's actions, including its disastrous local implementation at various airports across the Nation, the instructions given to local CBP officials at those airports, and the basis for these officials' interpretation of the order locally. On February 2, 2017, Plaintiffs – ACLU Affiliates in states with ports of entry that were heavily impacted by the E.O. – submitted eighteen separate FOIA requests seeking records related to the local interpretation and enforcement of the E.O. Compl. ¶¶ 20-22 & Ex. A. In each of these cases, local ACLU Affiliates seek local information specific to one local CBP Field Office, specifically, information held by local CBP employees and offices regarding CBP's local interpretation and enforcement of the E.O. at the local international airports (and in Michigan's case, the local land border crossings), and the corresponding port of entry offices and regional field operations office, specified in each underlying FOIA request. *Id.* ¶ 21 & Ex. A at 8. None of the ACLU Affiliates seeks any information held in the records of CBP Headquarters. *Id.*

The requests sought expedited processing, on the ground that there is a "compelling need" for these records under 5 U.S.C. § 552(a)(6)(E)(v)(II) because the records are "urgen[tly]" needed by an organization primarily engaged in disseminating information "to inform the public

concerning actual or alleged Federal Government activity.” Compl. ¶ 23 & Ex. A at 9. Except for Texas, CBP has not indicated whether, or when, it will comply with the FOIA requests. *Id.* ¶ 30. To Plaintiffs’ knowledge, CBP’s local field offices have yet to disclose any of the instructions its local officials were provided with respect to the Executive Order or any record explaining its interpretation of the Order.

B. Procedural Background and Pending Proceedings

Having received no response from CBP within the period allotted by the statute, the Affiliates within the jurisdiction of the San Francisco CBP Field Office – the ACLU of Northern California, the ACLU of Hawaii, and the ACLU of Utah – filed a Complaint on April 10, 2017; two days later, Affiliates within the jurisdictions of twelve additional CBP Field Offices also filed suits. Although the National ACLU had filed a FOIA request for CBP Headquarters records on February 2, no lawsuit has been filed seeking the records specified in that request, which differ from the local records sought in each of the pending thirteen actions here at issue.

The Complaints each allege that Defendants violated FOIA by failing to (i) produce responsive records, (ii) state whether they will make records available, and (iii) respond to the request for expedited processing. Compl. ¶¶ 34-44. However, each Complaint addresses the unique facts specific to the targeted local CBP Field Office, as CBP officials at local international airports scrambled to enforce the E.O. on virtually no notice. Section IV. A, *infra*.

On May 8, Defendants filed a motion with the JPML, seeking transfer to the District of Columbia in order to coordinate pretrial proceedings in the thirteen FOIA lawsuits.

III. LEGAL STANDARD

A. MDL Is Designed For Complex Or Fact-Intensive Cases.

Congress adopted the MDL process for the rare case that is complex enough to justify the unusual procedure. As one House Report explained, “[i]t is possible ... that *a few exceptional*

cases may share unusually complex questions of fact, or that many complex cases may share a few questions of fact. In either of these instances substantial benefit may accrue to courts and litigants through consolidated or coordinated pretrial proceedings.” House Rep. No. 1130, 90th Cong., 2d Sess. 4, reprinted in 1968 U.S. Code Cong. & Admin. News (“H.R. 1130”) at 1898, 1901 (emphasis added). The Panel has adhered to the intentionally narrow reach of Section 1407, making clear that “centralization under Section 1407 *should be the last solution after considered review of all other options.*” *In re Best Buy Co., Inc., Cal. Song-Beverly Credit Card Act Litig.*, 804 F. Supp. 2d 1376, 1378 (J.P.M.L. 2011) (emphasis added).

Accordingly this Panel may transfer civil actions to any district for coordinated or consolidated pretrial proceedings only if the moving party bears the heavy burden of demonstrating that: (1) there are common questions of fact; (2) consolidation will “serve the convenience of the parties and witnesses”; and (3) “the just and efficient conduct of the actions will be served” by transfer and centralization. 28 U.S.C. § 1407; *see* 15 Charles A. Wright, *et al.*, FEDERAL PRACTICE & PROCEDURE: JURISDICTION & RELATED MATTERS § 3862, 380, 407, 413 (2007); *United States v. Philip Morris, Inc. (In re Tobacco/Gov’t Health Care Litig.)*, 76 F. Supp. 2d 5, 7 (D.D.C. 1999); *In re G.D. Searle & Co. “Copper 7” IUD Prods. Liab. Litig.*, 483 F. Supp. 1343, 1345 (J.P.M.L. 1980). Common questions of facts are not enough to justify transfer; justice and efficiency must also be “sufficiently served to justify the necessary inconveniences of transfer and remand.” *In re Concrete Pipe*, 302 F. Supp. 244, 254 (J.P.M.L. 1969). The Panel must weigh the interests of all plaintiffs and defendants. *See In re Falstaff Brewing Corp. Antitrust Litig.*, 434 F. Supp. 1225, 1229 (J.P.M.L. 1977). If transfer and consolidation do not serve all statutory objectives, the request should be denied. *In re Concrete Pipe*, 302 F. Supp. at 255 (“If we are to order transfer, the statute requires us to determine that

the answer to that question, including each of its four elements, is in the affirmative.”).

B. FOIA Litigation Must Be Promptly Resolved.

In its decades-long history, the Panel has considered only two cases addressing FOIA litigation – both of them resolved decades ago. For good reason. MDL transfer makes no sense in FOIA litigation. FOIA’s “core purpose is to inform citizens about what their government is up to” so as to “ensure an informed citizenry,” which is “vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *Yonemoto v. VA*, 686 F.3d 681, 687 (9th Cir. 2012) (citation omitted), *overruled in part on other grounds by Animal Legal Def. Fund v. FDA*, 836 F.3d 987 (9th Cir. 2016) (*en banc*). Because “disclosure, not secrecy, is the dominant objective of the Act,” FOIA presumes all agency records are public and places the burden on the government to justify withholding based on specific exemptions that must be narrowly construed. *Id.* at 687-88 (quote omitted); *see* 5 U.S.C. § 552(a)(8)(A)(i). As discussed below, FOIA requires compliance by local agencies, as established by declarations from compliance officers in that jurisdiction, rendering factual disputes, and discovery into those disputes, uniquely local. Sections IV. A, IV. C, *infra*.

The statute advances the policy of prompt disclosure by requiring agencies to respond to requests within 20 days, absent “unusual” or “exceptional” circumstances. *Id.* § 552(a)(6)(A)(i). “[U]nreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent these abuses.” *Long v. IRS*, 693 F.2d 907, 910 (9th Cir. 1982). Legislative history shows that “Congress intentionally set harsh time limits for agencies to respond to FOIA requests because it recognized that information is often useful only if it is timely.” *Gilmore v. Dep’t of Energy*, 33 F. Supp. 2d 1184, 1189 (N.D. Cal. 1998).³

³ *See also Martins v. USCIS*, 962 F. Supp. 2d 1106, 1127 (N.D. Cal. 2013) (recognizing “expeditious release of documents ... furthers FOIA’s core purpose of shed[ding] light on an

Agencies *must* expedite processing and respond “as soon as practicable” where, as here, the requesters show “urgency to inform the public concerning actual or alleged Federal Government activity.” *Id.* § 552(a)(6)(E)(i). “[E]xpeditious processing of a FOIA request is a statutory right, not just a matter of court procedure.” *Edmonds v. FBI*, 417 F.3d 1319, 1323 (D.C. Cir. 2005). The public has a particularly strong interest in the swift adjudication of cases like these, which are the subject of “widespread and exceptional media interest,” and deal with “public confidence” in government institutions. *Edmonds v. F.B.I.*, Case No. 02-1294, 2002 WL 32539613 (D.D.C. Dec. 03, 2002). As one court explained, “President Bush [] invited meaningful debate about the warrantless surveillance program ... [t]hat can only occur if DOJ processes its FOIA requests in a timely fashion and releases the information sought.” *Elec. Privacy Info. Ctr. v. DOJ*, 416 F. Supp. 2d 30, 41 (D.D.C. 2006).⁴ Here, while CBP has agreed in principle that these FOIA requests must be expedited (*see* footnote 1, *supra*), this Motion, combined with its pending stay motions, seek only delay.

IV. THESE CASES DO NOT MEET THE DEMANDING STANDARD FOR MDL TREATMENT

A. Common Questions Of Fact, If Any Even Exist, Do Not Predominate Over Questions Of Law And Unique Questions Of Fact.

Defendants carry a heavy burden to show that common factual questions exist, *and* that

agency’s performance”) (quotation omitted). The Priorities Act also furthers this purpose, by expressly including FOIA litigation in its mandate that district courts “expedite the consideration of any action” upon a showing of “good cause.” 28 U.S.C. § 1657(a); *see also Ferguson v. FBI*, 722 F. Supp. 1137, 1144 (S.D.N.Y. 1989) (“Prompt review of decisions denying access to government information is critical to FOIA users and to the purposes of the Act.”) (quoting legislative history). This is because “the value of disclosed information is transitory. If this information is not released in a timely manner, it may be of no value at all.” H.R. Rep. 98-985, 5-6, 1984 U.S.C.C.A.N. 5779, 5783-84.

⁴ Likewise, in *ACLU v. DOD*, 2006 WL 1469418 (N.D. Cal. May 25, 2006), the court held the ACLU had an urgent need for records about a government program to gather information on political protesters because “[g]etting the requested information quickly might be valuable to would-be protesters and opposition groups” to “help them decide how to express their political viewpoints,” and, given the pending controversy over the program, delay also would harm “the media’s interest in quickly disseminating breaking, general-interest news.” *Id.* at *7-8.

they are “sufficiently complex [such] that *accompanying discovery will be so time-consuming as to further the purposes of Section 1407.*” *In re Garrison Diversion Unit Litig.*, 458 F. Supp. 223, 225 (J.P.M.L. 1978) (emphasis added). Consolidation and transfer are not justified where individual, rather than common, factual questions predominate, and common questions between the actions, if any, will be mainly legal questions. *See In re Airline “Age of Employee” Emp’t Practices Litig.*, 483 F. Supp. 814, 817 (J.P.M.L. 1980).

Defendants’ brief in support of their Transfer Motion shows this Section 1407(a) requirement is not satisfied. Memo. at 9-10. Although they claim that common questions of fact exist, their brief does not identify a single factual *dispute* (or even *potential* dispute). *See In Re: Townsend Farms Organic Anti-Oxidant Blend Prod. Liab. Litig.*, 24 F. Supp. 3d 1372 (J.P.M.L. 2014) (denying transfer in part because “factual core appears to be largely undisputed”). Defendants vaguely invoke CBP’s unilateral decision to “*coordinate* an initial search for records” through its headquarters, and speculate about issues that may arise in the course of that search. Memo. at 2, 9. They argue that the FOIA requests are virtually identical, but they ignore a key fact – each request makes clear that it is seeking *only* local records, and expressly disclaims any request for records housed at CBP’s headquarters in the District of Columbia:

To reiterate: **The ACLU seeks information regarding CBP’s interpretation and enforcement of the Executive order at the Local International Airports, not information held in the records of CBP Headquarters.** Specifically, the ACLU seeks records held by CBP employees and offices at the Local International Airports, and the corresponding Port of entry Offices and Regional Field Operations Office.

Compl. Ex. 1 at 9 (emphasis in original).

Although the FOIA requests use the same language to request documents, the similarities end there. These cases involve 42 different plaintiffs seeking different records, represented by 46 different attorneys, including 21 local counsel from 12 local firms. Each ACLU Affiliate

wants to obtain local records regarding the actions of government officials who live and work in their communities. Allegations from a few of the complaints highlight the factual differences between events in different jurisdictions, and thus the documents that should be available locally:

- **CBP Detroit Field Office:** The Michigan litigation concerns two separate FOIAS – one concerning events at Detroit Metropolitan Airport, and one concerning events at U.S./Canada border crossings in Michigan. Detroit, which is located on the border, has the highest number of residents per capita from the seven countries barred under the E.O., and also has the two busiest land crossings with Canada (the Ambassador Bridge and the Detroit-Windsor Tunnel). Conditions at the Michigan land ports of entry – which affected commuters not just international travelers – were chaotic, with CBP agents reportedly telling people that the “[didn’t] know what’s going on.” The Michigan ACLU seeks information on incidents like that in Port Huron, where a U.S. citizen and legal permanent resident were detained at the Canadian border. E.D. Mich. Compl. ¶¶ 11-16.
- **CBP Atlanta Field Office:** In the Northern District of Georgia, at least eleven people were detained, including a 76-year-old with a heart condition and glaucoma, and a CNN producer. This ACLU Affiliate understands that when Georgia Congressmen John Lewis and Hank Johnson arrived at the Hartsfield-Jackson Atlanta International Airport on January 28, 2017 to ascertain how many people were being detained, immigration officials refused to provide any information. It was not until after the Congressman refused to leave the airport and sat with waiting family members that immigration officials met privately with him. After the meeting, Congressman Lewis reported that there were no written protocols for enforcing the Executive Order. N.D. Ga. Compl. ¶¶ 10-15.
- **CBP Boston Field Office:** In Maine, scholars and academics from Boston-area institutions were denied entry into the United States. Doctors from New England hospitals and patients seeking medical care were delayed, denied entry, or subjected to unnecessary anguish. Me. Compl. ¶ 10.
- **CBP Los Angeles Regional Field Office:** In the Central District of California, which is home to Los Angeles International Airport – one of the busiest airports in the nation – CBP agents detained (1) a lawful permanent resident from Iran who was scheduled to be sworn in as a U.S. citizen in February, and who was traveling with her U.S. citizen infant son; (2) an Iranian citizen with a valid U.S. student visa, whom CBP removed from the country nearly two hours after a federal judge had ordered the government to halt all removals immediately; and (3) an Iranian citizen with a valid U.S. visa that had been granted as a result of a petition filed by his U.S. citizen son. Additionally, upon information and belief, an 80-year-old insulin-dependent Iranian diabetic with a heart condition was detained with her husband for nearly twenty-four hours after the couple arrived at Los Angeles International Airport to visit their son, a lawful permanent resident; the couple had valid tourist visas. C.D. Cal. Compl. ¶¶ 10-13.
- **CBP Houston Field Office:** In Texas, travelers were pressured into signing papers to voluntarily withdraw their admission into the United States. S.D. Tex. Compl. ¶ 11-16.
- **CBP Baltimore Field Office:** In the Eastern District of Virginia, Yemeni individuals flying

to Dulles with valid, government-issued visas had their visas cancelled and were refused entry into the United States. After several courts entered orders that, among other things, required that detained travelers have access to attorneys, CBP officials at Dulles appeared to ignore the orders. Two Syrian families with valid immigrant visas arrived at the Philadelphia International Airport in Pennsylvania to join family and were threatened with imprisonment and a 5-year ban on travel to the U.S., and so bought tickets to return to Qatar (resulting in a need for medical intervention for one of the patients). Lawyers, as well as local, state and federal politicians were denied access to detainees, some of whom were transferred to local jails to spend the night. E.D. Va. Compl. ¶¶ 10-16.⁵

As evident, each of the pending FOIA requests focuses on the factual circumstances surrounding local implementation of the E.O. in a particular CBP Field Office. As litigation proceeds, one legal question that will need resolution is the reasonableness of CBP's searches for records held in the relevant local Field Office, with reference to relevant events at the local international airport(s) within that Field Office's jurisdiction (or, for the Michigan FOIA action, at the local land border crossings).

CBP's own regulations require FOIA requesters who seek records from CBP field offices to serve their FOIA request *on the field office* itself, not CBP headquarters, and require CBP officers to attempt to locate any such local records upon receipt of a request. 19 C.F.R. § 103.5(d)(2), (g). For each of these pending FOIA cases, CBP's declarations attesting to the adequacy of the search and the pace of disclosure in the various jurisdictions necessarily will be submitted by employees within those respective jurisdictions, because only they will be able to attest that the search was adequately performed. Indeed, *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344 (D.C. Cir. 1983), supports the ACLU Affiliates. The requirements enunciated there make clear that local facts will predominate on the single factual issue presented – adequacy of the search. *Id.* at 1351. *See also Mobley v. CIA*, 806 F.3d 568, 580 (D.C. Cir. 2015) (“[t]his

⁵ Due to space limitations, the ACLU Affiliates are not able to identify all of the disparate facts in the various cases. If the Panel needs additional information, the Affiliates request permission to submit a supplemental brief.

court applies a reasonableness standard to determine whether an agency performed an adequate search, ..., and our review is heavily fact-dependent” (citations omitted)).

Because unique factual questions will predominate, transfer is not warranted.⁶

Defendants try to avoid this result by invoking their decision to coordinate compliance through CBP headquarters. But this is meaningless. Whatever CBP’s internal procedures, the question in each of these pending FOIA actions will be whether the local office conducted the requisite search. Section III. B, *supra*. Thus, while any intra-agency communications (which presumably will be electronic) may provide guidance regarding that search, any factual disputes will concern the application of that guidance within each individual CBP Field Office, and whether the resulting search suffices.

Finally, neither case invoked by Defendants supports their request. Memo. at 2, 11-12, citing *In re Church of Scientology Flag Serv. Org./IRS FOIA Litig.*, No. 892 (J.P.M.L. Sept. 4, 1991) (“*Church of Scientology*”); *In re Freedom Magazine/IRS FOIA Litig.*, No. 910 (J.P.M.L. Feb. 12, 1992) (“*Freedom Magazine*”). These decades-old decisions involved FOIA requests to the IRS seeking specific records, regardless of location, related to the Church of Scientology. The Panel agreed to transfer the 30 cases at issue in *Church of Scientology* to a Florida venue because 20 of the 30 cases were pending there and “every FOIA request in the litigation was made upon the IRS office in Jacksonville in that district, and accordingly relevant IRS witnesses and documents will be found there.” Order at 2. Here, in contrast, the 13 FOIA lawsuits were

⁶ See, e.g., *In re American Home Products Corp “Released Value” Claims Litigation*, No. 333, 448 F. Supp. 276, 278 (J.P.M.L. 1978) (“The factual issues presented are primarily, if not entirely, unique questions pertaining to the numerous distinct shipments involved in each action.”); *In re Pharmacy Benefit Plan Administrator Pricing Litig.*, 206 F. Supp. 2d 1362 (J.P.M.L. 2002) (denying § 1407 transfer on five class actions, even where they shared common legal questions and a few factual questions, because unique factual questions predominated); *In re Asbestos & Asbestos Insul. Mat. Prods. Liab. Litig.*, 431 F. Supp. 906, 910 (J.P.M.L. 1977) (“Many factual questions unique to each [class] action ... already pending in a single district clearly predominate, and therefore transfer is unwarranted.”).

filed in 13 different districts, none of which is Defendants' preferred district. In *Freedom Magazine*, the Panel approved transfer of 8 FOIA cases filed by a single plaintiff because "many relevant witnesses and documents" were likely to be found in the transferee district and a constituent action sought records located there. Order at 2. Here, however, the FOIA requests are explicit in disclaiming any request for documents in the District of Columbia.

Defendants have not met their heavy burden to disrupt these proceedings by transferring them for consolidation. The Panel should deny Defendants' Motion in its entirety.

B. Any Common Legal Questions Are Illusory And Irrelevant.

CBP suggests that common legal issues may arise if they invoke exemptions from disclosure under FOIA. *E.g.*, Memo. at 2; *see* 5 U.S.C. § 552(b)(1)(A)-(9). These exemptions protect defined categories of information and must be narrowly construed. *Dept. of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). Unless a record falls within one of these well-defined categories, the government will bear the burden of proving that *each particular record* falls within a FOIA exemption. 5 U.S.C. § 552(a)(4)(b). Although it is impossible to know whether Defendants will raise the same claimed exemptions – because each action seeks different records and Defendants have only responded in one case – it would not be relevant even if they did.

This Panel repeatedly has held that consolidation and transfer are not justified by the existence of common legal issues. Thus, in *In Re: Nat'l Ass'n for the Adv. of Multijurisdictional Practice Litig.*, 52 F. Supp. 3d 1377, 1378 (J.P.M.L. 2014), the Panel explained that "[m]erely to avoid [different] federal courts having to decide the same issue is, by itself, usually not sufficient to justify Section 1407 centralization." (Citations omitted.)⁷ In *In re Clean Water*

⁷ *See also, e.g., In re Ok. Ins. Holding Co. Act Litig.*, 464 F. Supp. 961, 965 (J.P.M.L. 1979) ("while the purportedly common questions listed by movants ... may involve some subsidiary factual inquiries, ... the legal aspects of these questions clearly predominate" and thus transfer is denied).

Rule, 140 F. Supp. 3d 1340, 1341 (J.P.M.L. 2015), for example, the Panel denied transfer of actions challenging a rule promulgated by the EPA because discovery would be minimal and the actions would turn on questions of law.

Even if Defendants invoked similar exemptions, it still would not support centralization because the exemptions will apply differently, depending on the facts of the case. The cases seek records related to enforcement of the E.O. at different airports, with some cases addressing orders apparently violated by the CBP, others addressing denial of counsel and others addressing conduct leading to physical injury, among other things. In addition, the Michigan case requests records related to implementation of the E.O. at the U.S./Canada land border. Section A, *supra*. These disparate facts will drive the legal question of whether an exemption applies to a particular record, and must be resolved on a case-by-case basis. Thus, even if Defendants invoke a particular exemption in every case, the disparate facts still will predominate.

Defendants' reliance on *Taylor v. Sturgell*, 553 U.S. 880 (2008), is particularly misplaced. Memo. at 12. There, the United States Supreme Court refused to bar the FOIA action of an individual who sought the same records as his friend, who had unsuccessfully attempted to acquire the records in a previous FOIA action. Overturning lower court decisions barring the FOIA suit, the Court embraced the individualized nature of relief under FOIA, stating that the "Act, however, instructs agencies receiving FOIA requests to make the information available not to the public at large, but rather to the 'person' making the request." *Id.* at 885, 902. "[A] successful FOIA action results in a grant of relief to the individual plaintiff, not a decree benefiting the public at large." *Id.* at 902-903. Accordingly, the Court found that Congress never meant to preclude successive actions seeking the same records, undercutting Defendants' argument that any common legal questions must be resolved in the same way. *See*

also *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2381 (2011) (allowing a “series of repetitive lawsuits demanding the selfsame documents” although “the payoff in a single successful FOIA suit – disclosure of documents to the public – could ‘trum[p]’ or ‘subsum[e]’ all prior losses”). Given this clear law, Defendants’ attempt to maneuver these cases to the District of Columbia, in the hope that they will obtain a single decision rejecting all of them, should be flatly rejected.

C. Transfer Would Impair, Not Advance, Convenience, Justice And Efficiency.

The Panel has emphasized that the mere presence of common issues of fact is not sufficient to justify transfer in the absence of a showing that transfer will be more convenient for parties and witnesses and will promote the just and efficient conduct of the action. *See In re Cessna Aircraft Distributorship Antitrust Litig.*, 460 F. Supp. 159, 161-62 (J.P.M.L. 1978).⁸ Thus, even if Defendants had identified sufficient common factual questions, the Motion should be denied because consolidation and transfer would not serve the Section 1407 statutory objectives of convenience, efficiency and justice. As the Panel held in *In re Cybil Fisher Litig.*, 987 F. Supp. 1376 (J.P.M.L. 2013), centralization is not warranted in cases like this one, that “are generally summary in nature.”

Defendants recognize, as they must, that discovery is rare in FOIA litigation. Memo. at 12, 16 n.8. Yet, Defendants fail to acknowledge the impact of this fact on their Motion. Because reducing discovery burdens is a primary reason for transfer and consolidation under MDL (H.R. 90-1130 at 1900), the Panel rarely orders transfer if discovery is not anticipated.⁹ Rather than the decades-old *Scientology* cases that Defendants invoke, the Affiliates are not aware of a single case granting transfer where the parties either have completed or do not anticipate discovery.

⁸ See also *United States v. Philip Morris, Inc.*, 76 F. Supp. 2d at 8 (holding that this is the most important factor in the Panel’s transfer decision).

⁹ See, e.g., *In re: Home Depot U.S.A., Inc. Wage and Hour Litigation*, 818 F. Supp. 2d 1376 (JPML 2011); *In re: Raymond Lee Org., Inc. Sec. Litig.*, 446 F. Supp. 1266 (JPML 1978).

Moreover, where it is clear that any discovery would require an individualized, fact-intensive inquiry, consolidation should be denied. *In re Rite Aid Corp. and Wage & Hour Emp't Practices Litig.*, 655 F. Supp. 2d 1376 (J.P.M.L. 2009) (centralization would not further the just and efficient conduct of the litigation, since discovery was likely to require an individualized, factual inquiry into the job duties performed by each employee).¹⁰ Here, any discovery that would arise would be uniquely local and tailored, relating to the adequacy of the search for and disclosure of the specific records that may exist in each specific jurisdiction. Defendants' unilateral decision to process these disparate requests through headquarters is not required by FOIA – indeed, it is arguably contrary to FOIA's requirement that the government expeditiously search for and disclose documents.¹¹ In any event, CBP's alleged internal agency mechanics are certainly insufficient to justify the extraordinary relief Defendants seek with this Motion.

The need for prompt resolution is particularly acute in these cases. The records sought involve an Executive Order that has been the subject of substantial media coverage and is a source of ongoing public debate. Plaintiffs sought expedited processing of their FOIA requests in order to provide the public with information about how the CBP read and implemented the E.O. in various local international airports and border crossings across the country. *See Compl.* ¶¶ 23-26. This has been, and continues to be, a matter of pressing public concern. *Id.* ¶¶ 5-12. As noted above and in each Complaint, CBP's local implementation of the Executive Order resulted in mass protests, widespread media coverage, calls for action by elected officials, and extensive litigation. *Id.* Although the E.O. itself is on hold, the legal and public policy debates

¹⁰ *See also Caldo Oil Co. v. Gulf Oil Co. (In re Petroleum Prods. Antitrust Litig.)*, 476 F. Supp. 455, 457 (J.P.M.L. 1979) (refusing to consolidate case involving unique discovery).

¹¹ Delayed, post-suit referral is improper. *See Keys v. Dep't of Homeland Sec.*, 570 F. Supp. 2d 59, 70 (D.D.C. 2008) (referral was not prompt and significantly delayed resolution of FOIA request); *McGehee v. CIA*, 697 F.2d 1095, 1110 (D.C. Cir. 1983) ("when an agency receives a FOIA request for "agency records" in its possession, it must take responsibility for processing the request").

surrounding the propriety and mechanics of CBP's local implementation thereof remain very much alive, including in each of the Districts in which these separate proceedings were filed.

Defendants' request to transfer these cases to the District of Columbia will only delay them, which is squarely at odds with FOIA's purpose and the ACLU Affiliates' statutory right to expedited access. The ACLU Affiliates requested these records on February 2, 2017, four months ago. Although FOIA requires compliance within 20 days (5 U.S.C. § 552(a)(6)(A)(i)), Defendants have not produced a single document except the paltry production in Texas, nor have they suggested a production schedule in the other actions. By the time this Motion is heard and resolved, six full months will have passed since the FOIA requests were submitted. The Panel should not delay this matter any longer. The ACLU Affiliates and the public have an urgent need for the records at issue, so that their members, media organizations, community groups, and ordinary citizens can have the information necessary to participate in the ongoing debate over the E.O. at a time when they can still influence public policy. *See EPIC*, 416 F. Supp. 2d at 42.

Further, "the proponent of centralization bears" an even "heavier burden to demonstrate that centralization is appropriate" where, as here, "only a minimal number of actions are involved." *See In re: Transocean Ltd. Sec. Litig. (No. II)*, 753 F. Supp. 2d 1373, 1374 (J.P.M.L. 2010); *see also In Re: Samsung Galaxy Smartphone Mktg. & Sales Prac. Litig.*, MDL No. 2771 (denying consolidation of 8 actions). In addition, the number of cases here is small, and they are not complex. *See In re: Proton-Pump Inhibitor Prod. Liab. Litig.*, No. 2757 at 3 (J.P.M.L. Feb 2, 2017) (denying motion to centralize 15 actions and 24 tag-alongs). Moreover, the ACLU Affiliates all oppose consolidation and transfer, which should weigh heavily against granting Defendants' Motion. *See In re Asbestos & Asbestos Insul. Material Prod. Liab. Litig.*, 431 F. Supp. 906, 910 (J.P.M.L. 1977) ("[t]he virtually unanimous opposition of the parties to transfer"

is “a very persuasive factor”).

Transfer would not promote the objectives of Section 1407. If discovery in a handful of jurisdictions happens to become necessary, the transferee court would be required to coordinate discovery into individualized questions of fact regarding Defendants’ compliance in distant jurisdictions – potentially delaying other actions, with no similar issues, while it resolves those disputes. Transfer also would be inconvenient to the parties and any potential witnesses. Each case has counsel within its jurisdiction, where any witnesses and discovery potentially relevant to compliance will be located. *See In re Sugar Indus. Antitrust Litig.*, 405 F. Supp. 1404, 1406 (J.P.M.L. 1975) (severing defendant because “on balance the convenience of parties and witnesses will be best served”). Defendants’ attempt to force the ACLU Affiliates to litigate in a district of their choosing, although no record or relevant witnesses can be found there, and most of the cases are on the other side of the country, contravenes the objectives of justice.

D. Alternatives to Centralization Exist.

Transfer is particularly inappropriate here because the benefits of centralization can be achieved through informal coordination. *In re Shoulder Pain Pump-Chondrolysis Prods. Liab. Litig.*, 571 F. Supp. 2d 1367, 1368 (J.P.M.L. 2008) (“parties can avail themselves of alternatives to Section 1407 transfer to minimize whatever possibilities there might be of duplicative discovery and/or inconsistent pretrial rulings”); *accord In re BMW Reverse Trans. Prod. Liab. Litig.*, 543 F. Supp. 2d 1382 (J.P.M.L. 2008). As evidenced by this consolidated Opposition, coordination already is occurring amongst the ACLU Affiliates. This is a persuasive factor where counsel overlap or already are coordinating their efforts. *See In re: Cymbalta (Duloxetine) Prod. Liab. Litig. (No. II)*, 138 F. Supp. 3d 1375, 1377 (J.P.M.L. 2015) (denying centralization of 41 actions in part because informal coordination and cooperation remained practicable). Counsel commit to continuing to make every effort possible to minimize any

duplication and reduce inefficiencies.

E. If This Motion Is Granted, The Michigan Border Crossing Case Should Not Be Consolidated With The Other Actions.

The Michigan action, which concerns not just implementation of the E.O. at the Detroit Metro Airport, but also implementation at Michigan's land border crossings with Canada, should in no event be consolidated.¹² As suggested by the Michigan ACLU's submission of two separate FOIAs, Michigan's situation is particularly unique. E.D. Mich. Compl. ¶ 1; *see id.* ¶¶ 10-18. The metro Detroit region has the highest number of residents per capita from the seven countries barred under the E.O., and is one of the primary locations for resettlement of Syrian refugees.¹³ Moreover, not only is Michigan's Arab-American population concentrated right on the land border with Canada,¹⁴ but the border crossings in the Detroit region – the Ambassador Bridge and the Detroit Windsor Tunnel – are the two busiest U.S./Canadian land crossings in the country. E.D. Mich. Compl. ¶ 15 The Michigan-Canada border is so close that it is common for people, including people from the banned countries residing in Canada, to commute to work or school from Windsor to Detroit daily during the week.¹⁵

The implementation of the E.O. at Michigan's land borders thus raises unique local issues, such as how the E.O. was applied to commuters or individuals who were in Canada to shop or dine when the E.O. went into effect. Given that the records on the Canada/Michigan

¹² The ACLU of Michigan will more fully set out the distinctiveness of the Michigan litigation in its forthcoming response (due June 2, 2017) to the government's motion to stay proceedings in the Eastern District of Michigan, and will file a copy of that response with this Panel.

¹³ George Hunter, *Number of Refugees Coming to Michigan Expected to Climb*, DET. NEWS, March 19, 2016, available at <http://www.detroitnews.com/story/news/local/oakland-county/2016/03/19/refugees-michigan-recent-high/82031954/> (visited May 30, 2017).

¹⁴ *Dearborn, Michigan has the highest percentage of Muslims in the country*, U.S. DEPT. OF COM., THE ARAB POPULATION: 2000-CENSUS BRIEF, U.S. CENSUS BUREAU (May 22, 2017), available at <https://www.census.gov/prod/2003pubs/c2kbr-23.pdf> (visited May 30, 2017).

¹⁵ Lauren Hayes, *Michigan/Windsor Cross Border Employment*, 5 J. FOR GLOBAL BUS. AND COMMUNITY 2, available at <http://jgbc.fiu.edu/files/journals/2/articles/109/public/109-587-1-PB.pdf> (visited May 30, 2017).

general docket conditions permit us to make the Section 1407 assignment knowing that the court has the resources available to manage this litigation”). The Judge in the pending FOIA case, the Hon. Leonie M. Brinkema, has no MDL proceedings assigned to her. *See, e.g., In re Lumber Liquidators Chinese-Mfd. Flooring Prods. Mktg., Sales Practices & Prods. Liab. Litig.*, 109 F. Supp. 3d 1382, 1383 (J.P.M.L. 2015) (“Centralization ... allows us to assign this litigation to a district to which we have transferred relatively few MDLs.”). It also is easily accessible, located in Alexandria, Virginia, a mere 9.1 miles from CBP Headquarters, and with three major airports and non-stop flights from most jurisdictions involved here, and of course conveniently located for defense counsel. *See In re Ameritrust Mtg. Co. Lending Practices Litig.*, 408 F. Supp. 2d 1354, 1355 (J.P.M.L. 2005) (transferring cases to a “geographically central district [that] will be a convenient location for a litigation already nationwide in scope”). Transfer to the Eastern District of Virginia would further the goals of expedited relief in FOIA actions.

Alternatively, the Districts of Maine or Western Washington both would be superior choices to the District of Columbia. Maine has an average pending caseload of only 219 cases per judge, a median time of 6.3 months from filing to disposition in civil cases, and only 1.5% of its civil cases are more than 3 years old. It has no MDL proceedings pending in the District. Western Washington has an average pending caseload of only 400 cases per judge, a median time in civil cases of 6.5 months from filing to disposition and 17.2 months from filing to trial, and only 3% of its cases are more than 3 years old. It also has no MDL proceedings pending. In addition, because 6 of the 13 FOIA cases are pending in the Ninth Circuit Court of Appeals, Western Washington would be a convenient choice for nearly half of the Affiliates’ counsel.

V. CONCLUSION

The ACLU Affiliates respectfully request that the Panel deny the Motion.

Date: May 30, 2017

Respectfully submitted,

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**BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION**

**IN RE AMERICAN CIVIL LIBERTIES
UNION FREEDOM OF INFORMATION
ACT REQUESTS REGARDING
EXECUTIVE ORDER 13769**

MDL Docket No. 2786

PROOF OF SERVICE

In Compliance with Rule 4.1(a) of the Rules of Procedures for the United States Judicial Panel on Multidistrict Litigation I hereby certify that copies of the foregoing **NOTICE OF FILING PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN** were transmitted for filing to the District Courts listed below by First Class Mail on June 5, 2017:

Clerk, U.S. District Court for the District of Maine
Edward T. Gignoux U.S. Courthouse
156 Federal Street
Portland, ME 04101

Clerk, U.S. District Court for the Southern District of California
333 West Broadway, Suite 420
San Diego, CA 92101

Clerk, U.S. District Court for the Southern District of Florida
Wilkie D. Ferguson, Jr. U.S. Courthouse
400 North Miami Avenue
Miami, FL 33128

Clerk, U.S. District Court for the Western District of Washington
700 Stewart Street, Suite 2310
Seattle, WA 98101

Clerk, U.S. District Court for the District of Arizona
Sandra Day O'Connor U.S. Courthouse, Suite 130
401 West Washington Street, SPC 1
Phoenix, AZ 85003-2118

Clerk, U.S. District Court for the Eastern District of Virginia

Albert V. Bryan U.S. Courthouse
401 Courthouse Square
Alexandria, VA 22314

Clerk, U.S. District Court for the Northern District of Illinois

Everett McKinley Dirksen United States Courthouse
219 South Dearborn Street
Chicago, IL 60604

Clerk, U.S. District Court for the Northern District of California

Ronald V. Dellums Federal Building & United States Courthouse
Suite 400S, 1301 Clay Street
Oakland, CA 94612

Clerk, U.S. District Court for the District of Oregon

Mark O. Hatfield U.S. Courthouse
1000 S.W. Third Avenue
Portland, OR 97204

Clerk, U.S. District Court for the Eastern District of Michigan

Federal Building
200 E. Liberty Street
Ann Arbor, MI 48104

Clerk, U.S. District Court for the Southern District of Texas

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2211 United States Courthouse
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Atlanta, GA 30303-3309

Clerk, U.S. District Court for the Central District of California

Suite 4311, 350 W. 1st Street
Los Angeles, CA 90012-4565

In Compliance with Rule 4.1(a) of the Rules of Procedures for the United States Judicial Panel on Multidistrict Litigation I hereby certify that copies of the foregoing **NOTICE OF FILING PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN**, were served on all parties in the following cases electronically via ECF on June 5, 2017:

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DATE this 5th day of June, 2017

Respectfully submitted,

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