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

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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]xpedited 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

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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).

land border are unlike any other local records sought, the Michigan litigation should not be consolidated.

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.

Defendants argue for transfer to the District of Columbia, even though not a single case is pending there and the responsive records are not located there, because they have chosen to "coordinate" their response through their headquarters. Memo. at 13. But the parties cannot, through their voluntary conduct, dictate the venue. *See In re Concrete Pipe*, 302 F. Supp. 244, 254-55 (J.P.M.L. 1969) (considering whether transfer would serve any party's ulterior motive of forum-shopping). It is telling that Defendants do not discuss the District of Columbia docket conditions. In light of the type of cases filed there and the burdens imposed by those cases, the District of Columbia processes cases slowly, with average time from filing to trial more than 40 months, and 12.5% of its cases more than three years old.[16] Given the mandate for prompt resolution of FOIA cases, the District of Columbia is not an acceptable choice for these cases.

As Defendants acknowledge (Memo. at 14), venue is appropriate in "the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated," as well as the District of Columbia. 5 U.S.C. § 552(a)(4)(B). If the Panel grants the Motion, the cases should be transferred to the Eastern District of Virginia, in which one of the cases is pending, and which efficiently manages docket. That District has an average of 317 cases per judge, the median time from filing to disposition is a mere 5.2 months, with a median time to trial of only 11.1 months, and only 3.5% of its cases are more than three years old. *In re Classicstar Mare Lease Litig.*, 528 F. Supp. 2d 1345, 1347 (J.P.M.L. 2007) ("[T]he district's

[16] *See* "United States District Courts – National Judicial Caseload Profile," available at http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2016.pdf (visited May 25, 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 Ameriquest 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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CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2017, a true and correct copy of the foregoing MEMORANDUM OF PLAINTIFFS, 42 AMERICAN CIVIL LIBERTIES UNION AFFILIATES, IN OPPOSITION TO DEFENDANTS' MOTION FOR TRANSFER TO THE DISTRICT OF COLUMBIA FOR CONSOLIDATION was electronically filed via the CM/ECF system, to be served via electronic notification on counsel of record for all parties.

Dated: May 30, 2017

By: */s/* Maya M. Eckstein

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