IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT, *Plaintiff*, v. U.S. DEPARTMENT OF JUSTICE, *Defendant.*	)	Case No. 17-848 (RJL)

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The question before the Court remains a simple one: is compliance with ethics requirements by federal employees a question of government integrity?

On April 7, 2017, American Oversight made a request under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), for records that would reveal the approach undertaken by Noel Francisco, President Trump's nominee to be Solicitor General of the United States,[1] to ensure his conduct complied with standards of government and legal ethics. American Oversight seeks expedited review of its request because, as called for by DOJ's regulations, the request both involves "a matter of widespread and exceptional media interest" and is one "in which there exist possible questions about the government's integrity that affect public confidence." 28 C.F.R. § 16.5(e)(1)(iv). DOJ denied the request for expedited processing, and American Oversight here asks the Court to remedy that error.

[1] As of the filing of this brief, Mr. Francisco's nomination is still pending in the U.S. Senate. *See* Pl.'s Ex. 7 (*PN299 – Noel J. Francisco – Department of Justice*, CONGRESS.GOV, http://bit.ly/2u5UH6h (last visited June 30, 2017)).

ARGUMENT

A FOIA requester seeking expedition under prong (iv) must satisfy two elements. First, the subject of the request must involve "a matter of widespread and exceptional media interest." 28 C.F.R. § 16.5(e)(1)(iv). Second, the matter must be one "in which there exist possible questions about the government's integrity that affect public confidence." *Id.* DOJ agrees that American Oversight's request satisfies the first element but contests the second, resting on a newly advanced interpretation of the regulatory language.

DOJ's denial of expedition was in error. The subject of American Oversight's request is one that clearly raises possible questions about the government's integrity. DOJ's alleged basis for the denial—that news articles themselves must explicitly raise possible questions of integrity—is neither consistent with the text of the regulation nor entitled to deference. Lastly, DOJ's conveniently timed production neither cures the administration's lack of transparency as of the date of American Oversight's FOIA request nor resolves all of the possible ethical questions arising from Mr. Francisco's shifting conduct in the travel-ban litigation.

I. AMERICAN OVERSIGHT'S REQUEST INVOLVES A MATTER WHERE POSSIBLE QUESTIONS EXIST REGARDING GOVERNMENT INTEGRITY THAT AFFECT PUBLIC CONFIDENCE.

Expedition is proper because American Oversight's request satisfies both elements of prong (iv). As DOJ has conceded, the request relates to "[a] matter of widespread and exceptional media interest," 28 C.F.R. § 16.5(e)(1)(iv); indeed, as spelled out in the request itself, it relates to more than one such matter, as it concerns both the government's conduct of high-profile litigation regarding the travel ban and the nomination of Mr. Francisco to be solicitor general, notwithstanding DOJ's limited focus on the latter in its briefing. Moreover, the

request seeks records that pertain to a matter in which there "exist *possible* questions about the government's integrity that affect public confidence." *Id.* (emphasis added).

On February 6, 2017, after Mr. Francisco's former law firm entered the travel-ban litigation as counsel to amici, Mr. Francisco refrained from signing the government's reply brief filed later that day "out of an abundance of caution." Reply Supp. Emergency Mot. Stay Pending Appeal at 1, *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 6, 2017), ECF No. 70. Ten days later Mr. Francisco was once again a full participant in the government's litigation. Supp. Br. *En Banc* Consideration, *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 16, 2017) , ECF No. 154 (bearing Mr. Francisco's signature). As indicated in American Oversight's FOIA request, this apparent about-face regarding the propriety of his participation in the litigation was wholly unexplained. There was no indication of whether he had been recused or disqualified or whether he had received any waiver or other authorization. Thus DOJ itself created significant questions about the government's integrity through its own conduct and its refusal to explain why Mr. Francisco could not sign the February 6th brief[2] followed by its failure to explain why he suddenly was able, once again, to sign the February 16th brief.

These significant questions arise in the context of the government's conduct of high-profile litigation that is the subject of widespread and exceptional media interest and relates to the conduct of the nominee to be solicitor general, a nomination which is itself also a matter of widespread and exceptional media interest. Expedition of American Oversight's request on April 7, 2017, was thus appropriate because the request described in detail the government

[2] Indeed, as reported on February X, DOJ both knew questions had been raised regarding Mr. Francisco's role in the travel-ban litigation and refused to offer clarity on the matter. *See* Pl.'s Ex. 6, ECF No. 17-8 ("A DOJ spokesperson, responding to questions about Francisco's role, reiterated the 'abundance of caution' noted in the reply brief and declined to comment further.").

conduct that raises questions about government integrity and outlined the ethics requirements that may be implicated by this conduct. At the time of the request, in the absence of a more robust explanation from DOJ or Mr. Francisco, these questions about government integrity could only have been resolved through disclosure of the requested records.

Contrary to DOJ's argument, Def.'s Opp'n at 14, American Oversight has never posited that a *recusal*, standing alone, would raise questions of government integrity. *See* Pl.'s Reply Supp. Prelim. Inj. at 12, ECF No. 10 ("A recusal, alone, would not raise questions of government integrity that affect public confidence."). Nor does American Oversight's position require the Court to believe that any recusal in a high-profile matter suffices to meet the standard for expedition. Had Mr. Francisco simply recused himself from the litigation and withdrawn his appearance in the case, American Oversight concedes that those facts would not be sufficient to establish possible questions about government integrity. But those are not the facts here. Mr. Francisco did not recuse himself from the litigation. He first refrained from signing a brief "out of an abundance of caution" and then subsequently, and without explanation, resumed signing briefs in the same litigation. To the best of American Oversight's knowledge, there is no word for what Mr. Francisco did. Ethics rules generally provide clear delineations: either an official can participate in a matter or he cannot. Officials are not typically "half-recused."

Here the government's conduct raises significant questions of government integrity because, from the public's perspective, there was no apparent change in circumstances nor did DOJ provide any explanation of what might have changed during the ten days between February 6th and February 16th that would suddenly permit Mr. Francisco to participate publicly in the case after announcing that he was not able to do so. That was the essence of the question American Oversight sought to answer with its FOIA request.

II. DOJ'S DENIAL IS NOT ENTITLED TO DEFERENCE.

These significant questions about how Mr. Francisco and DOJ approached their respective obligations to ensure that their conduct comported with applicable ethics requirements in the travel-ban litigation clearly qualify as "possible questions" of government integrity. Rather than try to contest this obvious fact, which DOJ's opposition does not meaningfully challenge, DOJ instead introduces an additional requirement for expedition—namely, that the "possible questions" of public integrity must themselves be the subject of widespread media interest—and argues that DOJ's decision to include this additional requirement in the expedition standard is entitled to deference. This argument ignores the administrative record and misreads the law, and this Court should reject it.

A. DOJ Overreads the Significance of a Footnote in *Al-Fayed*.

DOJ's argument places tremendous weight on a brief footnote discussion in *Al-Fayed v. CIA*, 254 F.3d 300 (D.C. Cir. 2001). That footnote states in full:

> We note one caveat concerning deference to agency FOIA regulations. FOIA directs each agency to promulgate regulations providing for expedited processing, not only "in cases in which the person requesting the records demonstrates a compelling need," but also "in other cases *determined by the agency*." 5 U.S.C. § 552(a)(6)(E)(i) (emphasis added). According to the legislative history, the latter provision gives an agency "latitude to expand the criteria for expedited access" beyond cases of "compelling need." H. R. REP. NO. 104–795, at 26. A regulation promulgated in response to such an express delegation of authority to an individual agency is entitled to judicial deference, *see United States v. Mead Corp.*, 121 S. Ct. 2164, 2171 (2001), as is each agency's reasonable interpretation of its own such regulations, *see United States v. Cleveland Indians Baseball Co.*, 121 S. Ct. 1433, 1444-45 (2001). We have examined the defendant agencies' FOIA regulations applicable to this case, and conclude that to the extent those regulations expand the criteria for expedited processing beyond "compelling need," the agencies reasonably determined that plaintiffs' requests did not meet the expanded criteria.

Id. at 307 n.7. From here, DOJ argues that courts must defer to *any* decision the agency makes when a requester seeks expedition under prong (iii) or (iv)—the two "cases determined by the agency" to be additionally appropriate for expedition—regardless of whether that determination is based on a legal interpretation or a factual determination.

This argument fundamentally misstates what the court found in *Al-Fayed*. First, the FOIA request at issue in *Al-Fayed* sought expedition under "compelling need" rather than one of the agency-determined reasons. DOJ's entire argument is based on a brief discussion in dicta in a footnote. The holding of *Al-Fayed* is that a court *may not defer* to any individual agency's efforts to elaborate on FOIA's definition of "compelling need" for purposes of expedition. *Id.* at 307. Second, DOJ's interpretation of this footnote in *Al-Fayed* asks this Court to ignore the significance of the D.C. Circuit's citation to *Cleveland Indians Baseball Co.,* 532 U.S. 200 (2001). The Supreme Court's analysis in that case makes even clearer that deference is only due to fair and considered interpretations by the agency. There, the Court considered how the IRS applies payroll taxes paid on back wages. *Id.* at 204-05. In 1994 the Cleveland Indians paid back wages to players who should have earned additional salary in 1986 and 1987. The team sought to have the payroll taxes for those wages allocated to 1986 and 1987, *id.* at 204; however, the IRS regulations implementing the relevant statutes clearly stated that the taxes were attached at the time the wages were paid, *id.* at 219. The Supreme Court's analysis turned on the fact that the IRS had a longstanding and publicly available interpretation that the plain text of the regulation applied both to wages presently owed and back wages. *Id.* at 219-20 (citing to previously published IRS Revenue Rulings regarding the application of the tax code to back pay).

Here DOJ's overreading of the footnote in *Al-Fayed* results in two errors. First, DOJ ignores *Cleveland Indians*'s implication that, in this context, its interpretation of the regulation

must be longstanding, or at minimum be fair and considered by the agency, to be entitled to deference. As discussed more fully below, there is no evidence that DOJ's denial of expedition here applied a longstanding, consistent, or considered interpretation of prong (iv), or even an interpretation of prong (iv) that pre-dates this litigation. Second, DOJ erroneously conflates the interpretation of the regulation and particular applications of the legal standard to the facts in any given case. The former receives deference from the courts where the interpretation is considered and reasonable; the latter remains subject to *de novo* review. *See INS v. Yang*, 519 U.S. 26, 32 (1996) (to be entitled to deference of a change in interpretation, an agency must make "an avowed alteration" of a policy it has previously "announce[d] and follow[ed]"). That distinction is particularly clear in the context of this case.

Moreover, DOJ's approach also overlooks the larger policy issues the D.C. Circuit was addressing in *Al-Fayed*, where the court expressed concern about inconsistent application of FOIA requirements across agencies. Footnote 7 is attached to a sentence that notes that FOIA is applied across the government and that the court may not defer to a particular agency's attempts to expand the statute's definitions. *Al-Fayed*, 254 F.3d at 307. Although American Oversight acknowledges that prong (iv) is not statutorily defined, nearly identical language nevertheless appears in multiple agencies' FOIA regulations. *See, e.g.*, 5 C.F.R. § 1303.10(d)(1)(iv) (Office of Management and Budget regulation allowing for expedition of a FOIA request where there is "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which effect [sic] public confidence"); 6 C.F.R. § 5.5(e)(1)(iv) (Department of Homeland Security regulation allowing for expedition of a FOIA request where there is "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence"); 15 C.F.R.

§ 4.6(f)(1)(iii) (Department of Commerce regulation allowing for expedition of a FOIA request where there is "[a] matter of widespread and exceptional media interest involving questions about the Government's integrity which affect public confidence"). American Oversight has not identified a requirement at other agencies that the media articles cited explicitly include the questions of government integrity. Permitting DOJ to impose a secret, additional standard on a FOIA requester could effectively result in nearly identical regulatory text promulgated under the same statute meaning different things at different agencies. *See Tax Analysts v. IRS*, 117 F.3d 607, 613 (D.C. Cir. 1997), *cited in Al-Fayed*, 254 F.3d at 306 ("The meaning of FOIA should be the same no matter which agency is asked to produce its records.").

B. The Administrative Record Does Not Support DOJ's Litigating Position.

As of June 23, 2017, DOJ claims that requests for expedition under prong (iv) must explicitly cite articles that mention "possible questions" regarding government integrity. However, nothing in the administrative record suggests that DOJ actually applied that interpretation to American Oversight's April 7th request or that the agency has, in fact, ever applied that interpretation before.

First, none of the denials of expedition received by American Oversight in response to this request reference the purported lack of media interest in the possible questions of government integrity, nor do they cite to such an interpretation of the regulation. *See* Pl.'s Exs. 2-4, ECF Nos. 17-4–17-6. Each of the denial letters makes clear that the denial was based solely on a determination that the requested records did not involve a matter where there existed "possible questions about government integrity." *See* Pl.'s Exs. 2-4, ECF Nos. 17-4–17-6. There is no mention of the absence of exceptional or widespread media interest in those "possible

questions"; rather, the language in the denials suggests DOJ did not, in fact, view prong (iv) to require exceptional media interest into those questions. *See* Pl.'s Exs. 2-4, ECF Nos. 17-4–17-6.

Second, there is no support in the administrative record for the assertion that DOJ has adopted an interpretation of the regulation linking the two elements on prong (iv). The first official indication by DOJ that it has such an interpretation is in last week's Flores Declaration attached to DOJ's opposition to the motion presently before the Court. Def.'s Ex. 1 ¶ 7, ECF No. 19-1. The Court should disregard this after-the-fact declaration that does not reflect positions taken or facts contained in the administrative record. *See Shieldalloy Metallurgical Corp. v. Nuclear Regulatory Comm'n*, 768 F.3d 1205, 1208-09 (D.C. Cir. 2014) (deference is not appropriate where an agency's interpretation "amounts to nothing more than a convenient litigating position").

Moreover, the form that the Office of Public Affairs (OPA) uses to evaluate requests for expedition under prong (iv) makes clear that DOJ treats the two elements of prong (iv) as separate requirements. *See* Pl.'s Ex. 8 (Mar. 23, 2017 OPA expedited processing worksheet for unrelated FOIA request). The form shows that the first question is whether the request is a matter of widespread media interest followed by the question of whether "the *topic of the request* [is/is not] a matter 'in which there exist possible questions about the government's integrity [that] affect public confidence.'" *Id.* (emphasis added). The form clearly portrays the two elements as distinct and independent, and there is no indication on the form that the director of OPA should consider whether there is media interest in the possible questions of government integrity.

Because the administrative record is devoid of any indication the wrongful denial of expedition here rested on the interpretation of the regulation now advanced in this litigation, the Court should decline to credit this *post-hoc* rationalization of the denial.

C. DOJ Has Not Adopted an Interpretation of Prong (iv) that Is Entitled to Deference.

Even if the Court is inclined to consider material from outside the administrative record, DOJ has not adopted a fair and considered interpretation of its regulations providing that there must be widespread media attention specifically to the possible questions of government integrity. In support of its purported interpretation of prong (iv), DOJ cites no published regulation or guidance. It points to no publicly available statements regarding how to interpret the regulation. It points to no documents containing internal guidance or training material relying on this interpretation. Instead, DOJ points to two past cases, but those cases are easily distinguished: Both of the cases turn not on whether there was exceptional and widespread media interest in the possible questions of government integrity, but rather on the basic question of whether such possible questions of government integrity existed.

For example, in *EPIC v. U.S. Department of Justice*, the Court considered the policy criticisms raised in materials cited in the request but concluded that there was no indication that "a law may have been violated." 322 F. Supp. 2d 1, 5 (D.D.C. 2003). In no way did the Court in *EPIC* hold that the possible questions of government integrity must, themselves, be the subject of exceptional and widespread media interest, nor was there any indication that DOJ argued that position. American Oversight's request here can be readily distinguished, since the request describes in detail how a law—5 C.F.R. § 2635.502—may have been violated by DOJ's conduct.

DOJ's reliance on *ACLU v. U.S. Department of Justice*, 321 F. Supp. 2d 24 (D.D.C. 2004), is even more surprising. In that case, the Court simply found that DOJ's own position was unreasonable because the media coverage reflected manifest questions regarding the government's integrity. *See id.* at 32. The Court made no holding that the possible questions had

to be the subject of media coverage, it just determined that DOJ's denial of expedition was unreasonable in light of the evident issues of public integrity reflected in the coverage.

Nor do DOJ's briefs in those cases discuss, or even refer to, any established interpretation of the regulations adopting the view that there must be exceptional and widespread media interest in the possible questions of government integrity. *See* Def.'s Ex. 2, ECF No. 19-2 at 15, 32-35 (DOJ brief in *EPIC*); Def.'s Ex. 3, ECF No. 19-3 at 21, 32-34 (DOJ brief in *ACLU*). Nor did the declaration DOJ attached to the *ACLU* brief[3] mention the need for the media articles to state possible questions of government activity; rather, the declaration emphasized the distinct elements of the standard. Hardy Decl. ¶ 12, *ACLU v. U.S. Dep't of Justice*, No. 03-2522 (D.D.C. Feb. 17, 2004), ECF No. 13-2 ("By letter dated January 9, 2004, plaintiffs were advised that the DOJ Director of Public Affairs had not detected 'widespread and exceptional media interest,' nor questions concerning the government's integrity as a result of plaintiffs' FOIA request. Accordingly, plaintiffs were advised that the Director of Public Affairs had denied their request for expedited processing.").

Thus there is no evidence that the interpretation advanced in this litigation results from an agency's reasoned and considered view of the regulation entitled to deference. In the absence of

[3] DOJ did not submit an analogous declaration for its *EPIC* brief. *See* Def.'s Mot. Summ. J., *EPIC v. U.S. Dep't of Justice*, No. 03-2078 (D.D.C. Nov. 18, 2003), ECF No. 10. There DOJ simply included a declaration that EPIC had not appealed the denial of expedition, *see* Jones Decl., *EPIC v. U.S. Dep't of Justice*, No. 03-2078 (D.D.C. Nov. 18, 2003), ECF No. 10-2, and incorporated by reference into its statement of material facts the DOJ component's letter denying expedition, Statement of Material Facts at 3, *EPIC v. U.S. Dep't of Justice*, No. 03-2078 (D.D.C. Nov. 18, 2003), ECF No. 10-3 (citing Pl.'s Ex. 5, *EPIC v. U.S. Dep't of Justice*, No. 03-2078 (D.D.C. Nov. 4, 2003), ECF No. 7-6). The denial letter again separates the element of prong (iv): "The Office of Public Affairs has informed us that they have denied your expedit[ion] request. The Office of Public Affairs determined that the subject of your request is not one of exceptional media interest, nor does it raise any questions about the government's integrity which might affect public confidence." Pl.'s Ex. 5 at 2, *EPIC v. U.S. Dep't of Justice*, No. 03-2078 (D.D.C. Nov. 4, 2003), ECF No. 7-6.

any written DOJ analysis of the text of the regulation adopting this interpretation, or explaining why DOJ construes the text of the regulation in this way, there is no basis for this Court to afford the interpretation deference. *See Smith v. City of Jackson*, 544 U.S. 228, 248 (2005) (O'Connor, J., concurring in judgment) (noting that deference is not warranted when "there is no reasoned agency reading of the text to which we might defer").

Indeed, the first public announcement by DOJ of this interpretation of its regulations is the Flores Declaration attached to DOJ's opposition to the motion presently before the Court, Def.'s Ex. 1, ECF No. 19-1. What is notable about the Flores Declaration is what it does not say: It does not cite to any memorialization of this purported interpretation of the regulation in any written document. It points to no guidance or internal record reflecting this interpretation, much less any public statement by DOJ adopting this interpretation. It does not meaningfully engage with the text of the regulation; it does not identify any ambiguity in the regulation requiring resolution, nor does it address why its interpretation is the best, or even a fair, reading of the regulatory text. It does not aver that this interpretation is longstanding or that it resulted from a reasoned and deliberate process of agency decisionmaking, or even indicate when or how DOJ adopted the purported interpretation. It points to no prior cases where DOJ advanced this interpretation. It points to no prior expedition requests where this interpretation was applied, notwithstanding the thousands of determinations DOJ has made under prong (iv) since it was formally promulgated in 1998. *See* Revision of Freedom of Information Act and Privacy Act Regulations and Implementation of Electronic Freedom of Information Act Amendments of 1996, 63 Fed. Reg. 29,591, 29,592 (June 1, 1998). Indeed, it does not even indicate that this interpretation pre-dated Ms. Flores's convenient conclusion in the context of denying expedition to American Oversight's April 7th request. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204,

212 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.").

The irony of DOJ's position is palpable. DOJ insists that American Oversight's request must be judged solely by what it contained when submitted on April 7th. Then DOJ complains that American Oversight's request fails to include information sufficient to meet a construction of its standard first publicly announced by DOJ in a declaration submitted in connection with its opposition on June 23rd. This is precisely the sort of circumstance where the Supreme Court has recently recognized deference would not be appropriate: where the interpretation was unannounced and would have a negative impact on the rights of affected parties who had no notice of the interpretation. *See*, *e.g.*, *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155-56 (2012) (holding that "there are strong reasons for withholding [] deference" when an interpretation adversely affects a party without adequate notice because that would result in "unfair surprise"); *cf. id.* at 158-59 ("It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance . . ."); *see also Indep. Training & Apprenticeship Program v. Cal. Dep't of Indus. Relations*, 730 F.3d 1024, 1035 (9th Cir. 2012) (deference to agency interpretation of its regulations is "unsuitable when such deference would result in 'unfair surprise' to one of the litigants").

D. FOIA Itself Precludes Using Unpublished Interpretations of the Regulations Against American Oversight.

The irony of DOJ's position is compounded by the fact that FOIA itself mandates that, if DOJ had adopted such an interpretation of its regulation, it would have had to be published, 5 U.S.C. § 552(a)(2)(B)-(C), and the penalty for failing to publish the adoption of such an interpretation is that it cannot be applied to the detriment of any party, *see* 5 U.S.C.

§ 552(a)(2)(E). FOIA requires agencies to publish statements of policy and interpretations that have been adopted by the agency and are not published in the Federal Register. *See* 5 U.S.C. § 552(a)(2) ("Each agency, in accordance with published rules, shall make available for public inspection in an electronic format— . . . (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; (C) administrative staff manuals and instructions to staff that affect a member of the public"). If an agency fails to publish or otherwise make available for public inspection an interpretation of law adopted by the agency, FOIA precludes the agency from relying on that interpretation in a manner that adversely affects a party. *See* 5 U.S.C. § 552(a)(2)(E) ("A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—(i) it has been indexed and either made available or published as provided by this paragraph; or (ii) the party has actual and timely notice of the terms thereof.").

Because the interpretation of the regulation DOJ purports to rely on here has not been made public and because American Oversight did not have actual and timely notice of the interpretation, DOJ cannot rely on that interpretation against American Oversight here. This requirement exists precisely to prevent the chain of events that have occurred here, where DOJ contends that American Oversight's request in April failed to satisfy the terms of an interpretation of its regulation that DOJ first made public in June. FOIA requesters cannot ensure that their requests satisfy secret legal requirements that DOJ might have adopted but not made public. Rather, American Oversight's request should be evaluated by the plain terms of the regulation, which clearly spell out two distinct, and independent, elements for expedition under prong (iv).

E. DOJ's Interpretation Conflicts with the Regulation's Unambiguous Text and Is Unreasonable.

Even if DOJ had actually adopted an interpretation of its regulation that requires media interest specifically in the possible questions of government integrity, that interpretation of the regulation is not entitled to deference because the regulatory text is not ambiguous and, in any event, such an interpretation must fail because it is unreasonable. An interpretation of a regulation is not entitled to deference when it is inconsistent with the plain terms of the regulation. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) (administrative interpretation is controlling unless inconsistent with the regulation); *Edwards v. Califano*, 619 F.2d 865, 869 (10th Cir. 1980) (agency "cannot ignore the plain terms of [its] own regulations"). Moreover, the Supreme Court has made clear that deference to an agency's interpretation of its regulations is only appropriate where the regulation itself is ambiguous. *See Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000) ("But [ ] deference is warranted only when the language of the regulation is ambiguous.").

Here, the plain and unambiguous text of the regulation demonstrates that there are two independent elements—media interest and possible questions of government integrity. The application of the basic rules of grammar to the regulation here make clear that the two elements are separate and distinct. There is no requirement in the regulatory text that the "possible" questions about government integrity themselves be the subject of widespread media interest. To conclude otherwise would be to fail to apply the basic rules of grammar to the language in the regulation—the phrase "in which" necessarily modifies "[a] matter" and indicates that the requester's obligation is to show that the request relates to a matter "in which there exist possible questions about the government's integrity that affect public confidence." 28 C.F.R. § 16.5(e)(iv). As a matter of simple grammar, the second clause does not refer back to or

incorporate the existence of media interest in any way. Because there is no ambiguity in the regulation on this point, DOJ's interpretation is not entitled to deference, a point reinforced by the inconsistency between the plain language of the regulation and DOJ's views.

Indeed, a contrary standard requiring media coverage of ethical issues in order for them to be cognizable under prong (iv) would incentivize the DOJ to do what it has done here: refuse to answer questions, stymying public information and interest. Moreover, affording DOJ's unreasonable interpretation of the regulation deference here would create the very danger the Supreme Court warned against in *Christensen*: "To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." 529 U.S. at 588. Applying DOJ's interpretation would effectively establish a new element necessary for expedition on prong (iv)—media interest in the questions of government integrity. And FOIA requesters would have received no notice to this new *de facto* element.

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For these reasons, the Court should reject DOJ's suggestion that its purported interpretation of the regulation creates this new required showing for expedition. Rather, the only requirement is that the requester establish an administrative record that there exist "possible" questions about government integrity in connection with the subject matter of the request. American Oversight's request amply meets the standard. It addresses the government's conduct that raises questions about government integrity. It outlines the ethics requirements that may be implicated by this conduct. In the absence of a more robust explanation from DOJ or Mr. Francisco, these questions about government integrity can only be resolved through the requested records.

III. DOJ'S BELATED PRODUCTION OF FOUR DOCUMENTS IN MAY DOES NOT AFFECT AMERICAN OVERSIGHT'S ENTITLEMENT TO EXPEDITION IN APRIL.

As DOJ has taken care to note, the evaluation of a request for expedition is "based on the record before the agency at the time of the determination." 5 U.S.C. § 552(a)(6)(E)(iii). It stands to reason that the agency should be held to the same standard. At the time of American Oversight's request, there was no public record explaining Mr. Francisco's shifting posture regarding the propriety of his public participation in the travel-ban litigation. American Oversight sought expedition to answer the possible questions regarding government integrity that Mr. Francisco's continued public participation raised. DOJ produced four records on the eve of a preliminary injunction hearing that answered some of those questions. While this conveniently timed production[4] may have lessened the irreparable harm resulting from DOJ's continued withholding of responsive documents, the production does not alter the facts upon which the determination regarding American Oversight's April request for expedition must be evaluated. For the reasons described in American Oversight's April request, it was entitled to expedited processing at that time, and it is the entitlement to that determination that American Oversight now asks this Court to enforce.

Because American Oversight asks this Court to reverse DOJ's erroneous denial of expedition based on the record before DOJ in April, it did not highlight in its opening brief the serious questions regarding DOJ and Mr. Francisco's approach to addressing ethical obligations in the travel-ban litigation that remain after DOJ's May 26th production. The extent to which the May 26th production answered, or failed to answer, the possible questions regarding public

[4] Conveniently timed FOIA productions on the eve of a hearing on a motion for a preliminary injunction appear to be a recurring event. *See* Pl.'s Notice of Filing, *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, No. 17-599 (D.D.C. June 19, 2017), ECF No. 14.

integrity that exist in connection with the travel-ban litigation and Mr. Francisco's nomination is irrelevant to its entitlement to expedition based on the record before the agency in April.

Nonetheless, DOJ is incorrect to state that the May 26th production resolved all "possible questions about government integrity" that arise from the facts outlined in American Oversight's request. Rather, significant questions regarding DOJ and Mr. Francisco's approach to meeting their respective ethical obligations remain that the requested records yet to be produced should address.

First, the documents produced on May 26th do not address in any way whether Mr. Francisco continued to work on the case between 2:01 pm EST (the time when his former law firm entered the case)[5] and 4:30 pm EST (the time when Mr. Francisco's authorization under 5 C.F.R. § 2635.502(d) to participate was approved). The requested records could show that Mr. Francisco refrained from participating during this interval, or that he continued to participate.[6] If Mr. Francisco refrained from participating during this interval, it would reflect positively on his qualifications to serve as solicitor general. By contrast, if Mr. Francisco continued to participate in the substance of this matter before receiving authorization under 5 C.F.R. § 2635.502(d), it could indicate a serious ethical transgression that would raise questions about his fitness to serve as solicitor general. As the Director of the Office of Government Ethics has recently made clear, there are no retroactive waivers under 5 C.F.R.

[5] American Oversight's Amended Complaint indicated that this amicus brief was filed at 11:01 am, but further discussions with the clerk's office for the U.S. Court of Appeals for the Ninth Circuit have made clear that the brief was filed at 11:01 am Pacific Standard Time.

[6] On Tuesday, June 27th DOJ's Civil Division made an additional production of records, but these records too fail to clarify this possibility because they include substantial redactions both under FOIA and because they have been referred to the Office of the Solicitor General (OSG), where Mr. Francisco worked on February 6th, which has yet to respond. *See* Pl.'s Ex. 9 (Response of the Civil Division). Separately, the component with the records most likely to address this question, OSG, has not yet produced any records.

§ 2635.502(d). Pl.'s Ex. 10 (Letter from Walter M. Shaub, Jr., Director, Office of Government Ethics, to U.S. Senators Elizabeth Warren, Sheldon Whitehouse, Edward J. Markey, and Mazie K. Hirono (June 13, 2017), http://bit.ly/2trwh9o) ("More importantly, the putative retroactivity is inconsistent with the very concept of a waiver, which is to take decisions regarding the appropriateness of an employee's participation in covered matters out of the employee's hands. By engaging in a prohibited matter at a time when the appointee does not possess a waiver, the appointee violates the rule."). Mr. Francisco was prohibited from participating in the substance of the case between the filing of the Jones Day amicus brief and the issuance of authorization to participate under 5 C.F.R. § 2635.502(d), and his participation during that period, if it happened, would be a serious ethical breach.

Second, the records produced on May 26th themselves contain internal contradictions that raise continued questions about the approach taken by DOJ and Mr. Francisco to complying with applicable ethics obligations. The preliminary authorization Mr. Francisco received on February 6th and the final authorization he received on February 9th impose different limitations on the scope of Mr. Francisco's participation in the travel-ban case, but there is no explanation for, or even acknowledgement of, the changes in the February 9th authorization. Mr. Francisco received a preliminary authorization on Monday, February 6th, to continue to participate in the case notwithstanding his former law firm's appearance. The preliminary authorization contained the following instruction, which presumably explains his failure to sign the reply brief filed later that evening:

> Adjustments that may be made in the employee's duties to eliminate the likelihood that a reasonable person would question his impartiality are being made in conformity with the January 28, 2017 Executive Order, which disallows communications with former employers. Mr. Francisco has been instructed not to communicate

> with Jones Day or sign the brief, which would constitute making an appearance or communication.

ECF No. 12-1 at 3-4. On Thursday, February 9th, Mr. Francisco received a second § 2635.502 waiver authorizing him to continue to participate in the case notwithstanding the same conflict. ECF No. 12-1 at 8-10. This second authorization contains a more robust explanation of DOJ's analysis regarding the application of § 2635.502 and the appropriateness of the waiver. Notably, however, this second authorization does not contain the same limitation regarding Mr. Francisco's public participation in the case. Nor does it contain an acknowledgement of the reasons for the change, much less any analysis explaining the reasons for the change or analyzing the application of the president's January 28, 2017 executive order. Thus DOJ's rationale for the decision to allow Mr. Francisco to resume signing briefs in the case remains an open question.

As a legal matter, the records produced on May 26th should be irrelevant to the Court's analysis of whether American Oversight was entitled to expedition at the time that it requested it, in April. But to the extent that the Court considers those records in evaluating the equities of granting American Oversight its requested relief, those records do not, as the government contends, resolve all outstanding questions that exist regarding government integrity in the conduct of the travel-ban litigation. However, taken together, the records that have been produced do highlight the significant ethics questions that arise from the course of events in the travel-ban litigation described in American Oversight's request. For these reasons, and the reasons explained above and in the Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment, the equities here weigh in favor of granting the relief American Oversight seeks.

CONCLUSION

For the foregoing reasons, the Court should grant American Oversight's Motion for Partial Summary Judgment and order DOJ to expedite the processing of American Oversight's April 7, 2017 FOIA request as of the date it was received by Defendant.

Dated: June 30, 2017

Respectfully submitted,

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