ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5335

CAUSE OF ACTION,

Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia
No. 12-cv-00850 (Hon. Emmet G. Sullivan)

REPLY BRIEF FOR PLAINTIFF-APPELLANT CAUSE OF ACTION

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GLOSSARY

COA	Cause of Action
EPIC	Electronic Privacy Information Center
FOIA	Freedom of Information Act
FTC	Federal Trade Commission
OSTP	White House Office of Science and Technology Policy

INTRODUCTION

Defendant-Appellee Federal Trade Commission's ("FTC") efforts to frustrate the Freedom of Information Act ("FOIA") and impede citizen oversight of the government by "weaponizing" and denying fee waivers to Plaintiff-Appellant Cause of Action ("COA") should fail. FTC's fee waiver denial rate significantly exceeds that of other agencies, reflecting clear hostility to FOIA's government transparency and accountability principles. COA Br. 42-43; A337-41. To defend such conduct, FTC misapprehends this Court's FOIA jurisprudence, the facts of COA's FOIA requests, and the unambiguous congressional mandate that underscores FOIA and the OPEN Government Act of 2007.

FTC relies on an outdated regulation to dispose of this case and burden non-profit government accountability and news organizations that use "alternative media" to inform the public about FTC's conduct. FTC strives in vain to support the district court's construction of a new, elevated standard for representatives of the news media as a wall to block requesters who attempt to uncover an agency's potential misdeeds. Finally, FTC attempts to evade its statutory duty to process a valid FOIA request—*i.e.*, Item One of the Third Request—without providing any authority justifying its actions.

FTC did all it could to prevent COA from obtaining access to information that may have "cast [FTC] in a less than flattering light or [led] to proposals to

reform . . . [its] practices." COA Br. 38 (citing statement of Sen. Patrick Leahy). Its actions are contrary to FOIA's fee waiver provisions, which were specifically enacted to allow news media organizations like COA, particularly in their nascent stages, to conduct much-needed government oversight. Accordingly, this Court should reverse the district court, remand to FTC, and require it to process COA's Third Request in full and make a determination as to COA's fee status as "a representative of the news media" on the Third Request's record.

ARGUMENT

I. DESPITE FTC'S CLAIMS, ITS *ULTRA VIRES* "REPRESENTATIVE OF THE NEWS MEDIA" REGULATION CONTINUES TO AFFECT THIS CASE.

FTC's regulation defining "a representative of the news media," 16 C.F.R. § 4.8(b)(2) (2012), was wrongly applied to all three of COA's FOIA requests and was contrary to the OPEN Government Act of 2007. *See Orion Reserves Ltd. P'ship v. Salazar*, 553 F.3d 697, 703 (D.C. Cir. 2009) (stating "a regulation contrary to a statute is void").[1]

FTC violated the statute in two respects. First, it failed to follow the statutory command that "alternative media shall be considered to be news-media entities." 5 U.S.C. § 552(a)(4)(A)(ii)(III). Second, it maintained outdated

[1] FTC tacitly admitted the regulation was *ultra vires* by updating it in March 2014 to mirror the statute. FTC FOIA, Miscellaneous Rules, 79 Fed. Reg. 15,680 (Mar. 21, 2014).

language that a news media representative must be "organized and operated to publish or broadcast news to the public." 16 C.F.R. § 4.8(b)(2) (2012). FTC and the district court also demanded unreasonable specificity as to the distinct work COA creates. These violations affected both FTC's determination of COA's request and the district court's ruling.

Although FTC does not attempt to defend the validity of its *ultra vires* regulation, it offers this Court two reasons why it should affirm the district court. FTC Br. 30-33. First, FTC alleges COA did not raise the *ultra vires* nature of the regulations below and thus argues "this Court should refuse to hear it . . . ." *Id*. at 30. Second, FTC claims COA failed to show the regulation "had any effect" on FTC's determinations or the district court's ruling. *Id*. Both arguments fail.

A. The Court Should Consider COA's Argument That FTC's Regulation Was *Ultra Vires*.

This Court should not condone the district court's failure to reject FTC's *ultra vires* regulation and refusal to apply the OPEN Government Act. FTC's claim COA failed to raise the deficiency in FTC's regulations below is incorrect and the district court's refusal to apply the statute is reversible error.

COA repeatedly raised the outdated nature of FTC's regulation below and insisted FTC and the district court apply the OPEN Government Act. A294; *see also* COA Second Appeal A158 (FOIA "unequivocally commands that organizations that electronically disseminate information and publications via

'alternative media *shall* be considered to be news-media entities'"); *id*. at A159 ("The statute controls, and its plain language trumps [FTC's] inconsistent administrative regulations."); COA Third Appeal A183 ("[T]he FOIA statute itself, as amended in 2007, explicitly defines 'representative of the news media' . . . [and] unequivocally commands that organizations that electronically disseminate information and publications via 'alternative media *shall* be considered to be news-media entities.'"); COA Mem. in Supp. of Opp'n to Def.'s Mot. for Summ. J. A294 ("[t]he statute unequivocally commands that organizations that disseminate information and publications via 'alternative media *shall* be considered to be news-media entities'"). Therefore, COA has not waived the argument because it raised FTC's regulatory deficiency before the agency and the district court.

FTC misplaces its reliance on *Hormel* and *Roosevelt* when claiming this Court should not consider COA's argument that FTC's regulation was *ultra vires*. FTC Br. 30. Both cases state a general rule that "[o]rdinarily an appellate court does not give consideration to issues not raised below." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *accord Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n.5 (D.C. Cir. 1992). Yet, FTC presents no explanatory factual or

legal support that the general rule applies here. Moreover, *Roosevelt* provides ample authority to resolve the issue in COA's favor. 958 F.2d at 419 n.5.[2]

Roosevelt holds that appellate courts may hear an issue for the first time on appeal if the case presents "a novel, important, and recurring question of federal law." *Id*. (citing *City of Newport v. Fact Concepts, Inc.*, 453 U.S. 247, 255-57 (1981)). Here, FTC's illegal fee status regulation, and its refusal to follow the OPEN Government Act's definition of "a representative of the news media," is a novel, important, and recurring issue this Court should resolve. 5 U.S.C. § 552(a)(4)(A)(ii)(III). The issue is recurring because, although FTC has updated its regulation, many other agencies' FOIA regulations contain pre-OPEN Government Act language.[3] Accordingly, this Court should provide clear guidance that it is no longer appropriate for agencies to adjudicate FOIA fee matters under the old law, as FTC has done in this case. Review of the new statutory definition, and its application to "alternative media" in particular, is an issue of first impression. As this Court well knows, FOIA lawsuits are filed with regularity and

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[2] *See also Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (holding whether an issue "may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals").

[3] *See, e.g., infra* n.12 (Department of Homeland Security applying the incorrect standard).

fee status is often a contested issue.[4] The resolution of this issue is a purely legal question—*i.e.*, whether an agency may adjudicate a FOIA request via a regulation in conflict with the statute—and it does not hinge on any further factual development. Finally, FTC has not alleged it will be prejudiced if the Court addresses the issue. Despite FTC's claims to the contrary, this Court is well within existing precedent to resolve this issue to the extent it finds COA did not raise the issue below.

B. The District Court Misapplied FTC's Outdated "Organized And Operated" Standard To COA.

FTC is incorrect when it claims COA did not show FTC's regulations "had any effect" on this case. FTC Br. 30. They affected this case because FTC was unduly dismissive of alternative media dissemination methods and because it required COA to be "organized and operated" around news dissemination.[5]

The "organized and operated" standard has never been part of the statutory definition of "a representative of the news media." Even in its Answering Brief, FTC argues a news media requester must anachronistically be "especially organized around its ability to publish or broadcast news to the public." FTC Br.

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[4] *See generally*, Dep't of Justice, List of Freedom of Information Act Cases in which a Decision was Rendered in 2013, *available at* http://goo.gl/lWc37f.
[5] *See infra* Section II regarding COA's use of alternative media to disseminate news.

18-19.[6] FTC then cites to its *ultra vires* regulations and offers the Court a footnote to a 2003 district court decision that pre-dates the OPEN Government Act. FTC Br. 19 n.5 (citing *Elec. Privacy Info Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 12-13 (D.D.C. 2003) [hereinafter *EPIC*]). FTC adopts the district court's elevated "especially organized" standard[7] but cites to its regulations, which do not contain the elevated test. FTC Br. 18-19. FTC's misstatement of the law displays its odd tolerance of an inapt regulation and its effect on this litigation.

The "organized and operated" standard was promulgated in 1987 in the Office of Management Budget's FOIA Fee Guidelines, which interpreted "'news media' . . . generically as 'an entity that is organized and operated to publish or broadcast news to the public.'" 52 Fed. Reg. 10,012, 10,015 (Mar. 27, 1987). FTC adopted the "organized and operated" standard in 1992. *See* 57 Fed. Reg. 10,804 (Mar. 31, 1992). The phrase has been cited in numerous court decisions, including by this Court in *National Security Archive v. Department of Defense*, 880 F.2d 1381, 1384 (D.C. Cir. 1989), and *Media Access Project v. FCC*, 883 F.2d 1063, 1065 (D.C. Cir. 1989). However, Congress did not adopt the "organized and operated" standard in 2007 when it amended FOIA to provide a statutory definition

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[6] FTC also argues elsewhere that "the District Court correctly found[] COA's activities were not 'organized especially around dissemination.'" FTC Br. 28.

[7] *See infra* at 10-11 (discussing the district court's novel and unprecedented elevated standard).

of "a representative of the news media." Instead, Congress expressly included this Court's *National Security Archive* test and the Department of Defense's regulatory language about "alternative media" and "evolving methods of news dissemination." 32 C.F.R. § 286.28(e)(7)(i).[8]

FTC overlooks the statute when it presses this Court to apply the "organized and operated" standard. FTC Br. 18-19. The expression-exclusion canon[9] of construction provides that when Congress "express[es] one item of a commonly associated group or series [it] excludes another left unmentioned." *United States v. Vonn*, 535 U.S. 55, 65 (2002). This canon has force only when the items are sufficiently related to "justify[] the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). Congress selected elements from the "associated group" of pre-2007 FOIA case law and agency regulations interpreting the phrase "a representative of the news media." It carefully selected two elements—the *National Security Archive* test and "alternative media"—while excluding others.

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[8] *Cf. Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) ("It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.") (internal quotation marks omitted).

[9] This canon is synonymous with *expressio unius est exclusio alterius* or negative implication.

The expression-exclusion canon justifies the inference Congress excluded "organized and operated" by deliberate choice, not inadvertence.

COA has actively participated with agencies to assist them in improving their FOIA regulations, while FTC has been slow to adopt the OPEN Government Act. For example, in May 2012, the Office of Science and Technology Policy ("OSTP") issued a notice of proposed rulemaking to amend its FOIA fee regulations. 77 Fed. Reg. 27,151. COA recognized OSTP proposed to continue using the "organized and operated" standard and submitted a regulatory comment urging OSTP to conform to the statute.[10] In June 2013, OSTP finalized its regulations, "accept[ing] [COA's] proposal and hereby adopt[ing] the current language found in the FOIA." 78 Fed. Reg. 33,209, 33,210.

Conversely, FTC likely amended its FOIA regulations when spurred to do so by this litigation, finally bringing its rules into compliance with the statute. However, FTC continues to argue the "organized and operated" standard should apply. In its Motion for Summary Judgment, FTC argued a representative of the news media must be "organized and operated to publish or broadcast news to the

[10] Comments of COA to White House OSTP, Proposed FOIA Regulations (June 11, 2012), *available at* http://www.whitehouse.gov/sites/default/files/epstein-wilcox.pdf.

public." A190, A199, A210.[11] In its district court declaration, FTC's Assistant General Counsel for Information and Legal Support repeated the "organized and operated" standard. A232. These recitations by a senior official evince FTC's hardened resolve to ignore the statute and instead apply the wrong standard to COA and potentially other similarly situated alternative-media requesters. *See* Reporters Comm. Br. 6 (discussing how agencies use fee waiver provisions to block news media access to information).

The district court committed reversible error when it embraced this anachronistic standard and elevated it by claiming a news media requester "must also demonstrate that its operational activities are *especially* organized around" dissemination. A403 (emphasis added). Such an elevated standard is unprecedented in FOIA jurisprudence or regulations.[12] The district court then applied the improper standard to uphold FTC's fee status denial because "the administrative record does not show that [COA's] activities are organized especially around dissemination" and thus, COA "cannot be defined as a

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[11] FTC also repeated the "organized and operated" standard in its Reply in Support of its Motion for Summary Judgment. A352.

[12] The elevated standard is starting to infect administrative decisions. The Department of Homeland Security applied the elevated standard against at least one FOIA requester. *See* Letter from Katy J. L. Duke, Att'y-Advisor, Dep't of Homeland Sec., to Shawn Musgrave, MuckRock (Dec. 18, 2013), *available at* http://goo.gl/sUO6U3.

representative of the news media." A405, A406. This use of an improperly elevated standard—grounded in an *ultra vires* regulation—is reversible error.

While COA maintains it is in fact organized and operated to disseminate news, and demonstrated as much throughout the administrative record,[13] it brought both FTC's and the district court's use of the "organized and operated" standard to this Court's attention in its Opening Brief. COA Br. 30 n.17.[14] Despite FTC's tacit admission the "organized and operated" standard is no longer appropriate, as demonstrated by its regulatory amendment deleting the phrase,[15] FTC continues to urge this Court to apply the standard.

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[13] *See* COA First FOIA Request Appeal, A026; COA Second FOIA Request Appeal, A155, A157; COA Third FOIA Request Appeal, A182.

[14] FTC did not object to COA's argument about FTC's inappropriate use of the "organized and operated" standard. *See United States v. Beckham*, 968 F.2d 47, 54 n.5 (D.C. Cir. 1992) ("[T]he government failed to object to it, or even to comment upon it, in its brief, thus waiving any waiver argument it may have had."). Nor could FTC claim COA did not raise the issue below, as FTC addressed the disparity between its regulation and the statute in the district court by claiming its "regulations further refine [the] term to mean . . . 'an entity that is organized and operated to publish or broadcast news to the public.'" A352.

[15] As FTC itself noted, it was "necessary to update its fee schedule . . . to implement the 2007 FOIA Amendments . . . including the definition[] for 'representative of the news media.'" FOIA Fee Schedule Rulemaking, 78 Fed. Reg. 13,570, 13,571, 13,572 (proposed Feb. 28, 2013) (to be codified at 16 C.F.R. pt. 4). *But see cf. Kinney v. Dist. of Columbia*, 994 F.2d 6, 10 (D.C. Cir. 1993) (noting an agency's admission in a docket that its regulation was "out of harmony with the intent of the statute . . . cannot be taken to mean . . . [the agency] declared its own regulation" *ultra vires*.) *Kinney* is inapposite to this case because in that case the agency "explicitly relied on its discretionary policymaking authority to

C. FTC And The District Court Demanded Unreasonable Specificity As To The Distinct Work COA Creates.

FTC's arguments are inconsistent when it claims COA failed to express it would create a distinct work while simultaneously arguing the district court never required COA to "precisely outline" what distinct work it would create. FTC Br. 20-21.[16] First, FTC states it is "sufficient that [a] requester 'express[] a firm intention' to create a distinct work" and implores the district court imposed no requirement that COA "precisely outline" what it would publish. *Id*. Then, it alleges COA is lacking the required detail because COA only stated it "would create unspecified memoranda, reports, or press releases, or that it has in the past generically reported on obtained information, analyzed relevant data, and evaluated the newsworthiness of the material, . . . without providing any details of the editing or distinct work." *Id*. at 22 (internal quotation marks and brackets omitted).

Such an argument misunderstands how representatives of the news media use FOIA and alternative media to create distinct works and disseminate information about the government. COA expressed an unambiguous intent to create a distinct work and use various alternative-media mechanisms to disseminate it; COA creates memoranda, reports, and press releases, and

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'define and delimit' the scope of" the statute, while here FTC amended its regulation to comply verbatim with the statute. *Id*.

[16] *See* COA Br. 28-29 (discussing the district court's unreasonable demand for a precise outline).

disseminates them via social media, an e-mail newsletter, a website and to other members of the news media.[17] A046-047, A154, A180-81, A270. FTC simultaneously argues FOIA requires no more than a "firm intention" and not a "precise outline" and then faults COA for providing exactly that—the agency cannot have it both ways.

II. COA ADEQUATELY DEMONSTRATED IT CREATES DISTINCT WORKS AND HAS THE CAPACITY TO DISSEMINATE THEM.

FOIA defines a representative of the news media as a person who "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii)(III). The district court misapplied this definition in two ways.

First, the district court incorrectly concluded COA does not "use[] its editorial skills to turn raw material into a distinct work." A402. In reaching its conclusion, the district court misapplied this Court's "range of sources" factor by transforming it into a dispositive element of the news media test. *See* COA Br. 24-

[17] COA also expressed the intent to publish two reports titled "How the FTC Denies Fee Waivers to Organizations That Seek Information About FTC Operations" and "The FTC and the Guides Concerning Endorsements: Why The Change?." A181. FTC and the district court refused to consider this information in light of COA's Third Request, but instead found the issue of fee waivers moot. A397.

25. FTC now incorrectly argues the district court "employed the 'range of sources' factor[] just as this Court did in *National Security Archive*." FTC Br. 22.

Second, the district court erroneously held COA did not have the "intent and ability to disseminate the requested information to the public rather than merely make it available." A403. The district court erred by holding in favor of FTC's decision requiring COA to have "demonstrate[d] that its operational activities are especially organized around" dissemination. *Id*.

A. FTC Inaptly Argues The District Court Followed This Court's Case Law When It Misapplied The "Range Of Sources" Factor.

A news media requester must use "editorial skills to turn raw materials into a distinct work." 5 U.S.C. § 552(a)(4)(A)(ii)(III). Obtaining materials from a range of sources and combining them into a distinct work may be an indicium an organization meets this requirement, yet the statute does not require multiple sources. COA Br. 23-24. The district court misapplied this factor as a dispositive requirement upon concluding COA "must demonstrate that it would use information from a range of sources to independently produce a unique product" and holding COA did not meet that requirement. A402-03. COA amply showed the district court misapplied the law in this respect. *See* COA Br. 23-24.

FTC now incorrectly argues the district court "employed the 'range of sources' factor, [the same way] this Court did in *National Security Archive*, . . . *i.e.*, as one among several indicia of whether the requester would create a new work."

FTC Br. 22-23. Notably, the district court cites both *National Security Archive* and *EPIC* for the proposition that a requester "must demonstrate that it would use information from a range of sources." A402. Neither case stands for this proposition.

In *National Security Archive*, this Court included "gather[ing] information from a variety of sources" as one factor, but was clear it "is [n]either necessary [nor] sufficient" to meet the test. 880 F.2d at 1387. The opinion provided an example of how a publisher of a single-source distinct work requiring very little editorial input is "every bit as much" a representative of the news media as one that applies comprehensive editorial skill and employs a range of sources. *Id*.

In *EPIC*, the District Court for the District of Columbia applied *National Security Archive*'s "range of sources" factor. 241 F. Supp. 2d at 11. However, it did not *require* EPIC to use a range of sources. Rather, the court took the fact that EPIC generally "gleans the information it publishes . . . from a wide variety of sources" as a factor in EPIC's favor. *Id*.

Here, FTC inaptly argues the district court's requirement COA use a "range of sources" for every distinct work generated from a FOIA request comports with these authorities. It claims COA's newly embarked publishing of a newsletter is somehow an indication COA could not create a distinct work. FTC Br. 22-23. There is simply no basis in law for asserting a newly created newsletter cannot be a

distinct work. FTC also claims, without authority, that COA's alleged failure to "show[] that it sought information from sources other than its same FOIA requests in this instance" is somehow damaging to COA's case. *Id*. at 23. The "range of sources" factor does not require an organization to use a range of sources for each and every distinct work, nor does it mandate a specific FOIA request is deficient if it is not accompanied by other sources. Rather, the fact that an organization generally employs a range of sources when creating distinct works is one of the "hallmarks of publishing, news, and journalism." *EPIC*, 241 F. Supp. 2d at 11. COA detailed how it employs a range of sources when creating distinct works. FTC Br. 25-26. "Instead of considering these arguments, the district court inappropriately elevated the 'various sources' factor to a dispositive test and incorrectly held COA did not meet that test." *Id*. at 26.

B. FTC Misapplies Existing Precedent In Its End-Run To Discount COA's Capacity To Disseminate.

FTC claims COA failed to demonstrate it had the capacity to distribute its work to an audience, yet it struggles to offer this Court a cogent argument regarding the size of the audience to whom a news media organization must distribute news. FTC Br. 24.[18] Though FTC cites *National Security Archive* for

[18] COA and FTC agree FOIA jurisprudence to this point has maintained a distinction between requesters who actively distribute information and those who passively make it available. *Accord* FTC Br. 24; COA Br. 31-32. COA and

the proposition that the audience cannot be small, it fails to specify the size of an audience needed to qualify. *Id*. at 25. FTC's reliance on *National Security Archive* is misplaced because that case does not speak to audience size but to the *audience type* in its language that distribution must be "to the public." 880 F.2d at 1387.

Instead, this Court should rely on *Tax Analysts v. Department of Justice*, where it ruled a "readership [that] is relatively small and largely composed of tax attorneys, accountants and economists" is not damaging to the question of whether the requester qualified. 965 F.2d 1092, 1095 (D.C. Cir. 1992); COA Br. 37. COA disseminates information to the public, just as *National Security Archive* envisioned. The fact that COA's audience may have been "small" due to its then-recent incorporation is irrelevant.

FTC fails to meaningfully respond to COA's argument that dissemination to other members of the news media is a valid avenue of dissemination that should be considered alongside other methods. *Compare* FTC Br. 26 *with* COA Br. 33. The agency attempts to dodge COA's argument when it states: "the record clearly shows that COA repeatedly relied upon its third party news media contacts throughout its first and second requests to assert its dissemination capabilities."

Amicus Reporters Committee for Freedom of the Press urge this Court to consider whether the active/passive distinction is still apt in the world of online information distribution. COA Br. 32 n.19; Reporters Comm. Br. 15. Nonetheless, COA has demonstrated it is an active news distributor. COA Br. at 33-34.

FTC Br. 26. COA never argued that it did not disseminate information to other members of the news media. Rather, it urged the Court to consider the "relevant question . . . [of] whether media contacts may be considered alongside other avenues of dissemination when demonstrating active distribution." COA Br. 33. COA's Brief offers two cases—*EPIC* and *Carney*—where such consideration was appropriate. *Id*. FTC offers no rebuttal and cites no cases that hold the contrary.

COA amply demonstrated sufficient media contacts to be considered a valid avenue of dissemination by virtue of the large number of news stories generated in COA's first few months of existence. *See* A030 n.11 (four stories in first three months of existence); A046-047 n.8 (seventeen stories in the first five months). The fact that a requester's "readership is relatively small and largely composed of" readers interested in a specific topic is "irrelevant" to its qualifications as a representative of the news media. *Tax Analysts*, 965 F.2d at 1095; *see also Carney v. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994) (finding the relevant type of audience is "persons interested in the subject"). "Certainly other members of the media may constitute 'persons interested in the subject' of the government oversight COA conducts." COA Br. 33-34, 37.

When Congress amended FOIA in 2007, Senator Patrick Leahy made clear FOIA requesters "who do not necessarily have a prior history of publication" and "anyone who gathers information to inform the public, including . . . bloggers" are

representatives of the news media. 153 Cong. Rec. at S10,987 (daily ed. Aug. 3, 2007). This Court should acknowledge Congress's purpose when amending FOIA's definition of "a representative of the news media" by reversing the district court and finding COA meets the statutory test.

III. FTC OFFERS THIS COURT NO LEGAL JUSTIFICATION FOR ITS REFUSAL TO PROCESS COA'S VALID FOIA REQUEST.

FTC cites no authority supporting its refusal to process Item One of COA's Third Request, which resulted in FTC finding fee issues moot for that Request. FTC Br. 42–45. Its terse rendition of its determination regarding mootness is insufficient to defend the district court decision.

A. FTC Fails To Meaningfully Respond On The Issue Of Mootness.

Neither FTC nor the district court provides any basis upon which FTC can refuse to process Item One of COA's Third Request. FTC claims COA's "rapid-fire duplicate requests for the same information . . . [within] five months" allow it to refuse to process the request. FTC Br. 44. Yet, it cites no statute, regulation, or case, in this Circuit or any other, that provides authority for that decision. COA has a statutory right to make a FOIA request and FTC neglected its statutory duty by refusing to process the request.

The district court's opinion upends the well-tread law in this Circuit that agencies cannot refuse to process substantially identical FOIA requests solely on the basis that such requests are duplicative. *See Spannaus v. Dep't of Justice*, 824

F.2d 52, 61 (D.C. Cir. 1987) (holding a requester may cure a procedural defect by requesting the same documents over and over); *Nat'l Sec. Counselors v. Cent. Intelligence Agency*, 931 F. Supp. 2d 77, 104 n.17 (D.D.C. 2013) ("A number of cases from this Circuit have recognized . . . FOIA requesters may submit entirely duplicative requests in order to cure certain defects in their original requests."). FTC provides little more than an assertion that COA's requests were "rapid-fire" to justify its refusal to process COA's request.

Fee category and fee waiver requests become moot only when there are no fees associated with the request and the requester "has obtained everything that [it] could recover." *Hall v. Cent. Intelligence Agency*, 437 F.3d 94, 99 (D.C. Cir. 2006). In *Hall*, this Court found appellant's request for fee waiver moot because on the eve of oral argument the agency produced the requested documents without charge. *Id*. at 98.[19] In stark contrast, FTC declared Item One of COA's Third Request duplicative and erroneously concluded no further processing of COA's fee status was necessary. A174.

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[19] This is the sole circumstance in which this matter would be legally and factually moot. This Court could then remand the case with instructions to vacate the district court opinion. *Hall*, 437 F.3d at 100 (citing *Armstrong v. Exec. Office of the President*, 97 F.3d 575, 582 (D.C. Cir. 1996)). The Court can order vacatur without a request from either party. *Hall*, 437 F.3d at 100 (citing *Columbian Rope Co. v. West*, 142 F.3d 1313, 1318 n. 5 (D.C. Cir. 1998)).

FTC also failed to liberally construe COA's Third Request when the terms "social media authors" and "bloggers" were added as discrete terms.[20] COA specifically indicated its Third Request was to "serve as a *perfected FOIA request to [COA's] initial August 30, 2011 letter* or October 28, 2011 letter." A172 (emphasis added). FTC's mootness determination prevented a "broader reading" of the Third Request where COA sought "the entire set of documents despite the fact that a specific subset of documents [was] named." *Nat'l Sec. Counselors*, 931 F. Supp. 2d at 101 (citing *LaCedra v. Exec. Office for U.S. Attorneys*, 317 F.3d 345, 348 (D.C. Cir. 2003)). The district court's opinion compounded this fundamental error. A397-400.[21] Accordingly, FTC's arguments do not rebut COA's premise that this Court should not allow the agency to refuse to process a legitimate FOIA request because the agency styles the request duplicative.

B. FTC Does Not Assert Any Factual Circumstances Supporting A Determination Of Mootness For COA's Third Request.

An agency may only refuse to process a proper FOIA request under certain limited circumstances, none of which are present here. *Nat'l Sec. Counselors*, 931

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[20] "All records relating to the drafting, formulation, and revision of the Guides Concerning the Use of Endorsements and Testimonials in Advertising *concerning social media authors or bloggers* between January 1, 2009 and September 6, 2011." A172 (emphasis added).

[21] The district court's opinion is entirely devoid of substantive analysis regarding FTC's determination of mootness. The court fails to acknowledge clear Circuit precedent requiring an agency to process a request, even if the agency believes the request is duplicative. This is clear error.

F. Supp. 2d at 103-04. For example, FOIA does not require an agency to "create records" or "answer questions." *Id*. at 103 (citing *ACLU v. Dep't of Justice*, 655 F.3d 1, 4 n.3 (D.C. Cir. 2011); *Moore v. Fed. Bureau of Investigation*, 883 F. Supp. 2d 155, 163 (D.D.C. 2012)). COA made no such request in this case; it merely made a proper FOIA request for records. A172. FTC does not contest whether Item One of COA's Third Request was properly made. Therefore, the district court's decision affirming such mootness determination should be reversed.

C. FTC Fails to Justify Its Refusal To Consider COA's Third Request On The Administrative Record As Of May 7, 2012.

A FOIA requester's ability to disseminate information, in addition to its fee category, is not static. FTC was required to evaluate COA's qualifications for fee status and waiver as of February 27, 2012, the date FTC received COA's Third Request in its FOIA office. A174; *see Long v. Dep't of Justice*, 450 F. Supp. 2d 42, 85 (D.D.C. 2006) (holding "an entity's fee status can change") (citation omitted). FTC cannot deny COA's changed and improved status six months after the initial August 30, 2011 request. A176-184.

FTC's denial of COA's appeal on May 7, 2012 is yet another example of its failure to abide by prevailing law. A185-86. It was required to process Item One of COA's Third Request regardless of its purportedly duplicative nature. FTC's Brief does nothing to challenge COA's contention that the improved record

underlying COA's Third Request was sufficient to require FTC to process the request. FTC Br. 44-45; A176-184.[22]

FTC does not contest COA perfected its First and Second Requests in its Third Request, which requires the agency to consider the issues set forth in those documents. *See* A172 (stating that this letter "serve[s] as a perfected FOIA request to [COA's] initial August 30, 2011 or October 28, 2011 letter."). The October 2011 letter states the Guides Concerning the Use of Endorsements and Testimonials in Advertising "raise potential First Amendment issues, therefore implicating a fundamental right of great public importance." A030.

COA, repeatedly and in good faith, attempted to meet FTC's concerns and comply with the requirements of FOIA and the OPEN Government Act regarding fee waivers. FTC denied all such attempts, instead building a stone wall to block disclosure. COA's intent to publish articles critical of FTC's actions regarding the Guides is thus impossible to ignore. *See* A181. FTC refused to process Item One of the Third Request, thus avoiding a determination of COA's fee status for the Third Request. A174, A186. This Court should not allow that decision to stand.

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[22] FTC's Brief contains ineffective assertions on this point that are contradicted by the record. For example, FTC *never* utilized the terms "social media authors" or "bloggers" as search terms, despite having expressly agreed to do so. *See* FTC Br. 44; A020-21, A024, A172. Its "final denial" of COA's First Request was actually made on May 7, 2012 by its General Counsel, having refused to consider the state of the administrative record as of that date. FTC Br. 44; A185-86.

CONCLUSION

For the foregoing reasons and those stated in COA's Opening Brief, the judgment of the district court should be reversed and the case remanded for further proceedings.

September 24, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Under Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B) because it contains 5,739 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1). This brief complies with typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font.

Dated: September 24, 2014

/s/ Aram A. Gavoor
Counsel for Plaintiff-Appellant

REPLY ADDENDUM

Except for the following, all applicable statutes and regulations are contained in the Corrected Addendum accompanying the Corrected Opening Brief of Plaintiff-Appellant Cause of Action.

TABLE OF CONTENTS

Regulations

Department of Defense
FOIA Fee Schedule, General Provisions

32 C.F.R. § 286.28(e)(7)(i)

(7) Representatives of the news media. Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by a representative of the news media. Requesters must reasonably describe the records sought (see § 286.4(h)). Fees shall be waived or reduced if the criteria of paragraph (d) of this section, have been met.

(i) The term "representative of the news media" refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. These examples are not meant to be all-inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of "freelance" journalists they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but Components may also look to the past publication record of a requester in making this determination.

(ii) To be eligible for inclusion in this category, a requester must meet the criteria in paragraph (e)(7)(i) of this section, and his or her request must not be made for commercial use. A request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use. For example, a document request by a newspaper for records relating to the investigation of a defendant in a current

criminal trial of public interest could be presumed to be a request from an entity eligible for inclusion in this category, and entitled to records at the cost of reproduction alone (excluding charges for the first 100 pages).

(iii) "Representative of the news media" does not include private libraries, private repositories of Government records, information vendors, data brokers or similar marketers of information whether to industries and businesses, or other entities.

Federal Trade Commission
FOIA, Miscellaneous Rules
57 Fed. Reg. 10,804 (Mar. 31, 1992)
In Relevant Part

§ 4.8 Costs for obtaining Commission records.

(b)(2) ***Educational requesters, non-commercial scientific institution requesters, and representative of the news media.*** Requesters in these categories will be charged for the direct costs to duplicate documents, excluding charges for the first 100 pages. An *educational institution* is a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research. A *non-commercial scientific institution* is an institution that is not operated on a *commercial* basis as that term is referenced in paragraph (b)(1) of this section, and that is operated solely to conduct scientific research the results of which are not intended to promote any particular product or industry. A *representative of the news media* is any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. *News* means information that is about current events or that would be of current interest to the public.

Federal Trade Commission
FOIA Fee Schedule Rulemaking, 78 Fed. Reg. 13,570 (proposed Feb. 28, 2013)
In Relevant Part

78 Fed. Reg. at 13,571

The Commission has determined that it is necessary to update its fee schedule for provision of services to the public, which was last changed in 1998. Since then, the Freedom of Information Act ("FOIA") was amended once in late 2007 by the Openness Promotes Effectiveness in our National Government Act of 2007, Public Law 110-175, 121 Stat. 2524 ("2007 FOIA Amendments"). The Commission proposes to change its fee schedule to implement the 2007 FOIA Amendments as appropriate. There have also been changes in technology and to the costs of providing services over the last decade, necessitating revisions to reflect both new and discontinued services that the FTC offers the public. The proposed changes will also be useful in providing additional notice to the public and to the FTC's professional and administrative staff about the procedures governing how the agency responds to FOIA requests. The additional guidance will supplement and restate the information available at the FOIA page on the FTC Web site, *http://www.ftc.gov/foia/index.shtm.*

78 Fed. Reg. at 13,572

In Rule 4.8(b)(2), 16 CFR 4.8(b)(2), the Commission proposes to amend the definitions for "representative of the news media" to implement the definition codified at 5 U.S.C. 552(a)(4)(A)(ii) by the 2007 FOIA Amendments. The Commission also proposes amending the definition of "educational institution" to more closely comport with Section 6(h) of the 1987 OMB Fee Guidelines: a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research of the institution, not an individual goal.

Office of Science and Technology Policy
Proposed, Implementing FOIA, 77 Fed. Reg. 27,151 (proposed May 9, 2012)
In Relevant Part

77 Fed. Reg. 27,152-53

§ 2402.3 General policy and definitions.

* * *

(c) *Definitions.* For purposes of this part, all of the terms defined in the Freedom of Information Act, and the definitions included in the "Uniform Freedom of Information Act Fee Schedule and Guidelines" issued by the Office of Management and Budget apply, unless otherwise defined in this subpart.
. . .
Representative of the news media or *news media requester* mean any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. For purposes of this definition, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. For "freelance" journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization. A publication contract would be the clearest proof, but OSTP shall also look to the past publication record of a requester in making this determination. To be in this category, a requester must not be seeking the requested records for a commercial use. A request for records supporting the news-dissemination function of the requester shall not be considered to be for a commercial use.

Office of Science and Technology Policy
Final, Implementing FOIA, 78 Fed. Reg. 33,209 (June 4, 2013)
In Relevant Parts

78 Fed. Reg. at 33,210

Commenter # 2

As proposed, § 2402.3(c) defines the term "representative of the news media" or "news media requester" as any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. For purposes of this definition, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. For "freelance" journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization. A publication contract would be the clearest proof, but OSTP shall also look to the past publication record of a requester in making this determination. To be in this category, a requester must not be seeking the requested records for a commercial use. A request for records supporting the news-dissemination function of the requester shall not be considered to be for a commercial use.

Commenter # 2 proposes a definition that mirrors FOIA's language in 5 U.S.C. 552(a)(4)(A)(ii) (as amended by the OPEN Government Act of 2007, Pub. L. 110-175, 121 Stat. 2524) which provides that the term "representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term 'news' means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of 'news') who make their products available for purchase by or subscription by or free distribution to the general public. These

examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

OSTP accepts Commenter # 2's proposal and hereby adopts the current language found in the FOIA.

78 Fed. Reg. at 33,213

(10) The terms "representative of the news media" or "news media requester" mean any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of 'news') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I also hereby certify that I will have eight copies hand-delivered or sent via Federal Express overnight delivery to the Court within two business days, pursuant to Circuit Rule 31(b).

/s/ Aram A. Gavoor
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