

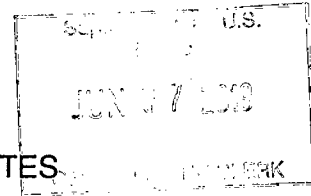
18-9651

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



Carlos Arturo Patino Restrepo — PETITIONER
(Your Name)

vs.

Department of State — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the District of Columbia
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Carlos Arturo Patino-Restrepo 64782-053
(Your Name)

FCI Schuylkill P.O. BOX 759
(Address)

Minersville, PA. 17954
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Does a district court abuse its discretion in granting an agency summary judgment in a FOIA proceeding where the agency has failed to comply with a mandatory regulation?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 14, 2019.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Text of 22 C.F.R. § 171.4(b): See Appendix C
2. Text of 22 C.F.R. § 171.11(g): See Appendix C

STATEMENT OF THE CASE

Petitioner filed a Freedom of Information Act ('FOIA') to the United States Department of State ('DOS'), among other agencies. The FOIA request sought the following information:

1. Any document, which memorializes, summarizes, reports, or comments on, or is evidence of any i) interview, ii) debriefing, iii) proffer; or iv) description of any of the occurrences in (i) - (iii) regarding Listed Individuals which was conducted by the Department of Justice or its agents or conducted by or participated in by any other person or entity, regardless of whether any employee of the Department of Justice, in any Document within your files, records or custody or control. 1/
2. Any Document which contains summaries, reports, comments upon or concerns [Petitioner] where such information regarding [Petitioner] was provided by or attributed to any of the Listed Individuals.
3. Any Document which contains information, summarizes, reports or comments upon whether [Petitioner] was (or was not) a participant, member of, or affiliated with in any way the Norte Valle Cartel.
4. Any Document concerning Bonnie Klapper and/or Romedio Viola relating or concerning their activities that concern [Petitioner].
5. Any agreement-between any Listed Individual and the United States, Department of Justice, and/or any Assistant United States Attorneys, including, but not limited to, any United States or foreign prosecutorial entity or representative.
6. All medical records and prison records concerning [Petitioner] in the possession, custody or control of the authorities in the Eastern District of New York.

After a delay in processing the request by the DOS, Petitioner filed a complaint pursuant to 5 U.S.C. § 552.

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1. At the onset of the FOIA request, Petitioner provided a list of approximately 39 names of individuals to whom the information was sought. These individuals were referred to as the 'Listed Individuals' throughout the request.

While the FOIA complaint was pending, the Central Foreign Policy Records division of the DOS searched its Central File for the listed names. Using the complex search approach, it located 21,314 documents; using the 'Exact Name and Alias' approach it located 9,188 documents; and using the 'Exact Name' approach it located 3,125 documents. The DOS informed Petitioner that in the absence of any personally identifying information for the Listed Individuals, the information he sought was exempt under FOIA exemptions 6 and 7(C). Importantly, at no point was Petitioner provided an opportunity to modify his request.

In seeking summary judgment, the DOS argued that a search of the voluminous documents would be unreasonably burdensome. Moreover, the DOS asserted that it was under no obligation to ask Petitioner to narrow and/or modify his request and that it was his duty to submit a FOIA request that 'reasonably describe[d]' the records sought.

The district court ultimately agreed with the DOS and granted summary judgement. This conclusion was later affirmed by the appeals court.

REASONS FOR GRANTING THE PETITION

An appropriate remedy in this case would be for this Court to exercise its authority pursuant to 28 U.S.C. § 2106 and grant certiorari, vacate the judgment and remand to the appellate court. As this Court has noted, a GVR may be appropriate when it determines that doing so may "assist the court below by flagging a particular issue that it does not appear to have fully considered" or when this Court believes that it would benefit from the lower court's insight before it rules on the merits. See Lawrence v. Chater, 516 U.S. 163, 168 (1996). The record from the lower court dictates that no attempt was made to harmonize the incongruity of the district and appellate courts' decisions—particularly, where the agency acknowledged before the district court that no obligation existed to comply with certain internal regulations and the appellate court's decision rested, in part, on the premise that the agency complied with the regulation. Therefore, since it is well-settled that a GVR has no precedential weight and does not dictate how the lower court should rule on remand, see Tyler v. Cain, 533 U.S. 656, 666 n.6 (2001) ("We also reject Tyler's attempt to find support in our [GVR] disposition. ... Our order ... was not a final determination on the merits."), the appellate court should be afforded the opportunity in the first instance to determine if the district court abused its discretion by granting summary judgment to the DOS notwithstanding the agency's concession that it failed to adhere to a mandatory FOIA regulation.

- **DOS FOIA Regulations**

A FOIA request necessitates an agency to make their records available

in response to requests that "reasonably describe" the records sought. 5 U.S.C. § 552(a)(3)(A); see also DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 755 (1989). DOS regulations implementing this provision provides, in part, that "a request must reasonably describe the Department records that are sought." 22 C.F.R. § 171.4(b). The regulations further provide, in relevant part, that "[t]he Department **shall** ... provide the requester with an opportunity to modify the request" to satisfy the 'reasonably describe' requirement. Id. @ § 171.11(g).

Generally, agencies must follow their own rules and regulations. Accardi v. Shaughnessy, 347 U.S. 260, 266-67 (1956). This principle derives from the notion that a properly promulgated substantive agency regulation has the force and effect of law. Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979); see also United State v. Nixon, 418 U.S. 683, 694-96 (1974) (noting that as long as properly promulgated regulations are in effect, the promulgating agency has no choice but to follow them). Based on this principle of strict adherence, the DOS was obligated to follow its FOIA regulations.

There is yet another reason why the DOS had an obligation to strictly adhere to its aforementioned regulations governing the FOIA process. Specifically, § 171.11(g)'s inclusion of the word 'shall' mandated a certain action from the DOS. This Court has long acknowledged that when Congress uses the word 'shall,' it is mandatory, and does not give an agency authority to disregard that directive. For example, in Kingdomware Technologies, Inc. v. United States, 195 L.Ed.2d 334 (2016), this Court held that "[u]nlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement. Id. @ 339; see also Ross v. Blake, 136 S.Ct. 1850, 1856-57 (2016) (where the PLRA provides that

"[a]n inmate 'shall' bring 'no action' ... absent exhaustion of available administrative remedies ... [t]here is no question that exhaustion is mandatory"); Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 661-62 (2007) (the statutory phrase "shall approve" means "EPA does not have the discretion to deny a transfer of an application"); Lopez v. Davis, 531 U.S. 230, 241 (2001) (noting Congress' "use of a mandatory 'shall' ... to impose discretionless obligations").

The use of the word 'shall' in § 171.11(g) thus indicated that the DOS had an obligation to contact Petitioner and afford him the opportunity to modify his request if the agency believed that his request was overly broad. However, the DOS conceded that it made no effort to contact the Petitioner for purposes of aiding him in narrowing his request. Instead, the DOS argued—and the district court agreed, that no regulation existed that obligated the DOS to afford Petitioner the opportunity to narrow his request before seeking summary judgment on the basis that a search for the requested documents would be unreasonably burdensome. The district court's grant of summary judgment in this regard therefore constituted an abuse of discretion. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 403, 405 (1996) (holding that a district court abuses its discretion where it bases its ruling on an erroneous view of the law).

This error in the district court's judgment was subsequently compounded by the appellate court. Particularly, the appellate court determined that summary affirmance was warranted with respect to the DOS. Yet, as to the basis of why summary affirmance was proper regarding the DOS, the appellate court diverged from the district court's rationale for granting the DOS summary judgment. On the appellate level, the DOS argued—unlike it had done in the

district court—that it had complied with § 171.11(g) and that Petitioner had spurned their assistance and had adopted not to modify his FOIA request. Based on this occurrence, the appellate court deemed that summary affirmance was appropriate.

Where, as here, an agency has failed to comply with a mandatory regulation in the context of a FOIA proceeding courts have repeatedly concluded that summary judgment on the agency's behalf is not appropriate. See, e.g., Yagman v. Pompeo, 868 F.3d 1075, 1084 (9th Cir. 2016) (reversing district court's grant of summary judgment and ordering district court on remand to provide the CIA another opportunity to comply with 32 C.F.R. § 1900.12(c) which provides that requests that "do not meet [the reasonable description] requirements will be considered an expression of interest and the agency will work with, and offer suggestions to, the potential requester in order to define a request properly"); Rutuolo v. DOJ, 53 F.3d 4, 10-11 (2d Cir. 1994) (reversing grant of summary judgment and holding that under 28 C.F.R. § 16.3(b), the agency had a duty to assist FOIA requesters "in reformulating their requests if it was thought that the request needed to be narrowed"); see also Hall & Associates v. EPA, 83 F.Supp.3d 92, 102 (D.D.C. 2015) (denying, in part, EPA's request for summary judgment in FOIA proceeding where it concluded that the plaintiff's request did not 'reasonably describe' the records sought but failed to comply with 40 C.F.R. § 2.102(c) which required the agency to notify the plaintiff and provide him with the opportunity to discuss and modify his request). Because noncompliance with a mandatory regulation seemingly prevents a district court from awarding an agency summary judgment, a GVR is particularly necessary in this instance to afford the appellate and district courts an opportunity

to determine whether the DOS complied with § 171.11(g).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Carlos Arturo Patino R.

Date: June 3, 2019