

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

JUDICIAL WATCH, INC.,)	
)	
Plaintiff-Appellant,)	
)	No. 17-5283
v.)	
)	
U.S. DEPARTMENT OF JUSTICE,)	
)	
Defendant-Appellee.)	
_____)	

**APPELLANT’S MOTION TO VACATE BRIEFING SCHEDULE
AND JUDGMENT AND FOR REMAND**

Appellant Judicial Watch, Inc., by counsel and pursuant to Rules 26 and 27 of the Federal Rules of Appellate Procedure, respectfully requests that the briefing schedule be vacated, that the judgment be vacated, and that this matter be remanded to the District Court for further proceedings. Appellee U.S. Department of Justice concurs in the request to vacate the briefing schedule, but intends to file a response with respect to the balance of the motion.

1. At issue in this Freedom of Information Act (“FOIA”) appeal is whether three FBI 302s from the criminal investigation of former Illinois Governor Rod Blagojevich may be withheld from Judicial Watch under FOIA Exemption 7(A). 5 U.S.C. § 552(b)(7)(A) (“records compiled for law enforcement

purposes...[that] could reasonably be expected to interfere with enforcement proceedings.”). The government argued to the District Court that the 302s could be withheld in full under both FOIA Exemption 5 and FOIA Exemption 7(A). It also asserted that certain portions of the 302s were exempt from production under FOIA Exemptions 3, 6, 7(C) and 7(E).

2. On October 20, 2017, the District Court granted summary judgment in the government’s favor on Appellee’s Exemption 7(A) claim, citing a then-pending petition for *writ of certiorari* the impeached former governor had filed at the U.S. Supreme Court. Blagojevich’s petition did not challenge his 2011 conviction on 14 separate corruption charges. The Supreme Court previously denied a cert. petition by Blagojevich challenging that conviction. Rather, Blagojevich’s then-pending petition challenged his 168-month sentence. The District Court held, “Until the appeal is fully exhausted, disclosure of investigative materials could be reasonably expected to interfere with whatever occurs going forward.” *See* Memorandum Opinion (ECF No. 22) at 9. The District Court did not undertake a separate analysis of the government’s Exemption 5 claim or other claims of exemption the government had invoked over portions of the 302s. *Id.* at 6-7 & n.

3.

3. On April 16, 2018, the Supreme Court denied Blagojevich's second cert. petition. *Blagojevich v. United States*, Case No. 17-658, Order (U.S. April 16, 2018).

4. For Exemption 7A to apply, a law enforcement proceeding must be pending at the time of the court's decision. *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 746 F.3d 1082, 1097 (D.C. Cir. 2014). "Thus, reliance on Exemption 7(A) may become outdated when the proceeding at issue comes to a close." *Id.*

5. Because the Supreme Court denied Blagojevich's cert. petition challenging his sentencing, the law enforcement proceeding on which the government based its Exemption 7(A) claim has now concluded. There is no pending law enforcement proceeding, and, as a result, the government's Exemption 7(A) claim is moot.

6. When a case becomes moot on appeal in its journey through the federal courts, the established practice is that the judgment will be reversed or vacated with instructions to dismiss. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). This procedure "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Id.* It also preserves the rights of the parties. *Munsingwear, Inc.*, 350 U.S. at 40; *see also Carlisle Tire & Rubber Co. v. U.S.*

Customs Serv., 663 F.2d 210, 214 (D.C. Cir. 1980) (vacating district court ruling on FOIA Exemption 5 after agency voluntarily produced requested records and remanding with instructions to dismiss that part of the case).

6. The judgment in this case did not become moot because of any action attributable to Judicial Watch. *United States Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 22-23 (1994) (“A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.”). It was only the happenstance of Blagojevich’s filing of a second cert. petition in his nearly decade long criminal case and the petition’s recent denial that caused the judgment to become moot. The equities weigh in favor of vacatur. *Id.* at 25 and 29.

7. Judicial Watch does not ask that the judgment be reversed. It only asks that the judgment be vacated and the case be remanded so the District Court can consider the government’s claims that the 302s may lawfully be withheld in full under FOIA Exemption 5 or in part under FOIA Exemptions 3, 6, 7(C), and 7(E).

8. Judicial Watch’s opening brief and appendix are due May 24, 2018. The government’s answer brief is due June 25, 2018, and Judicial Watch’s reply is due July 9, 2018. Vacatur of the briefing schedule is warranted to avoid a claim of lack of prosecution while the Court considers the judgment’s mootness.

For the foregoing reasons, Judicial Watch respectfully requests that: (1) the briefing schedule be vacated; (2) the judgment be vacated; and (3) this matter be remanded to the District Court for resolution of the government's remaining claims of exemption.

Dated: May 8, 2018

Respectfully submitted,

/s/ Paul J. Orfanedes

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/s/ Lauren M. Burke

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion complies with the type-volume limitations of Fed. R. App. P. 27(d)(2)(A) and (d)(1)(E). This document contains 1,031 words (using Microsoft Word 2010) and has been prepared in a proportional Times New Roman, 14-point font.

/s/ Lauren M. Burke _____

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2018 I filed via the CM/ECF system the foregoing Motion with the Clerk of the Court. Participants in the case are registered CM/ECF users and service will be accomplished by the Appellate CM/ECF system.

I also certify that I caused an original and four (4) copies to be delivered to the Clerk of Court via hand delivery.

/s/ Lauren M. Burke