No. _____

In The
Supreme Court of the United States

JEFFERSON MORLEY,

Petitioner,

v.

CENTRAL INTELLIGENCE AGENCY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should *Morley v. CIA*, 894 F.3d 389 (D.C. Cir. 2018) ("*Morley XI*") be reversed because it is in direct conflict with *Dept. of Justice v. Tax Analysts*, 492 U.S. 136 (1989)?

2. Should the judgment of the Court of Appeals for the District of Columbia be reversed to preserve the proper administration of justice by requiring circuits to ensure that district courts will follow precedent and the mandate rule?

3. Whether conflicts within the D.C. Circuit and between the D.C. Circuit and other circuits created by *Morley XI* require reversal in order to maintain national uniformity in the administration of the FOIA attorney's fees law?

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

RULE 29.6 STATEMENT

The petitioner is not a nongovernmental corporation nor does the petitioner have a parent corporation or shares held by a publicly traded company.

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Jefferson Morley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS AND ORDERS BELOW

The per curiam published opinion of the United States Court of Appeals for the District of Columbia Circuit in *Morley v. CIA*, Docket No. 17-5114, decided and filed on July 9, 2018, and reported at 894 F.3d 389 (D.C. Cir. 2018) ("*Morley XI*"), is set forth in the Appendix hereto at App. 1.

The published Memorandum Opinion of the United States District Court for the District of Columbia in *Morley v. CIA*, Civil Action No. 03-cv-2545 (RJL), decided and filed March 29, 2017, and reported at 245 F. Supp. 3d 74 (D.D.C. 2017) ("*Morley X*"), is set forth in the Appendix hereto at App. 37.

The published opinion of the United States Court of Appeals for the District of Columbia Circuit in *Morley v. CIA*, Docket No. 14-5230, decided and filed on January 21, 2016, vacating the district court's denial of Morley's renewed motion for attorney's fees and costs under FOIA and remanding the matter to the district court is reported at 810 F.3d 841 (D.C. Cir. 2016) ("*Morley IX*").

The published Memorandum Opinion of the United States district court for the District of

Columbia in *Morley v. CIA*, Civil Action No. 03-cv-2545 (RJL), decided and filed July 23, 2014, denying Morley's renewed motion for attorney's fees and costs under FOIA, is reported at 59 F. Supp. 3d 151 (D.D.C. 2014) ("*Morley VIII*").

The per curiam published opinion of the United States Court of Appeals for the District of Columbia Circuit in *Morley v. CIA*, Docket No. 12-5032, decided and filed on June 18, 2013, vacating the district court's denial of Morley's motion for attorney's fees and costs under FOIA and remanding the matter to the district court with directions to apply the Circuit's four-factor test, is reported at 719 F.3d 689 (D.C. Cir. 2013) ("*Morley VII*").

The published Memorandum Opinion of the United States District Court for the District of Columbia in *Morley v. CIA*, Civil Action No. 03-cv-2545 (RJL), decided and filed December 15, 2011, denying Morley's motion for an award of attorney's fees and costs under FOIA, is reported at 828 F. Supp. 2d 257 (D.D.C. 2011) ("*Morley IV*").

The unpublished orders of the United States Court of Appeals for the District of Columbia Circuit in *Morley v. CIA*, Docket No. 17-5114, decided and filed on November 29, 2018, denying Morley's timely filed petition for rehearing or rehearing en banc, are set forth in the Appendix hereto at App. 45 & 47.

JURISDICTION

Morley seeks review of the decision of the United States Court of Appeals for the District of Columbia Circuit entered on July 9, 2018. A timely petition for rehearing[1] or rehearing en banc was denied on November 29, 2018. Upon a motion timely filed, Chief Justice John Roberts on February 19, 2019, granted Morley a 60-day extension of time to file this petition by April 28, 2019. This petition for writ of certiorari is filed within the time allowed by 28 U.S.C. § 2101(c), Supreme Court Rule 13.3 and the prior order of the Chief Justice. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 552(a)(4)(E) [Freedom of Information Act (FOIA) as amended by The OPEN Government Act of 2007]:

(E)

(i) The court may assess against the United States reasonable attorney's fees and other litigation costs reasonably incurred in any

[1] On December 17, 2018, Morley filed a motion to reconsider the order denying a panel rehearing on the grounds that the panel that decided the petition for a panel rehearing had only two members instead of the three required by 28 U.S.C. § 46(c) and the order denying the petition for panel rehearing did not indicate that the decision was a quorum decision pursuant to 28 U.S.C. § 46(d). The motion to reconsider was denied by order entered on December 26, 2018.

> case under this section in which the complainant has substantially prevailed.
>
> (ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either –
>
> (I) a judicial order, or an enforceable written agreement or consent decree; or
>
> (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

44 U.S.C. § 2107, note, President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No. 102-526, § 11(b):

> (b) Freedom of Information Act. – Nothing in this Act shall be construed to eliminate or limit any right to file requests with any executive agency or seek judicial review of the decisions pursuant to section 552 of title 5, United States Code.

STATEMENT OF THE CASE

Plaintiff/Petitioner Jefferson Morley ("petitioner" or "Morley") is a journalist. On July 4, 2003, he submitted a request under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), to defendant/respondent Central Intelligence Agency ("the CIA") for "all records pertaining to CIA operations officer George Efythron Joannides" ("Joannides"). Joannides had served as a

case officer in charge of anti-Castro propaganda operations and the Directorio Revolucionario Estudantl ("the DRE") from November of 1962 through April of 1964. In 1978 Joannides, acting undercover, served as a CIA liaison to the House Select Committee on Assassinations ("HSCA") which was investigating the assassination of President Kennedy and the CIA.

In August of 1963, Lee Harvey Oswald ("Oswald") was in an altercation with officers of the DRE in New Orleans, Louisiana, generating a large amount of publicity about Oswald's alleged pro-Castro sympathies. The CIA withheld Joannides' identity from official bodies investigating the assassination, including the President's Commission on the Assassination of President Kennedy ("Warren Commission"); the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities ("Church Committee"); and the HSCA. While Joannides was actually working with the HSCA in a liaison capacity, the CIA went so far as to deny to the HSCA that any CIA case officer was working with the DRE in 1963. The CIA also initially concealed Joannides' identity and other pertinent information from the Assassination Records Review Board ("ARRB"). The ARRB, however, eventually discovered that Joannides had been the DRE's case officer in 1963.

The CIA did not acknowledge receipt of Morley's FOIA request until November 5, 2003, advising him that its assassination records had been "transferred to the National Archives and Records Administration ("NARA") in compliance with [the JFK Records Act]."

CIA dismissed Morley's FOIA request, telling him to submit his request to NARA.

On December 16, 2003, Morley filed his suit against the CIA under FOIA seeking injunctive relief. On December 22, 2004, the CIA sent Morley 3 documents released in their entirety and 112 documents with redactions. It also advised Morley it had located additional responsive material that was being withheld in its entirety, and that any release of 2 other documents required consultation with another agency. CIA also advised that 78 other responsive documents were on file with NARA.

In February of 2005, the CIA sent Morley redacted copies of 2 documents after consulting with another federal agency. In May of 2005, the CIA provided additional redacted documents which it had inadvertently failed to include in its earlier disclosure; and it told Morley that it was withholding additional material which was classified and thus could not be released in their entirety.

The parties filed cross motions for summary judgment. The CIA argued it had conducted an adequate search for responsive documents and Morley contended it had not. On September 29, 2006, the district court granted the CIA summary judgment and denied Morley's cross-motion. *Morley v. CIA*, 453 F. Supp. 2d 137, 145-148 (D.D.C. 2006) ("*Morley I*"). The court of appeals affirmed in part and reversed in part and remanded the case with instructions that the district court "direct the CIA to search its operational files and

the records released to NARA." *Morley v. CIA*, 508 F.3d 1108, 1129 (D.C. Cir. 2007) ("*Morley II*").

Consequently, the CIA conducted additional searches and, in April of 2008, it released 88 records in full and 25 in part, totaling 1,040 pages, responsive to Morley's FOIA request. In August of 2008, another 29 responsive documents were released in their entirety and another 264 in part. The CIA located an additional 293 records, the release of which was denied in full.

After renewed motions for summary judgment, on March 30, 2010, the district court granted summary judgment to the CIA. *Morley v. CIA*, 699 F. Supp. 2d 244, 251-258 (D.D.C. 2010) ("*Morley III*"), *aff'd*, 466 F.App'x 1 (D.C. Cir. 2012) (per curiam) ("*Morley V*"). Thereafter, the substantive case was dismissed by the district court. *Morley v. CIA*, No. 03-2545, 2013 WL 140245 (D.D.C. Jan. 9, 2013) ("*Morley VI*").

On June 1, 2011, Morley moved for an award of attorney's fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E)(i). On December 14, 2011, the district court denied the motion. *Morley v. CIA*, 828 F. Supp. 2d 257 (D.D.C. 2011) ("*Morley IV*"). Conceding that Morley might be eligible for attorney's fees and costs as the substantially prevailing party, the district court concluded that Morley was not entitled to an award. *Id.* at 261.

The district court found the released documents had "little, if any" public benefit because they were previously available at NARA. *Id.* at 262-263. The district court, noting NARA's high copying costs, further found

that, as a free-lance journalist, Morley had a private interest in pursuing the records. *Id.* at 264-265. Finally, in regard to the reasonableness of the CIA's original refusal to search, he found, without analysis, that "there is no indication in the record that the CIA has engaged in any recalcitrant or obdurate behavior." *Id.* at 265.

Morley appealed. In a per curiam opinion, the court of appeals reversed and remanded the case to the district court for reconsideration of the four-factors in light of its decision in *Davy v. CIA*, 550 F.3d 1155 (D.C. Cir. 2008). *Morley v. CIA*, 719 F.3d 689, 690 (D.C. Cir. 2013) ("*Morley VII*").

Upon remand, the district court once again denied the motion. *Morley v. CIA*, 59 F. Supp. 3d 151 (D.D.C. 2014) ("*Morley VIII*"). While the district court quoted the *ex ante* formulation of the public benefit factor from *Davy*, rather than applying it, the court limited its reanalysis to the four documents actually produced that CIA admitted were newly released documents. *Id.* at 157-158. The district court did not reanalyze or rebalance the remaining factors in light of the *Davy* opinion.

On appeal, a unanimous court of appeals again vacated the district court's judgment and remanded the matter because the district court had disregarded the prior instructions and had improperly analyzed the public-benefit factor by assessing the public value of the information received rather than "the potential public value of the information sought" *Morley v. CIA*,

810 F.3d 841, 844 (D.C. Cir. 2016) ("*Morley IX*") (quoting, *Davy*, 550 F.3d at 1159). The court of appeals ruled that the district court's valuation of the public benefit of the documents actually produced was "ultimately of little relevance" to *Davy*'s requirement that a court assess "'the potential public value of the information sought,' not the public value of the information received." *Id.* The court of appeals concluded that Morley's request in this case had potential value because "there was at least a modest probability that [it] would generate information relevant to the assassination or later investigations." *Id.* at 845. Having decided the public-benefit factor in Morley's favor, the case was remanded again to the district court to consider the remaining three factors and to balance the four factors "afresh." *Id.*

On remand Morley submitted additional evidence of the potential public benefit of the records he requested. The district court, purporting to do the *ex ante* analysis, acknowledged that Morley's request "sought to uncover any connection between Joannides, a CIA officer who appears to have been assigned to cover the DRE around the time of the assassination, and the DRE's known contact with Lee Harvey Oswald." *Morley v. CIA*, 245 F. Supp. 3d 74, 77 (D.D.C. 2017) ("*Morley X*"). He then conceded, "Any such connection would be 'useful new information' indeed about the JFK assassination." *Id.* Conceding that Morley's request "had at least a decent chance of turning up information that would clarify the worth of the congressional investigation into the JFK assassination," *id.*, the district court

nevertheless concluded "the expectation-adjusted value of the public benefit that plaintiff sought to provide was small." *Id.* Then, again disregarding mandates of the court of appeals, the district court restated its own limited analysis of the four-factor test, finding that Morley had a private incentive as a journalist for compensation from stories arising from his request and his avoiding the necessity "to expend resources engaging with the JFK collection at the National Archives." *Id.* at 78. While the district court found the first three factors "a very close call," it concluded, "Thankfully, the final factor breaks the tie – it weighs heavily against Morley and is ultimately dispositive," holding, "[a]n award of attorney's fees and costs is not necessary in this case to ensure that the agency refrains from needlessly frustrating efforts to obtain information. As I found in *Morley IV*, 828 F. Supp. 2d at 265, the 'CIA [] advanced a reasonable legal position' and did not engage 'in any recalcitrant or obdurate behavior'; hence, this factor 'weighs strongly in favor of the CIA.' Enough said!" *Id.* (footnote omitted).

Morley again appealed. In an unsigned majority per curiam opinion Judges Katsas and Kavanaugh affirmed the district court judgment. App. 16. Judge Henderson filed a dissenting opinion. App. 16.

The majority opinion opened by observing that the case had "dragged on for a staggering 15 years. . . . It is time to bring the case to an end." App. 1. The majority then considered how the court was to review a district court's decision on attorney fees by deferential review of the lower court's analysis of each of the four

individual factors for abuse of discretion and, then, whether the court abused its discretion in balancing the four factors. Although the majority stated that it was debatable "whether the District Court's decision denying attorney's fees was correct," it formulated a new super-deferential standard of discretion for awarding attorney's fees and costs under which the fourth factor becomes *the* dispositive factor. Because the district court's determination was "at least reasonable," the majority perforce adopts it. App. 4. It is from that decision that Morley seeks a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. *MORLEY XI* IS IN DIRECT CONFLICT WITH *DEPT OF JUSTICE V. TAX ANALYSTS*, 492 U.S. 136 (1989).

The per curiam majority's citation of *Dept. of Justice v. Tax Analysts*, 492 U.S. 136 (1989) ("*Tax Analysts II*"), *aff'g*, *Tax Analysts v. Dept. of Justice*, 845 F.2d 1060 (D.C. Cir. 1988) ("*Tax Analysts I*") for the proposition that CIA had a colorable basis for not searching its files for records responsive to Morley's request turns this Court's holding in that case on its head. In *Tax Analysts II* the Department of Justice argued that it did not have to search for documents that *all* were publicly available from another agency. In rejecting that position this Court emphasized that subsections (a)(1) and (a)(2) of the FOIA "are carefully limited to situations in which the requested materials have been

previously published or made available by the *agency itself*." 492 U.S. at 152. This holding was in keeping with this Court's view that the only basis for withholding that is not improper is withholding made "pursuant to one of the nine enumerated exemptions listed" in the FOIA. *Id.* at 150-151.

In spite of this Court's clear holding, the per curiam majority excuses the fact that the documents sought by Morley had not been previously made available by the agency *itself* by arguing "Congress itself had provided an 'alternative form of access,'" by passing the JFK Act. *Morley XI*, 894 F.3d at 394, App. 10. This Court, however, rejected that argument in *Tax Analysts II* where all the records sought under the FOIA were already publicly available from district court clerks as was mandated by 28 U.S.C. § 1914 and judicial rules. The government had argued that Congress provided an alternative form of access that should satisfy the FOIA requirements. This Court rejected the argument, declining "to read into the FOIA a disclosure exemption that Congress did not itself provide. . . . Congress knew that other statutes created overlapping disclosure requirements [as] is evident from § 552(b)(3), which authorizes an agency to refuse a FOIA request when the materials sought are expressly exempted from disclosure by another statute. If Congress had intended to enact the converse proposition – that an agency may refuse to provide disclosure of materials whose disclosure is *mandated* by another statute – it was free to do so. Congress, however, did not take such a step." 492 U.S. at 154.

Nothing in the President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No. 102-526, 44 U.S.C. § 2107, note ("JFK Act"), exempts the records collected thereunder from the FOIA. The JFK Act rather provides: "Nothing in this Act shall be construed to eliminate or limit any right to file requests with any executive agency or seek judicial review of the decisions." *Id*. at § 11(b).

The situation in this case is virtually identical with the situation presented to this Court in *Tax Analysts II*. In both cases the records sought under the FOIA were "agency records" under the control and in the possession of the agency that received the request. In both cases the "FOIA requests referred to [records] in the agency's possession at the time the requests were made." 492 U.S. at 146; *Morley II*, 508 F.3d at 1119. In both cases the agency sought to avoid its duty under the FOIA to search for responsive records by referring the requester to another agency as if the agencies could satisfy their obligations under the FOIA "simply by handing requesters a map and sending them on scavenger expeditions." 492 U.S. at 153. In both cases the agency receiving the request had not *itself* previously made the documents available. In both cases there is a statute mandating public availability from a different agency. In this last circumstance, however, there are two important differences between the cases: First, the statute involved in *Tax Analyst II* was silent in regard to its relationship with the FOIA whereas here the JFK Act specifically provides that it was to have no effect on rights under the FOIA. Second,

in *Tax Analysts II* the documents sought under the FOIA were *all* available from both agencies but in this case, in addition to the files transferred to NARA under the JFK Act, there were many other records responsive to Morley's request that had not been transferred and were maintained exclusively by the CIA. Moreover, many of the transferred records were not made public by NARA because the CIA declined to allow declassification and release.[2]

Tax Analysts II is so clearly on point with this case that it is hard to understand how any legal analyst could believe that the case constituted a colorable, reasonable justification for the CIA in 2003 to refuse to search its records for documents responsive to Morley's request. The burden was on CIA to show that its referral was reasonable under law. The record in this case is devoid of any evidence offered by the CIA that this alleged justification was their motivation in 2003 when they acted. In addition to the clear guidance provided by this Court in *Tax Analysts II*, the text of the JFK Act shows that it specifically does not curtail an agency's duty to search for agency records under the FOIA. In addition to *Tax Analysts I* & *II*, circuit and district court case law also supported this. *See Assassination Archives & Research Ctr. v. Dept. of Justice*, 43 F.3d 1542, 1544 (D.C. Cir. 1995) ("The JFK Act and the FOIA are separate statutory schemes with separate sets of standards and separate (and markedly

[2] The text of Morley's July 4, 2003, request shows that the request is much broader than records related only to the JFK assassination.

different) enforcement mechanisms. . . . The drafters of the JFK Act explicitly addressed the Act's relationship to FOIA, using terms that seem to leave FOIA's completely separate character unaffected."); *Minier v. CIA*, 88 F.3d 796, 802-803 (9th Cir. 1996) ("Had Congress intended the JFK Act to alter the procedure for reviewing FOIA requests, presumably it would have expressly said so."); *Assassination Archives & Research Ctr. v. Dept. of Justice*, 828 F. Supp. 100, 102 (D.D.C. 1993) ("There is simply no indication that Congress intended for the JFK Act to supersede FOIA."). The JFK Act was passed three years after this Court reminded Congress in *Tax Analysts II* that it had to specifically mandate an exception to FOIA requirements if it intended to create one.

The CIA never offered any evidence of its motivation, reasonable or otherwise, for not conducting a search of its records for documents responsive to Morley's request. No sworn affidavit of record in this case offers the JFK Act as a reason for CIA's refusal to search and subsequent dismissal of Morley's request. The closest they come to it is in a declaration filed early on in the case that simply states, "Because they are publicly available and accessible through NARA, CIA did not search for or produce those JFK-related documents." Dorn Decl., Case No. 17-5114, Oct. 3, 2017, Doc. No. 1696655. The issue was first raised in oral argument in this case where, in response to a question from Judge Katsas about whether the JFK Act has anything in it that "would support an argument that the general rule of *Tax Analysts II* doesn't apply here because

Congress has set up this special scheme for J.F.K. requestors to go through NARA," counsel for the CIA, before picking up and repeating the centralization of records argument suggested by Judge Katsas, admitted "I don't believe that was specifically addressed, the *Tax Analyst* precedent was specifically addressed in the Act itself." Transcript of Oral Argument at 15, *Morley XI* (Mar. 19, 2018) (No. 17-5114). In other words, CIA admitted that the JFK Act did not expressly exempt agencies from the FOIA so as to be able to "refuse a FOIA request." *Tax Analysts II*, 492 U.S. at 154.

At the last court of appeals oral argument in this case, following Judge Katsas's prompting, counsel for the CIA did assert that the "whole raison d'etre" of the JFK Act was "to provide one location for requestors to go and to search for these particular documents." Transcript of Oral Argument at 15, *Morley XI* (Mar. 19, 2018) (No. 17-5114). No legal precedent or statutory citation is offered for this assertion. Indeed, there is no legal support for the argument which contradicts the explicit provisions of the Act and § 2 of the JFK Act reveals that centralizing the records for requestors to have one place to go is not among the Act's stated purposes. Congress, rather, specifically providing that the Act does not "eliminate or limit any right to file requests" under the FOIA shows a contrary intent to leave requestors free to request records directly from agencies that have them in their possession. Courts have recognized, however, that one motivation for the JFK Act was the less than adequate responses by executive agencies to FOIA requests. *Assassination*

Archives & Research Ctr., 43 F.3d at 1544; *Minier*, 88 F.3d at 802-803. To interpret these cases to allow agencies to say that an agency could reasonably refuse to do a FOIA search is to make a travesty of precedent and legal reasoning by allowing an agency to use the cure to advance the disease.

The per curiam majority suggests that while the JFK Act preserved the public's right to "file" an FOIA request the "statutory language – 'file' – said nothing to suggest that an agency had a duty to collect and produce copies" of documents that had already been collected and transferred to another agency. *Morley XI*, 894 F.3d at 395, App. 11. On this basis, the majority reasoned, "it was at least arguable that the JFK Act did not require agencies to conduct entirely redundant searches for *copies* of those documents that the agency had already transferred to the Archives." *Id.* From there, the majority conjectured that "such a scheme would seem highly inefficient to the point of absurdity." On that basis, they concluded: "it was at least reasonable – even if not ultimately correct – for the CIA to read the JFK Act's provision referencing FOIA to speak only to those records that might be responsive to a FOIA request and that the CIA had *not* transferred to the Archives." *Id.* It is submitted that this reasoning is not just a refusal to follow the main holding in *Tax Analysts II* regarding a duty to search, it is also an untenable restatement of the administrative burden argument soundly rejected in *Tax Analysts II*: "Congress undoubtedly was aware of the redundancies that might exist when requested materials have been

previously made available. It chose to deal with that problem by crafting only narrow categories of materials which need not be, in effect, disclosed twice *by the agency*." 492 U.S. at 152.

The per curiam majority's reading of the JFK Act "apparently reads [its] language to mean that the public may 'file' a FOIA request but an agency has no duty to collect and produce documents it has already transferred to NARA. Maj. Op. 395. If the JFK Act ensures the public's right to 'file' a FOIA request, it necessarily preserves the agency's duty to respond to that request. The right to file means little if the agency replies with nothing more than a letter." *Morley XI*, 894 F.3d at 405 (Henderson, J., dissenting), App. 35. Judge Henderson went on to observe: "The CIA's *eventual* document production here illustrates the difference between FOIA and the JFK Act. When Morley first made his request, neither he nor the CIA knew whether the documents he requested had been transferred to NARA. As it turns out, only 113 of the 524 documents were ever transferred. *Morley X*, 245 F. Supp. 3d at 76. If not for Morley's lawsuit, the CIA never would have disclosed those non-transferred 411 documents." *Id.*

Although the issue was not briefed in *Morley II*, the reviewing court rejected an argument based on the JFK Act in connection with the adequacy of the search conducted by the CIA, making it clear that the CIA did not have a reasonable basis in law for not searching its records, noting that the "FOIA has a 'settled policy' of 'full agency disclosure.'" *Morley II*, 508 F.3d at 1119 (quoting *Tax Analysts I*, 845 F.2d at 1064). The court

also rejected a CIA argument that it did not need to search the NARA records because most were in the postponed collection under the JFK Act. In rejecting that argument, the Court recognized that the CIA had offered no evidence of a rational motivation for its action, observing, "this *post hoc* explanation cannot make up for the Dorn Declaration's silence." *Morley II*, 508 F.3d at 1120. Similarly, in this present appeal, the CIA's court assisted *post hoc* excuse should be rejected out of hand and the case should be reversed and remanded with instructions to follow this Court's decision in *Tax Analyst II*. *See also Milner v. Dept. of the Navy*, 562 U.S. 562, 571 (2011) ("We have often noted 'the Act's goal of broad disclosure' and insisted that the exemptions be 'given a narrow compass.' ") (quoting *Tax Analysts II*).

II. REVERSAL OF *MORLEY XI* IS NECESSARY TO PRESERVE THE PROPER ADMINISTRATION OF JUSTICE BY REQUIRING CIRCUITS TO ENSURE DISTRICT COURTS WILL FOLLOW PRECEDENT AND THE MANDATE RULE.

The district court in this case repeatedly failed to follow precedent or implement the mandate of the court of appeals on remands. This case has been before the court of appeals on the issue of attorney fees on three separate occasions. In the first two instances, the case was remanded with instructions. In this final instance, the per curiam majority has abandoned or ignored compliance with the circuit's mandates, and

acquiesced to the district court's refusal to implement those mandates.

In first denying Morley's motion for fees, the district court considered the public benefit of the documents *actually* obtained by Morley, opining that since the documents were already available at NARA, the public benefit did not derive from Morley's case. *Morley IV*, 828 F. Supp. 2d at 263.[3] The district court also found that Morley "received 'minimal' compensation for writing news articles about this matter," *id.* at 264-265, and his interest in obtaining the files from CIA "to avoid expending his own time and money to obtain the documents from NARA," were grounds for finding that he had a "sufficient private interest in pursing these records without attorney's fees." *Id.* at 265. Finding, without analysis, that the CIA had "acted reasonably throughout this case," including what he considered to be their early helpful referral of Morley to NARA, the district court held that the fourth factor also favored a denial of fees. *Id.*

On appeal, the circuit court, in a per curiam decision, reversed and remanded the case, directing the district court to apply the four-factor standard in a manner consistent with their decision in *Davy v. CIA*, 550 F.3d 1155 (D.C. Cir. 2008) ("*Davy IV*"). *Morley VII*, 719 F.3d at 689.[4] The *Davy* and *Morley* cases are very

[3] The district judge would later acknowledge that his surmise that all the documents released were already publicly available was incorrect. *See Morley VIII*, 59 F. Supp. 3d at 157.

[4] The *Davy* and *Morley* cases involved the same district court judge, The Hon. Richard J. Leon.

close factually. In *Davy IV* the court of appeals observed that "[a] grudging application of [the FOIA fee provision], which would dissuade those who have been denied information from invoking their right to judicial review, would be clearly contrary to congressional intent." *Id.* at 1158. In addressing the role of public benefit in that case, the *Davy* court held that it "requires consideration of both the effect of the litigation for which fees are requested and the *potential* public value of the information sought." *Id.* at 1159. The *Davy* court found that the district court's determination on the other three factors had been based on "inappropriate considerations and clearly erroneous findings of fact." In regard to the second and third factors, the Court found that the district court had erred in holding that because Davy had published a book he had a "sufficient commercial interest" upon which to base a denial of attorney's fees, noting that it had been "long recognized that 'news interests,' regardless of private incentive, generally 'should not be considered commercial interests' for purposes of the second and third factors, and that 'a court would generally award fees if the complainant's interest in the information sought was scholarly or journalistic or public-interest oriented, [unless] . . . his interest was of a frivolous or purely commercial nature.'" *Id.* at 1160-1161 (internal citations omitted). A journalist, the court said, "requesting information under FOIA about what the government was up to that he intends to share with the public as part of his scholarship or 'news' gathering role rather than merely to promote his private commercial interests" is "among those whom Congress intended to be

favorably treated under FOIA's fee provision." *Id.* at 1162. In regard to the fourth factor of the test, the *Davy* court held that the district court "mistakenly shifts the burden to the requester" on that issue. *Id.* The question is whether "the agency has shown that it had any colorable or reasonable basis for not disclosing the material until after" a lawsuit is filed. *Id.* at 1163. Lack of resistance after the suit is filed is not a justification for delay and prevarication prior to the filing of the suit. The *Davy* court held the agency had not presented evidence of a colorable basis in law for its failure. *Id.*

It has long been settled that an "inferior court is bound by the decree, as the law of the case; and must carry it into execution according to the mandate: they can examine it for no other purpose than execution; nor give any other or further relief; nor review it upon any matter decided on appeal, for error apparent; nor intermeddle with it further than to settle so much as has been remanded." *Ex parte Sibbald v. The United States*, 37 U.S. 488, 492 (1838). *See also In re Washington & Georgetown R.R. Co.*, 140 U.S. 91 (1891); *Gaines v. Rugg*, 148 U.S. 228, 243 (1893); *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895); *In re Potts*, 166 U.S. 263, 267 (1897); *Illinois v. Illinois Central R.R. Co.*, 184 U.S. 77, 91-92 (1902); *Ex parte Union Steamboat Co.*, 178 U.S. 317, 319 (1900); *Kansas City Southern R.R. Co. v. Guardian Trust Co.*, 281 U.S. 1, 10-11 (1930); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 168 (1939). The rule is essential to the full and fair administration of justice. *See*, *e.g.*, *In re Washington & Georgetown R.R. Co.*, 140 U.S. at 95 ("right and justice . . . did not

authorize the general term of the supreme court of the District to depart in any respect from the judgment of this court"); *In re Potts*, 166 U.S. at 267 (the mandate rule is "founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation"). On remand, the trial court "is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion" of the appeals court. *Yablonski v. United Mine Workers of Am.*, 454 F.2d 1036, 1038 (D.C. Cir. 1972). This is commonly called " 'the mandate rule' which 'generally requires trial court conformity with the articulated appellate remand [and], is a discretion-guiding rule.' " *United States v. Gama-Bastidas*, 222 F.3d 779 (10th Cir. 2000).

The *Morley VII* court clearly and unequivocally incorporated *Davy IV* in its mandate to the district court, directing it to "apply the four-factor standard in a manner consistent with *Davy*." 719 F.3d at 690. In spite of the clear charge, the district court ignored the mandate to apply the four-factor test in a manner consistent with *Davy IV*. The district court, rather, focused on the characterization of the *Davy* case in the circuit court's opinion as one that "recently elaborated on one of the four factors, the public benefit factor," *Morley VIII*, 59 F. Supp. 3d at 154, thereby disregarding the charge to apply the full four-factor test anew under *Davy IV* standards. As it had in *Morley IV*, the district court again disregarded *Davy IV*'s holdings in regard to the commercial interest and reasonableness aspects of the four-factor test. The district court, instead,

reanalyzed the documents obtained by Morley in his case, again relying on *Cotton v. Heyman*, 63 F.3d 1115, 1120 (D.C. Cir. 1995), for the misapplied proposition that public benefit analysis is limited to the "specific documents at issue." *Morley VIII*, 59 F. Supp. 3d at 155. This position is taken contrary to the holding of the court of appeals that the issue is "the *potential* public value of the information sought." *Davy IV*, 550 F.3d at 1159. The district court acknowledged that it was uncontested that four of the documents released to Morley were previously unreleased and contained "information not already in the public domain." The district court, nevertheless, found that the public benefit of the information was not great. *Morley VIII*, 59 F. Supp. 3d at 157. The court acted on a rationale that it acknowledged was based on the documents actually released, saying that "nothing in the newly-released information demonstrate[s] an actual relationship to the Kennedy assassination or any other topic of 'great national interest.'" *Id.* at 157-158. In passing lip service to the appeals court mandate, the district court noted that the mandate required an application of the four-factor test as explicated in *Davy IV* but, instead of doing such an analysis, merely stated that its "analysis of the other factors remains the same." *Id.* at 158.[5]

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[5] The district court, perhaps ironically, asserts, in footnote 8 of its opinion, that its previous analysis of the second and third factors directly cited the *Davy IV* opinion at 828 F. Supp. 2d at 264. The trial court did, indeed, there cite *Davy IV*, which had distinguished *Tax Analysts v. Dept. of Justice*, 965 F.2d 1092 (D.C. Cir. 1992), to support his assertion that Morley had sought "'disclosure for a commercial benefit or out of personal motives'"

On appeal, the circuit court again reversed, holding that the "district court erred in concluding that the merits case had not yielded a public benefit." *Morley IX*, 810 F.3d 841, 843 (D.C. Cir. 2016). The circuit court observed that an analysis of the actual documents released is "ultimately of little relevance as *Davy* required the court to assess 'the potential public value of the information sought,' not the public value of the information received." *Id.* at 844 (internal citations omitted). Given the district court's response to the prior remand, the circuit court made it explicit: "Lest there be any uncertainty, we clarify that the public-benefit factor requires an *ex ante* assessment of the potential public value of the information requested, with little or no regard to whether any documents supplied prove to advance the public interest. . . . [I]f it's plausible *ex ante* that a request has a decent chance of yielding a public benefit, the public-benefit analysis ends there." *Id.* The circuit court further explained that the *ex ante* standard of "potential public benefit" means that the "request must have at least a modest probability of generating useful new information about a matter of public concern," noting that "showing potential public value is relatively easy" when the "subject is the

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and, therefore, " 'an award of attorney's fees is generally inappropriate.' " *Morley IV*, 828 F. Supp. 2d at 264. In both *Morley IV* and *Morley VIII* the trial court ignored, or simply refused to apply, the distinction of the *Tax Analysts III* decision which addressed what constitutes a "commercial interest" in fee application cases, as set out in the *Davy IV* opinion.

Kennedy assassination – an event with few rivals in national trauma." *Id.*

The circuit court then took the public benefit issue out of the district court's hands by explicitly ruling that there was, at least "a modest probability that Morley's request would generate information relevant to the assassination or later investigations" and, therefore, the "request had potential public value." *Id.* at 845. The circuit court then distinguished Morley's case from *Tax Analysts v. Dept. of Justice*, 965 F.2d 1092 (D.C. Cir. 1992) ("*Tax Analysts III*") on commercial interest by noting that "Morley had no reason to believe that all records pertaining to Joannides would be available" at NARA where CIA had initially referred him. *Id.* Finally, the circuit court observed that after the prior remand, "the district court declined to reevaluate any factors other than public benefit, or to rebalance the factors despite this court's suggestion in *Davy* that the first three factors are all addressed to the distinction "between requesters who seek documents for public informational purposes and those who seek documents for private advantage." *Id.* The circuit court again remanded the case, directing the district court to "consider the remaining factors and the overall balance afresh." *Id.*

On remand, the district court again acted "contrary to either the letter or spirit of the . . . mandate construed in the light of the opinion." *Thornton v. Carter*, 109 F.2d 316, 320 (8th Cir. 1940). The district court on remand tried to justify its finding that "the public benefit that plaintiff sought to provide was

small." *Morley X*, 245 F. Supp. at 77. In order to do so, the district court did not attempt to analyze the evidence Morley submitted in support of his position but cavalierly dismissed it as a "sprawling explanation" that made it "difficult for the Court to identify what the reasons were to believe that the search would turn up something useful." *Id.* In other words, the district court again did not analyze the potential public benefit in light of the factual evidence of record of potential public benefit. Because of the circuit court's ruling, however, the district court was forced to accept there was, at least, a small public benefit. *Id.*

Turning to the second and third factors, the district court again did not analyze the facts of the case in light of *Davy IV*, rather again repeating that Morley having received "some compensation for writing news articles" along with his saving money by not having to search NARA records himself was sufficient commercial interest to offset any small public benefit from the case. Finally, the district court again did no analysis of the record in regard to whether the CIA had met its burden to show a reasonable basis at law for its actions. Instead, the district court, quoting its initial opinion, repeated its conclusion: "'CIA [] advanced a reasonable legal position' and did not engage 'in any recalcitrant or obdurate behavior,'" gratuitously adding his emotional response, "Thankfully, the final factor breaks the tie . . . . Enough said!" *Id.* at 78. The district court never conducted an objective analysis of the fourth factor. Even in this last opinion, the district court again, disregarding the precedent set in *Davy*,

550 F.3d at 1162-1163, improperly shifted the burden to Morley, quoting *Maydak v. Dept. of Justice*, 579 F. Supp. 2d 105, 109 (D.D.C. 2008), to the effect that Morley's "failure to satisfy the fourth element" was sufficient to foreclose an award of attorney's fees.[6]

Morley again appealed. The circuit court affirmed by a split per curiam decision with Judge Henderson dissenting. *Morley XI*. In doing so, the per curiam majority not only accepted the district court's refusal to comply with the prior mandates, but attempted to validate its refusal to do so. As Judge Henderson observed in her dissent:

> "We review the district court's application of the four-factor test for abuse of discretion. The district court's discretion has two important limits. First, it is constrained by precedent. *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996) ('A district court by definition abuses its discretion when it makes an error of law.'). Second, the district court's discretion is limited by the mandate rule, which provides that 'an inferior court has no power or authority to deviate from the mandate issued by an appellate court.'. . . . My colleagues do not discuss these two constraints."

Morley XI, 894 F.3d at 401. App. 25. Judge Henderson then carefully details how the district court involved in

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[6] Both *Maydak* and the case it quotes, *Summers v. Dept. of Justice*, 477 F. Supp. 2d 56 (D.D.C. 2007), are district court cases decided prior to the circuit court's decision in *Davy*.

both the *Davy* and *Morley* cases had consistently resisted following the court's mandates in both cases, concluding, "I believe the district court ignored our mandate and misapplied our precedent, I would vacate the district court order a fifth time and remand with instructions to award Morley the attorney's fees to which he is entitled." *Id.* at 405.

Requiring respect for and adherence to the mandate rule is not just a check on the lower court's discretion; it is an essential element of the fair and proper administration of justice. *In re Potts*, 166 U.S. at 267 (the mandate rule is "founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation"). The purpose of the rule is to "effectuate the proper administration of justice." *United States v. Carson*, 793 F.3d 1141, 1147 (10th Cir. 1986). One of the ways it does this is in aiding in the "fair and prompt administration of justice to discourage piecemeal litigation." *Kerr v. U.S. District Court for N. District of Cal.*, 426 U.S. 394, 403 (1976). In this case, the per curiam majority bemoaned the fact that this litigation has lasted 15 years with litigation of attorney's fees taking 8 years. 894 F.3d at 391. App. 1. But, as noted in the dissent by Judge Henderson, she shares the displeasure of the majority of the

> "waste of judicial resources, especially because 'fee litigation [is] one of the last things lawyers and judges should be spending their time on.'" *Baylor v. Mitchell Rubenstein & Assocs., P.C.*, 857 F.3d 939, 960 (D.C. Cir. 2017) (Henderson, J., concurring), Jefferson Morley, however, is not to blame for this 'staggering'

> saga. Maj. Op. 391. But for the district court's repeated misapplication of FOIA precedent, this case could have ended as early as 2006. If it had been correctly decided the first time, 'Morley would already have his fees, and this litigation would have long since concluded.' *Morley v. CIA*, 719 F.3d 689, 693 (D.C. Cir. 2013) (Kavanaugh, J., concurring)."

Morley XI, 894 F.3d at 397 (Henderson, J., dissenting). App. 16-17.

This Court should now grant a writ of certiorari to review this case to ensure the fair administration of justice and to preserve, reaffirm, and reassert, the principle that on remand, a trial court "is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion" of the remanding appeals court. *Yablonski*, 454 F.2d at 1038.

III. *MORLEY XI* CREATES CONFLICTS WITHIN THE D.C. CIRCUIT, AND BETWEEN THE D.C. CIRCUIT AND OTHER CIRCUITS, THAT UNDERMINE NATIONAL UNIFORMITY IN THE ADMINISTRATION OF THE FOIA ATTORNEY'S FEES LAW.

Under case law developed consistently over the last four decades, the attorney-fee inquiry in FOIA cases has traditionally been divided into two prongs: fee eligibility and fee entitlement. *Brayton v. Office of the U.S. Trade Rep.*, 641 F.3d 521, 524 (D.C. Cir. 2011). The eligibility prong is not at issue in this case. In deciding eligibility a court is to consider four factors:

"(1) the benefit to the public, if any, derived from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding of the records had a reasonable basis in law." *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1364 (D.C. Cir., 1977), *overruled on other grounds*, *Kay v. Ehrler*, 499 U.S. 432 (1991).

Circuits that have addressed the question have adopted or approved the four-factor test. *See*, *e.g.*, *Brown v. Fenster*, 617 F.2d 740 (D.C. Cir. 1979); *Education/Instruccion, Inc. v. H.U.D.*, 649 F.2d 4, 7 (1st Cir. 1981); *Church of Scientology of Cal. v. U.S. Postal Serv.*, 700 F.2d 486, 492 (9th Cir. 1983); *Stein v. Dept. of Justice*, 662 F.2d 1245, 1262 (7th Cir. 1981); *Seegull Mfg. Co. v. N.L.R.B.*, 741 F.2d 882, 885-886 (6th Cir. 1984); *Miller v. Dept. of State*, 779 F.2d 1378, 1389 (8th Cir. 1986); *Trenerry v. Dept. of Treasury*, 986 F.2d 1430 (10th Cir. 1993); *Pietrangelo v. U.S. Army*, 568 F.3d 341, 343 (2d Cir. 2009); *Batton v. I.R.S.*, 718 F.3d 522, 527 (5th Cir. 2013).

Circuits have followed this uniform standard without conflict until the decision in this case. The majority distorts the four-factor test by elevating the fourth factor of reasonableness to a determinative factor and then "focusing on the 'double dose of deference' they believe we owe the district court's fourth-factor 'reasonableness' assessment. Maj. Op. 393." *Morley XI*, 894 F.3d at 401 (Henderson, J., dissenting). App. 25-26. The majority, in piling "their deference far too high" comes close to rendering the four-factor abuse of discretion "an empty formality." *Id.* at 398. App. 18. While

the majority pays lip service to the four-factor test saying, "we of course must and do adhere to our circuit precedent," *id.* at 393, App. 6, n.1, they also acknowledge awareness and approval of their undermining that precedent by stating, "[i]t is arguable that the fourth factor alone should constitute the test under FOIA for attorney's fees." *Id.* The majority then, in effect, does exactly what they argue should alone be done and compound the error of the overemphasis of the fourth factor by applying a new double dose of deference standard in evaluating it. In doing so they have created a conflict between the circuits on the standard of entitlement that is applied in analysis of a trial court's exercise of discretion in the award of attorney's fees in FOIA cases.

This Court has not considered a FOIA attorney's fee issue case since its decision in *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 610 (2001), *superseded in part by statute*, OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(E)) (amending the fee-shifting provision of the FOIA). Since that time, attorney's fee litigation in FOIA cases has consumed more and more judicial time and attention. With this case now creating conflict between the circuits on the standard of review to be applied by elevating the role of the fourth factor and creating a new "double-dose of deference" standard it can be expected that the fair and proper administration of justice will be further infringed by even more litigation and appeals in this area. If left unreviewed, *Morley XI* will cause increased "waste of

judicial resources [on] one of the last things lawyers and judges should be spending their time on." *Baylor*, 857 F.3d at 960 (Henderson, J., concurring). By the same token, the incentives of FOIA plaintiffs to engage in efforts to enforce disclosure obligations will be severely, perhaps irremediably, impaired.

This Court should grant a writ of certiorari in this case to review and settle the issue of what factors should guide a court's award or denial of attorney's fees to an eligible litigant under 5 U.S.C. § 552(a)(4)(E).

CONCLUSION

For all these reasons, this Court should grant the petition.

Respectfully submitted,

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