No. _____

In The
Supreme Court of the United States

WILLIAM J. BUSH,

Petitioner,

v.

RISK MANAGEMENT AGENCY, USDA/RMA, and
UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit's standard for agency records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. §552 *et seq.*, that an agency must maintain agency records conflicts with the District of Columbia (D.C.) Circuit's constructive control standard.

2. Whether the Eighth Circuit's standard of limited de novo review for responsive records withheld pursuant to FOIA exemption 3 conflicts with the Ninth Circuit's standard of de novo review.

3. Whether the Eighth Circuit's standard for adequacy of the search conflicts with the D.C. Circuit's standard.

4. Whether the Eighth Circuit erred in affirming an interpretive rule requiring 15 records aggregated to the county level is reasonable and entitled to deference.

5. Whether the Eighth Circuit erred in affirming the FOIA request is asking for the creation of new records.

6. Whether the Eighth Circuit erred in affirming the authority of Section 1619 of the Food, Conservation, and Energy Act of 2008 has not expired.

7. Whether the Eighth Circuit erred in affirming the District Court's Order providing Risk Management Agency's (RMA's) Answer to the Complaint for United States Department of Agriculture (USDA).

QUESTIONS PRESENTED – Continued

8. Whether the Due Process Clause of the Fifth Amendment is violated due to the subjugation of self-representation to assistance of independent counsel as held in *Kay* v. *Ehrler*, 499 U.S. 432 (1991).

9. Whether the Due Process Clause of the Fifth Amendment is violated due to unequal protection of natural persons due to an artificial person possessing a right that cannot be held by a natural person, specifically the right of attorney-client relationship which entitles an artificial person to be eligible for attorney's fees as held in *Kay*.

10. Whether the Due Process Clause of the Fifth Amendment is violated due to the Eighth Circuit's failure to uphold Supreme Court and Eighth Circuit decisions, and sanctioning said conduct in the District Court, which renders the law so standardless as to be arbitrary.

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PETITION FOR WRIT OF CERTIORARI

William J. Bush respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Affirmance of the Court of Appeals, reprinted at Appendix (App.) 1a-2a, is unreported. The Orders of the District Court, reprinted at App. 3a-37a, are also unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 2018. A timely petition for rehearing en banc was denied on August 29, 2018, reprinted at App. 38a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the U.S. Constitution Article III, §2, and Amendment V; the Freedom of Information Act, 5 U.S.C. §§552(a)(3)(B), 552(a)(3)(D), 552(a)(4)(E), 552(a)(4)(F)(i), and 552(b)(3); the Administrative Procedure Act, 5 U.S.C. §706; the Federal Crop Insurance Act, 7 U.S.C. §1502(c); Section 1619 of

the Food, Conservation, and Energy Act of 2008, codified at 7 U.S.C. §8791; Section 701 of the American Taxpayer Relief Act of 2012 (Pub. L. 112-240, §701, 126 Stat. 2313 (2013)); and Actual Production History Coverage Program Production report, 7 C.F.R. §400.52(n), are reprinted at App. 39a-44a.

STATEMENT

The Freedom of Information Act (FOIA), 5 U.S.C. §552 *et seq.*, requires records be provided in the "form or format requested." 5 U.S.C. §552(a)(3)(B). The Federal Crop Insurance Act provides information "may be disclosed to the public if the information has been transformed into a statistical or aggregate form that does not allow the identification of the person who supplied particular information." 7 U.S.C. §1502(c)(2)(A).

This case requested from Risk Management Agency (RMA), an agency of the United States Department of Agriculture (USDA), aggregation by section of yields, acres harvested, and total production for corn and for soybeans (from Actual Production History Coverage Program Production reports, 7 C.F.R. §400.52(n) (APH records)) for Amherst, Rock, Sheridan, and Tilden Townships in Cherokee County, Iowa for 2015, 2014, 2013, and 2012. App. 25a. Citing no FOIA exemption, RMA denied the request and stated, "[T]he individual unit tract of land reported by producers have not been aggregated to the section level for townships within any county. FOIA does not require agencies to

create new reports/records. . . ." Doc. 3-1,[1] Amended Complaint (Complaint) App. 1. RMA now finally agrees the "individual unit tract of land reported by producers," Complaint App. 1, to be the APH records. RMA CA Brief 19-20.

The denial was appealed. Complaint App. 2-3. The appeal was denied citing FOIA exemption 3, 5 U.S.C. §552(b)(3), pursuant to Section 1502(c) of the Federal Crop Insurance Act, 7 U.S.C. §1502(c), and Section 1619 of the Food, Conservation, and Energy Act of 2008 (Section 1619) (codified at 7 U.S.C. §8791). Complaint App. 5. The appeal denial also stated, "RMA can only release crop insurance data aggregated to the county level." *Id.*

The original complaint was filed November 16, 2016. App. 26a. An amended complaint was filed on December 5, 2016, requesting: the aggregation by section of the records; declaration the authority of Section 1619 expired on September 30, 2013; declaration the application of *Kay* to FOIA violates the Due Process Clause of the Fifth Amendment as attorney's fees are a prerequisite to obtaining a written finding; declaration the Due Process Clause of the Fifth Amendment is violated due to subjugation of self-representation to assistance of independent counsel; declaration the Due Process Clause of the Fifth Amendment is violated due to unequal protection of natural persons versus

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[1] Doc. refers to the District Court Clerk's Record, followed by the docket entry number, and the actual page number of the original document.

artificial persons; and other relief. Complaint ¶ 42. The District Court had jurisdiction pursuant to 5 U.S.C. §552(a)(4)(B). App. 27a-28a.

The original complaint referred to a singular defendant. App. 26a. A few weeks later, in a *pro se* amended complaint, Bush sued "Risk Management Agency" and "United States Department of Agriculture" and referred to plural defendants. *Id.* In February 2017, Bush filed a motion for default judgment against USDA for failure to respond to the amended complaint. *Id.* The District Court denied the motion finding that Bush had failed to provide evidence that RMA and USDA are "legally distinct," and "reasoned that '[e]ven assuming RMA and USDA are distinct entities, I find that RMA's answer should be deemed to apply equally to USDA,' and therefore found default judgment against USDA inappropriate." *Id.* (quoting Doc. 14, reprinted at App. 37a). The District Court referred to "RMA/USDA as a singular defendant." *Id.*, at 27a.

The District Court denied Bush's motions for judgment on the pleadings pursuant to FED. R. CIV. P. 12(c) and discovery pursuant to FED. R. CIV. P. 56(d). App. 35a. The District Court granted "defendant's motion for summary judgment (Doc. 20)." App. 22a.

The Eighth Circuit affirmed all of the District Court Orders by invoking 8TH Cir. R. 47B. App. 2a. It is indiscernible on which basis the appeal was decided; therefore, all conceivable possibilities will be addressed.

This case presents questions of great importance which have divided the Courts of Appeals and constitutional challenges which are as follows:

1. Whether the Eighth Circuit's standard for agency records that an agency must "maintain," App. 17a, agency records conflicts with the D.C. Circuit's "constructive control" standard in *Burka* v. *U.S. Department of Health & Human Services*, 87 F.3d 508, 515 (CADC 1996).

2. Whether the Eighth Circuit's standard of limited de novo review for responsive records withheld pursuant to FOIA exemption 3 conflicts with the Ninth Circuit's standard of de novo review for all FOIA exemptions as held in *Long* v. *IRS*, 742 F.2d 1173, 1182 (CA9 1984).

3. Whether the Eighth Circuit's standard for adequacy of the search conflicts with the D.C. Circuit's standard in *Aguiar* v. *Drug Enforcement Admin.*, 865 F.3d 730 (CADC 2017).

4. Whether, in affirming an interpretive rule requiring 15 records aggregated to the county level is reasonable and entitled to deference, the Eighth Circuit's judgment: 1) conflicts with *Perez* v. *Mortgage Bankers Ass'n*, 135 S.Ct. 1199 (2015); *United States* v. *Mead Corp.*, 533 U.S. 218 (2001); and *Dep't of the Air Force* v. *Rose*, 425 U.S. 352 (1976); 2) violates the Due Process Clause of the Fifth Amendment pursuant to the void-for-vagueness doctrine due to deference being so standardless that it invites arbitrary enforcement; and

3) violates the Administrative Procedure Act, 5 U.S.C. §706.

5. Whether the Eighth Circuit erred in affirming the FOIA request is asking for the creation of new records.

6. Whether the Eighth Circuit erred in affirming the authority of Section 1619 has not expired.

7. Whether the Eighth Circuit erred in affirming the District Court's Order providing RMA's Answer to the Complaint for USDA.

8. Whether the Due Process Clause of the Fifth Amendment is violated due to the subjugation of self-representation to assistance of independent counsel as held in *Kay* v. *Ehrler*, 499 U.S. 432, 438 (1991).

9. Whether the Due Process Clause of the Fifth Amendment is violated due to unequal protection of natural persons due to an artificial person possessing a right that cannot be held by a natural person, specifically the right of attorney-client relationship which entitles an artificial person to be eligible for attorney's fees as held in *Kay*, *supra*, at 436, n. 7.

10. Whether the Due Process Clause of the Fifth Amendment is violated due to the Eighth Circuit's failure to uphold Supreme Court and Eighth Circuit decisions, and sanctioning said conduct in the District Court, which renders the law "so standardless that it

invites arbitrary enforcement." Cf. *Johnson* v. *United States*, 135 S.Ct. 2551, 2556 (2015).

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S STANDARD THAT AN AGENCY MUST MAINTAIN AGENCY RECORDS CONFLICTS WITH THE D.C. CIRCUIT'S STANDARD OF CONSTRUCTIVE CONTROL

The Eighth Circuit's standard for agency records that an agency must "maintain," App. 17a, agency records conflicts with the D.C. Circuit's "constructive control" standard in *Burka* v. *U.S. Department of Health & Human Services*, 87 F.3d 508, 515 (CADC 1996). "In *Burka v. U.S. Department of Health & Human Services*, for example, we held that, although the requested records were 'neither created by agency employees, nor . . . located on agency property,' the agency had a close enough relationship with the records to give the agency 'constructive control' over them. 87 F.3d 508, 515 (D.C. Cir. 1996)." *Aguiar* v. *Drug Enforcement Admin.*, 865 F.3d 730, 736 (CADC 2017).

Other than stating or affirming "RMA did not maintain records matching the description of plaintiff's request," App. 17a, neither the District Court nor the Eighth Circuit ever determined whether the APH records are "agency records," which is the first consideration. *Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136, 143 (1989). "The burden is on the agency to demonstrate, not the requester to disprove, that the materials

sought are not 'agency records' or have not been 'improperly' 'withheld.'" *Missouri, ex rel. Garstang* v. *U.S. Dep't of Interior*, 297 F.3d 745, 749 (CA8 2002) (quoting *Tax Analysts*, 492 U.S. at 142, n. 3) (citing S. Rep. No. 813, 89TH Cong., [1st] Sess., at 8 (1965)).

The standard for "agency records" is "create or obtain" and "control." *Tax Analysts*, 492 U.S. at 144-145 (citation omitted). Bush's statement of additional material facts no. 8 stated, "Production reports *created* pursuant to 7 CFR § 400.52(n) are the same production reports *required to be created* by the Crop Insurance Handbook." Doc. 26-2, at 2 (citations omitted and emphasis added). RMA's response stated, "Admitted." Doc. 27, at 2. RMA's admission contradicts the "Declaration of David P. Zanoni," Doc. 20-3, at 1-14 (Affidavit). The Affidavit stated, "Additional records obtained by [Approved Insurance Providers] . . . are not *created*, obtained, or controlled by RMA." *Id.*, at 3 (emphasis added).

The Eighth Circuit has held that the Federal Crop Insurance Act gives RMA[2] "significant control" over the APH records. *American Growers Ins. Co.* v. *Federal Crop Ins. Corp.*, 532 F.3d 797, 798 (CA8 2008). See, *e.g.*, *Forsham* v. *Harris*, 445 U.S. 169, 182 (1980) ("Congress did not intend that grant supervision *short of Government control* serve as a sufficient basis to make the private records 'agency records' under the Act.") (emphasis added). See also *Aguiar*, 865 F.3d at 736 ("[A]

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[2] "In 1996, Congress created the Risk Management Agency ('RMA'), which administers the federal crop insurance program on behalf of the FCIC." *United States* v. *Hawley*, 619 F.3d 886, 889 (CA8 2010).

record can be under an agency's control even if not physically held by the agency.").

"RMA cannot claim the APH records are not 'agency records' merely because the APH records are stored on Approved Insurance Providers' (AIPs) information systems. *Ibid.* Furthermore, RMA cannot accurately aggregate yield information to the county level without utilizing all APH records." Bush CA Principal Brief 20. See Transcript[3] 15 ("[T]he contention from [Bush] is that all of [the APH] records, regardless of where they are stored, are agency records."). "[RMA and USDA] can't even aggregate the records to the county level without relying on [the APH] records." *Id.*, at 14.

RMA stated, "FCIC also publishes procedures (publicly available on RMA's website at http://www.rma.usda.gov/handbooks/) which specify, among other items, various crop reporting requirements producers must provide to their AIPs." Affidavit 3. "[Bush's] FOIA request was made on the basis of these requirements." Doc. 22-1, at 3 (citations omitted).

Legal description is a required element of the APH records; this fact was admitted in RMA's Answer, Doc. 11, to the Complaint. Answer ¶ 9, sixth sentence. Bush's statement of additional material facts no. 3 stated, "[RMA and USDA] admit legal description allows the aggregation of yield information by section." Doc. 26-2, at 1. In reply RMA stated, "[I]f RMA collected yield information by section for all sections it

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[3] Transcript references are to the hearing on the motion for summary judgment, Doc. 37.

would be possible to aggregate the data by section. . . ." Doc. 27, at 1. RMA's statement is either an admission or a failure to address another party's assertion of fact as required by FED. R. CIV. P. 56(c) and therefore is an undisputed fact pursuant to FED. R. CIV. P. 56(e)(2). This is proof RMA excluded all APH records from the search; the APH records have all the information necessary for aggregation by section, i.e., legal description, and no reports have to be matched in a "specialized query," Affidavit 9-10. Bush CA Principal Brief 14.

RMA stated, "RMA only obtains information from AIPs that is deemed necessary to the operation of the crop insurance program. Only those specific records are maintained by RMA and are considered agency records for FOIA purposes." Affidavit 3. RMA admitted its "willful neglect" of the Court's standard of "create or obtain" and "control," *Tax Analysts*, 492 U.S. at 144-145 (citation omitted), for "agency records." See *United States* v. *Boyle*, 469 U.S. 241, 245 (1985) ("As used here, the term 'willful neglect' may be read as meaning a conscious, intentional failure or reckless indifference.") (citations omitted); Complaint ¶¶ 18, 42. Furthermore, RMA's admission is especially galling, as RMA's counsel, the Department of Justice, was the other litigant in *Tax Analysts*. *Tax Analysts, supra*, at 136.

RMA stated, "APH records are used by insurance producers to provide data to Approved Insurance Providers (AIP), and the data in these reports is provided via the 'Acreage Report.'" RMA CA Brief 19. RMA's admission contradicts the Affidavit which stated, "RMA *does not utilize or rely upon such records*, and RMA has

not incorporated these AIP records into its own record systems." Affidavit 3 (emphasis added).

By stating "the data in these reports is provided via the 'Acreage Report,'" RMA CA Brief 19, RMA is now admitting RMA does "utilize or rely upon such records," Affidavit 3. Bush CA Reply Brief 5. RMA's admissions that RMA creates the APH records, *ante*, at 8, and "the data in these reports is provided via the 'Acreage Report,'" RMA CA Brief 19, contradicts the Affidavit on material facts, rendering the entire Affidavit in "bad faith," FED. R. CIV. P. 56(h), and "unreliable *in toto*" on the basis of "*falsus in uno, falsus in omnibus.*" Cf. *United States* v. *Castleman*, 134 S.Ct. 1405, 1421 (2014) ("Justice Department's definitions ought to be deemed unreliable *in toto* on the basis of their extravagant extensions alone (*falsus in uno, falsus in omnibus*).") (SCALIA, J., concurring in part and concurring in the judgment); see also *United States* v. *Gaudin*, 515 U.S. 506, 509 (1995) ("The parties also agree on the definition of 'materiality': The statement must have 'a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed.' *Kungys* v. *United States*, 485 U.S. 759, 770 (1988) (internal quotation marks omitted).").

Furthermore, RMA's admission that "the data in these reports is provided via the 'Acreage Report,'" RMA CA Brief 19, establishes "the requisite nexus between the [APH] records and [RMA's] performance of its official agency duties," *Garstang*, 297 F.3d at 751; Bush CA Reply Brief 5. "*See Wolfe v. Dep't of Health &*

Human Servs., 711 F.2d 1077, 1079-80 (D.C.Cir. 1983) (holding that a nexus must exist between agency and requested documents for documents to pass from private to agency control)." *Garstang*, *supra*, at 750; *contra Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 157 (1980) ("The papers were not in the control of the State Department at any time. They were not generated in the State Department. They never entered the State Department's files, and they were not used by the Department for any purpose.").

In *Garstang*, the Eighth Circuit adopted the "nexus" standard for "agency records" from *Wolfe* v. *Dep't of Health & Human Servs.*, 711 F.2d at 1080, which the D.C. Circuit adopted from *Forsham*, 445 U.S., at 178, yet the Eighth Circuit failed to uphold *Garstang*, and by extension *Forsham*, in this case. The Eighth Circuit also failed to uphold *American Growers* and *Tax Analysts* in this case. "[O]ne panel may not overrule an earlier decision by another. Only the court en banc has the power to take such action." *Jackson* v. *Ault*, 452 F.3d 734, 736 (CA8 2006) (citations omitted). See also *Union Pacific R.R. Co.* v. *174 Acres of Land Located in Crittenden Cnty.*, 193 F.3d 944, 946 (CA8 1999) ("[W]e are bound to follow controlling United States Supreme Court precedents.").

"Furthermore, RMA's admission of 'the data in these reports is provided via the 'Acreage Report,'" [RMA CA Brief 19], reveals RMA's argument regarding the APH records not being 'agency records' to be frivolous from the beginning, including at the

administrative level." Bush CA Reply Brief 7; FED. R. CIV. P. 11(b). RMA's tactic has been "to harass, cause unnecessary delay, or needlessly increase the cost of litigation," FED. R. CIV. P. 11(b), and proves that RMA and USDA have "acted arbitrarily or capriciously with respect to the withholding," 5 U.S.C. §552(a)(4)(F)(i). Complaint ¶¶ 19, 42.

The Eighth Circuit erred in affirming the District Court's failure to determine whether the APH records are "agency records." The Court should adopt the D.C. Circuit's standard of "constructive control," *Burka*, 87 F.3d at 515, for "agency records" and conclude the APH records are "agency records." Prevailing on the APH records being "agency records" would prove Bush has "substantially prevailed," 5 U.S.C. §552(a)(4)(E)(ii).

II. THE EIGHTH CIRCUIT'S STANDARD OF LIMITED DE NOVO REVIEW FOR FOIA EXEMPTION 3 CONFLICTS WITH THE NINTH CIRCUIT'S STANDARD OF DE NOVO REVIEW

The Eighth Circuit's standard of limited de novo review for responsive records withheld pursuant to FOIA exemption 3 conflicts with the Ninth Circuit's standard of de novo review for all FOIA exemptions as established in *Long* v. *IRS*, 742 F.2d 1173, 1182 (CA9 1984) (holding "review was expressly made de novo under all the exemptions in subsection (b)" of FOIA). Petition for Rehearing 15.

In *Central Platte* v. *U.S. Dep't of Agriculture,* 643 F.3d 1142 (2011), the Eighth Circuit held, "[L]imited de novo review can satisfy FOIA in this case." *Id.*, at 1148 (internal quotation marks and citation omitted). "This limited de novo review may define the entire scope of review in FOIA exemption 3 cases." *Id.*, at 1147.

> The D.C. Circuit, in *Ass'n of Retired Railroad Workers, Inc.* suggested that "[n]o more was required" after a district court completed its de novo review, 830 F.2d at 337, but also stated that it "[did] not rule" on whether that would always complete "the requisite scope of review in Exemption 3 cases." *Id.* at 336. The First Circuit has decided, however, that any additional review of an agency's decision should be done "under more deferential, administrative law standards" which decides only whether the agency's action was arbitrary and capricious. *Aronson v. IRS*, 973 F.2d 962, 967 (1st Cir. 1992).

Ibid.

It is certain the Eighth Circuit panel in this case could not have performed de novo review without committing the Eighth Circuit to de novo review for all FOIA exemption 3 cases. Petition for Rehearing 15. If the panel in this case had performed de novo review, any subsequent Eighth Circuit panel that performed limited de novo review for a FOIA exemption 3 case would, in violation of Eighth Circuit law, be effectually overruling this panel. *Jackson*, 452 F.3d at 736.

By using the words "may be disclosed" in 7 U.S.C. §1502(c)(2)(A), Congress explicitly authorized disclosure, provided "the information has been transformed into a statistical or aggregate form that does not allow the identification of the person who supplied particular information," *ibid.* Furthermore, Congress did not mandate aggregation to the county level in "clearly delineated statutory language." *Dep't of the Air Force* v. *Rose*, 425 U.S. 352, 361 (1976); see also *Asgrow Seed Co.* v. *Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning.") (citation omitted).

Congress expressly made review de novo under all the exemptions in subsection (b) of FOIA. See 5 U.S.C. §552(a)(4)(B) ("In such a case the court shall determine the matter de novo."); see also *Milner* v. *Dep't of Navy*, 562 U.S. 562, 569 (2011) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (citation omitted).

It is clear limited de novo review cannot satisfy FOIA in this case as the FOIA request in this case does not fall within the prohibition established by Congress in "clearly delineated statutory language," *Rose*, 425 U.S. at 361. Petition for Rehearing 15.

III. THE EIGHTH CIRCUIT'S STANDARD FOR ADEQUACY OF THE SEARCH CONFLICTS WITH THE D.C. CIRCUIT'S STANDARD

The Eighth Circuit's standard for adequacy of the search conflicts with the D.C. Circuit's standard in *Aguiar* v. *Drug Enforcement Admin.*, 865 F.3d 730 (CADC 2017). "Under these circumstances, which include well defined requests and positive indications of overlooked materials, the DEA's declarations are too sparse to assure the court on summary judgment that the search was reasonable." *Id.*, at 739 (quotation marks and citations omitted).

By excluding all APH Coverage Program records from the search, RMA does not demonstrate "beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents," *Aguiar*, *supra*, at 738 (citations omitted). Bush CA Principal Brief 13. Bush contends RMA's search "is inadequate because it did not include all these APH records which it is contended . . . [RMA and USDA] create and control and, at a minimum, they sometimes obtain these records," Transcript 21-22.

The Eighth Circuit's affirmation of USDA's acceptance of the District Court's finding "that RMA's answer should be deemed to apply equally to USDA," App. 37a, and then allowing the "singular defendant," *id.*, at 27a, to limit the search to RMA, *id.*, at 10a, conflicts with *New Hampshire* v. *Maine*, 532 U.S. 742 (2001). Petition for Rehearing 10. "This rule, known as judicial estoppel, generally prevents a party from

prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire*, 532 U.S. at 749 (internal quotation marks and citations omitted). Petition for Rehearing 10-11.

Although not cited to an authority, the doctrine of judicial estoppel was raised in the District Court. See Doc. 26, at 8 ("If RMA's answer 'should be deemed to apply equally to USDA,' [App. 37a], then by the same standard [Bush]'s FOIA request 'should be deemed to apply equally to USDA,' *ibid.*"). "USDA received a benefit from the [District] Court by not being required to answer the Amended Complaint after being duly served with a summons and a copy of said complaint. USDA must now bear any detriment which flows from having accepted said benefit." Doc. 26, at 8; Bush CA Principal Brief 50.

> The "singular defendant," [App. 27a], presented the [A]ffidavit to the District Court after accepting "that RMA's answer should be deemed to apply equally to USDA," [*id.*, at 37a]. Thus, USDA has been swallowed whole by this case as a "singular defendant," [*id.*, at 27a], and the search must include all of USDA, including Farm Services Agency's Farm Records Management System. The search was inadequate as the search not only excluded the APH records but also only included RMA's record systems. [*Id.*, at 10a]. "RMA searched its Corporate Reporting Business Intelligence (CRBI) database, a database it uses to construct data reports." *Id. Contra Kissinger* v.

> *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 157 (1980) ("Therefore, we also need not address the issue of when an agency violates the Act by refusing to produce records of another agency, or failing to refer a request to the appropriate agency.").

Petition for Rehearing 11.

Neither RMA, individually, nor the "singular defendant" of USDA, including RMA, demonstrate "beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents," *Aguiar*, 865 F.3d at 738. Bush CA Principal Brief 13. Therefore, the Eighth Circuit erred in affirming the District Court's grant of summary judgment. *Id.*, at 25. See FED. R. CIV. P. 56(a) (Summary judgment is only appropriate when there is "*no* genuine dispute as to any material fact" for trial.) (emphasis added). Petition for Rehearing 9-10.

IV. THE EIGHTH CIRCUIT ERRED IN AFFIRMING AN INTERPRETIVE RULE IS ENTITLED TO DEFERENCE

In affirming an interpretive rule requiring "the aggregation of 15 records within a county," App. 20a, "to be reasonable," *ibid.*, and presumably entitled to *Chevron*[4] or *Skidmore*[5] deference, the Eighth Circuit's judgment conflicts with *Perez* v. *Mortgage Bankers*

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[4] *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[5] *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944).

Ass'n, 135 S.Ct. 1199 (2015); *United States* v. *Mead Corp.*, 533 U.S. 218 (2001); and *Dep't of the Air Force* v. *Rose*, 425 U.S. 352 (1976). Petition for Rehearing 8-10.

Deference to an interpretive rule is a violation of the Due Process Clause of the Fifth Amendment pursuant to the void-for-vagueness doctrine. Deference is also a violation of the Administrative Procedure Act, 5 U.S.C. §706. "[T]he reviewing court shall decide all relevant questions of law." *Ibid.*

Any aggregation standard lower than the county level would prove Bush has "substantially prevailed," 5 U.S.C. §552(a)(4)(E)(ii). Bush CA Principal Brief 43.

1. An interpretive rule promulgated by an agency with the authority to engage in notice-and-comment rulemaking is not entitled to *Chevron* deference

"Interpretive rules do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Perez*, 135 S.Ct. at 1204 (citation omitted). An interpretive rule promulgated by an agency with the authority to engage in notice-and-comment rulemaking is not entitled to *Chevron* deference. *Mead*, 533 U.S. at 226-227. RMA and USDA have the authority to engage in notice-and-comment rulemaking. *American Growers*, 532 F.3d at 798. The standard for *Chevron* deference is the interpretation must be *reasonable*. *Mead*, *supra*, at 229 (citing *Chevron*, 467 U.S. at 842-845) (emphasis added). The Eighth Circuit erred by affirming *Chevron* deference to an

interpretive rule promulgated by RMA and USDA. *Mead*, *supra*, at 226-227. Furthermore, after raising *Chevron* deference in the District Court, Transcript 28, RMA waived the argument in the Eighth Circuit. See *Heerman* v. *Burke*, 266 F.2d 935, 940 (CA8 1959) (holding appellee waived argument by not raising issue in the appellee's brief).

"Congress intended exemption from the FOIA to be a legislative determination and not an administrative one." *Wisc. Project on Nuclear Arms Control* v. *U.S. Dep't of Commerce*, 317 F.3d 275, 280 (CADC 2003) (citation omitted). Requiring aggregation to the county level is an administrative, not legislative, determination and thus violates the intent of Congress. *Ibid.* "Exemption 3 takes literally the requirement that disclosure prevail absent 'clearly delineated statutory language.'" *Ibid.* (quoting *Rose*, 425 U.S. at 361). Aggregation to the county level was not mandated by Congress in "clearly delineated statutory language." *Rose*, *supra*, at 361.

It is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. §706(2)(A), to require aggregation to the county level, as Congress mandated no such requirement in "clearly delineated statutory language," *Rose*, 425 U.S. at 361. Petition for Rehearing 10. See *Milner*, 562 U.S. at 569 ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (citation omitted). Therefore, it is unreasonable to require aggregation to the county level.

"[T]he number of records necessary to comply with 7 U.S.C. §1502(c) is a genuine issue of material fact for trial," Petition for Rehearing 9, and for which discovery is necessary. See *Carney* v. *Dep't of Justice*, 19 F.3d 807, 812 (CA2 1994) ("In order to justify discovery once the agency has satisfied its burden, the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations, or provide some tangible evidence that an exemption claimed by the agency should not apply or summary judgment is otherwise inappropriate.") (internal citation omitted).

RMA stated, "[T]here is no absolute answer to the number of records required to prevent the identification of individuals. . . ." Affidavit 10-11. At oral argument RMA stated, "So whether that's four, whether that's five, that's what it needs to be aggregated to. . . ." Transcript 29. RMA admitted the number of records "that does not allow the identification of the person who supplied particular information," 7 U.S.C. §1502(c)(2)(A), is four or five aggregated records. Transcript 29.

Regarding RMA's argument pertaining to someone being able to "reverse engineer the identity of the producer," RMA provided an example of one producer per section. Affidavit 13. Bush agreed one producer per section was the proper suppression standard. Transcript 17-18.

2. An interpretive rule requiring 15 aggregated records to the county level is not entitled to *Skidmore* deference, or, in the alternative, *Skidmore* was subsequently overruled by Congress in the Administrative Procedure Act

Under *Skidmore* deference, "the ruling is eligible to claim respect according to its persuasiveness," *Mead*, 533 U.S. at 221. If the Eighth Circuit affirmed *Skidmore* deference, the Eighth Circuit erred, as Congress did not mandate aggregation to the county level in "clearly delineated statutory language," *Rose*, 425 U.S. at 361 (1976). See *Milner*, 562 U.S. at 569 ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (citation omitted).

It is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. §706(2)(A), to require aggregation to the county level as Congress mandated no such requirement in "clearly delineated statutory language," *Rose*, 425 U.S. at 361. Therefore, it is unreasonable to require the aggregation to the county level.

Furthermore, RMA waived *Skidmore* deference by not raising the argument in either the District Court or the Eighth Circuit. See *Misner* v. *Chater*, 79 F.3d 745, 746 (CA8 1996) (refusing to consider argument not raised in district court unless manifest injustice

will otherwise result); see also *Heerman*, 266 F.2d at 940.

Alternatively, *Skidmore* was subsequently overruled by Congress in the Administrative Procedure Act, 5 U.S.C. §706. "[T]he reviewing court shall decide all relevant questions of law." *Ibid.*

3. *Chevron* and *Skidmore* violate the Due Process Clause of the Fifth Amendment

Chevron and *Skidmore* violate the Due Process Clause of the Fifth Amendment under the void-for-vagueness doctrine due to the law being "so standardless that it invites arbitrary enforcement." Cf. *Johnson* v. *United States*, 135 S.Ct. 2551, 2556 (2015). "The void-for-vagueness doctrine, as we have called it, guarantees that ordinary people have fair notice of the conduct a statute proscribes." *Sessions* v. *Dimaya*, 584 U.S. ___ (2018), slip op. at 4 (quotation marks and citation omitted). The void-for-vagueness doctrine, which was originally applied to criminal statutes, has now been applied to civil statutes. *Id.*, at 5-6.

"On [JUSTICE SCALIA'S] view that *Chevron* rendered *Skidmore* anachronistic, when courts owe any deference it is *Chevron* deference that they owe, *post*, at 250." *Mead*, 533 U.S. at 237 (majority opinion). "The Court, on the other hand, said nothing in *Chevron* to eliminate *Skidmore*'s recognition of various justifications for deference depending on statutory circumstances and agency action." *Ibid.*

Void-for-vagueness is proved by the fact that even the preeminent legal eminence, the Honorable JUSTICE SCALIA, could not discern what was decided in *Chevron* regarding *Skidmore*. *Ibid.* "Once it is determined that *Chevron* deference is not in order, the uncertainty is not at an end—and indeed is just beginning. Litigants cannot then assume that the statutory question is one for the courts to determine, according to traditional interpretive principles and by their own judicial lights." *Mead*, 533 U.S. at 240-241 (SCALIA, J., dissenting).

Void-for-vagueness is proved for *Chevron* and *Skidmore* as "[t]he principal effect will be protracted confusion." *Id.*, at 245. "It is hard to know what the lower courts are to make of [the Court]'s guidance." *Id.*, at 246. The Court has no authority to abdicate its constitutional duty. U.S. CONST. art. III, §2. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803).

4. *Chevron* and *Skidmore* violate the Administrative Procedure Act

"There is some question whether *Chevron* was faithful to the text of the Administrative Procedure Act (APA), which it did not even bother to cite." *Mead*, 533 U.S. at 241 (SCALIA, J., dissenting). "Title 5 U. S. C. § 706 provides that, in reviewing agency action, the court shall 'decide all relevant questions of law'—which would seem to mean that all statutory ambiguities are to be resolved judicially." *Ibid.*, n. 2.

Chevron and *Skidmore* violate the intent of Congress as expressed in the Administrative Procedure Act, 5 U.S.C. §706, that "all statutory ambiguities are to be resolved judicially." *Mead*, 533 U.S. at 241 (SCALIA, J., dissenting). See *Milner*, 562 U.S. at 569 ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (citation omitted). The Court has no authority to abdicate its statutory duty pursuant to the Administrative Procedure Act. 5 U.S.C. §706. "[T]he reviewing court shall decide all relevant questions of law." *Ibid.* "[A]n agency may not use interpretive rules to *bind* the public by making law, because it remains the responsibility of the court to decide whether the law means what the agency says it means." *Perez*, 135 S.Ct. at 1211 (SCALIA, J., concurring in the judgment). "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803).

V. THE EIGHTH CIRCUIT ERRED IN AFFIRMING THE FOIA REQUEST IS ASKING FOR THE CREATION OF NEW RECORDS

FOIA requires records be provided in "any form or format requested by the person if the record is readily reproducible by the agency in that form or format." 5 U.S.C. §552(a)(3)(B).

Regarding the creation of new records, RMA's only argument is predicated on the APH records not being "agency records" and accessing the APH records would force RMA to create new records. RMA Appellee Brief 21.

"The aggregation of the records is a function of the search requirements mandated by 5 U.S.C. §552(a)(3)(D)." Complaint ¶ 17. "[Bush] contends that a request for any alteration to the records would be a request for the creation of new records." Doc. 26, at 3. "However, a request for the records in an aggregate form other than the county level aggregate form is not asking for any alteration to the records, and hence not requesting the creation of new records." *Id.* RMA has also waived any argument as to cost, Transcript 9, technical feasibility, or reproducibility, Complaint ¶ 18. By not defending in either the District Court or the Eighth Circuit, RMA has waived all of the aforementioned arguments. See *Chater*, 79 F.3d at 746 (refusing to consider argument not raised in district court unless manifest injustice will otherwise result); see also *Heerman*, 266 F.2d at 940 (holding appellee waived argument by not raising issue in the appellee's brief).

Since the FOIA request is not asking for any alteration to the APH records, the FOIA request is not asking for the creation of new records; RMA is required to provide the records in the "form or format requested." 5 U.S.C. §552(a)(3)(B).

VI. THE EIGHTH CIRCUIT ERRED IN AFFIRMING THE AUTHORITY OF SECTION 1619 OF THE FOOD, CONSERVATION, AND ENERGY ACT OF 2008 HAS NOT EXPIRED

The authority of Section 1619 ceased with the expiration of the extension of the Food, Conservation, and Energy Act of 2008 in Section 701 of the American Taxpayer Relief Act of 2012 (Pub. L. 112-240, § 701, 126 Stat. 2313 (2013)) (Section 701). Complaint ¶ 13. Section 701 provides: "[T]he Secretary of Agriculture shall carry out the authorities, until the later of—(1) September 30, 2013; or (2) the date specified in the provision of that Act or amendment made by that Act."

Since no date later than September 30, 2013, is specified in Section 1619, and since Section 1619 was not reauthorized in the Agricultural Act of 2014 (Pub. L. 113-79; 128 Stat. 649 (2014)), the authority of Section 1619 ended on September 30, 2013, and does not extend to any subsequent period. Complaint ¶ 14. If Congress had intended the authority of Section 1619 to extend beyond September 30, 2013, Congress would have so stated in Section 1619 or in the American Taxpayer Relief Act of 2012. *Id.* Furthermore, Congress could have reauthorized Section 1619 in the Agricultural Act of 2014 or any time since. *Id.*

RMA did not defend against this claim in either the District Court or the Eighth Circuit and has waived any defense in the Supreme Court. See *Chater*, 79 F.3d at 746; see also *Heerman*, 266 F.2d at 940.

The District Court failed "the duty of a District Court to adjudicate a controversy properly before it." *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 813 (1976). The Eighth Circuit failed the duty of a Court of Appeals to review a controversy properly before it. Cf. *ibid.* The Eighth Circuit erred in affirming the District Court's failure to grant Bush's motion for judgment on the pleadings pursuant to FED. R. CIV. P. 12(c), Doc. 19, on this claim. Bush CA Principal Brief 47. Prevailing on this claim would prove Bush has "substantially prevailed," 5 U.S.C. §552(a)(4)(E)(ii).

VII. THE EIGHTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S ORDER PROVIDING RMA'S ANSWER TO THE COMPLAINT FOR USDA

If the Court finds the doctrine of judicial estoppel, *ante*, at 16-18, is inapplicable, then, in the alternative, the Eighth Circuit erred in affirming the District Court's Order providing RMA's Answer to the Complaint for USDA, App. 37a. USDA "'failed to plead or otherwise defend,' Fed. R. Civ. P. 55(a), against the amended complaint, or join any subsequent pleading." Bush CA Principal Brief i. If RMA and USDA are not a "singular defendant," App. 27a, then USDA is in default. FED. R. CIV. P. 55(a).

The District Court erred in providing RMA's Answer to the Complaint for USDA, which either could not in good faith, or would not, for some other undetermined reason (but perhaps as a legal strategy), provide RMA's answer or any other answer for itself. Bush CA Principal Brief 50. A judge providing an answer for a litigant in a civil case is an act, in both appearance and in fact, which "would provide an objective, knowledgeable member of the public with a reasonable basis for doubting [the] judge's impartiality," *Perkins* v. *Spivey*, 911 F.2d 22, 33 (CA8 1990) (citation omitted). Bush CA Principal Brief 50-51. Such an act is a violation of the Code of Conduct for United States Judges Canon 2(A): "A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Furthermore, by stating "RMA does not equal FSA [Farm Services Agency, another USDA agency]," Transcript 27, RMA conceded that RMA cannot equal USDA. Therefore, the Eighth Circuit erred in affirming the District Court's Order providing RMA's Answer to the Complaint for USDA.

VIII. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT IS VIOLATED DUE TO SUBJUGATION OF SELF-REPRESENTATION TO ASSISTANCE OF INDEPENDENT COUNSEL

The Due Process Clause of the Fifth Amendment, U.S. CONST. amend. V, is violated due to the subjugation of self-representation to assistance of independent counsel as held in *Kay* v. *Ehrler*, 499 U.S. 432 (1991). Complaint ¶¶ 21-31. "The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case." *Kay*, *supra*, at 438. The text in FOIA clearly requires the awarding of "reasonable attorney fees and other litigation costs" as prerequisites for the issuance of "a written finding" pursuant to 5 U.S.C. §552(a)(4)(F)(i). Complaint ¶ 30. Self-representation is a fundamental right. Bush CA Principal Brief 34.

It is unconstitutional under the Due Process Clause of the Fifth Amendment to couple the holding in *Kay* that *pro se* litigants are not awarded attorney's fees with the judicial interpretation that requires the awarding of reasonable attorney's fees and other litigation costs as prerequisites to the issuance of written findings under 5 U.S.C. §552(a)(4)(F)(i). Complaint ¶ 21. See *Norwood* v. *FAA*, No. 83-2315, slip op. at 20 (W.D. Tenn. Dec. 11, 1991) (finding that when a court denies fees on the ground that the plaintiff is proceeding *pro se*, "the issuance of written findings pursuant to 5 U.S.C. § 552(a)(4)(F) would be inappropriate since

both prerequisites have not been met"), *aff'd in part, rev'd in part on other grounds*, 993 F.2d 570 (6th Cir. 1993). Complaint ¶ 21. This double standard of justice provides unequal protection to litigants who have been treated arbitrarily or capriciously depending on whether litigants are *pro se* or represented by independent counsel. *Id.* Only a litigant represented by independent counsel can have attorney's fees awarded and, therefore, meet the condition required to have the Court issue a written finding pursuant to 5 U.S.C. §552(a)(4)(F)(i). Complaint ¶ 21. This holding that *pro se* litigants can be treated arbitrarily or capriciously with FOIA providing no recourse is a violation of the Due Process Clause of the Fifth Amendment. *Id.* "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638, n. 2 (1975); *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964); see also *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). Complaint ¶ 21.

"In the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation. Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92, enacted by the First Congress and signed by President Washington one day before the Sixth Amendment was proposed, provided that, 'in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of . . . counsel. . . .' The right is currently codified

in 28 U.S.C. § 1654." *Faretta* v. *California*, 422 U.S. 806, 812-813 (1975); Complaint ¶ 22.

"This Court's past recognition of the right of self-representation, the federal-court authority holding the right to be of constitutional dimension, and the state constitutions pointing to the right's fundamental nature form a consensus not easily ignored."*Faretta*, *supra*, at 817; Bush CA Principal Brief 34. "This Court has often recognized the constitutional stature of rights that, though not literally expressed in the document, are essential to due process of law in a fair adversary process." *Faretta*, *supra*, at 819, n. 15; Bush CA Principal Brief 34.

"The right of self-representation was guaranteed in many colonial charters and declarations of rights. These early documents establish that the 'right to counsel' meant to the colonists a right to choose between pleading through a lawyer and representing oneself." *Faretta*, 422 U.S. at 828; Complaint ¶ 22. "[T]here is no evidence that the colonists and the Framers ever doubted the right of self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel." *Faretta*, *supra*, at 832; Complaint ¶ 22.

Counsel is a synonym for attorney, http://www.merriam-webster.com/thesaurus/counsel (last accessed on November 14, 2016). Complaint ¶ 23. "[T]he Concessions and Agreements of West New Jersey, in 1677, provided, for all cases, civil and criminal, 'that no person or persons shall be compelled to fee any attorney

or councillor to plead his cause, but that all persons have free liberty to plead his own cause, if he please.'" *Faretta*, 422 U.S. at 828, n. 37; Complaint ¶ 23. Counsel and attorney would have been known to be synonymous to the colonists and the Framers, the same as now. *Id.* Therefore, the right to an attorney would have been understood by the colonists and the Framers exactly as "the 'right to counsel' meant to the colonists a right to choose between pleading through a lawyer and representing oneself," *Faretta*, *supra*, at 828. *Id.*

Numerous Rules of the FEDERAL RULES OF CIVIL PROCEDURE allow the awarding of attorney's fees to curb abuses of the judicial process. Doc. 26, at 12. However, since *pro se* litigants are not allowed the awarding of attorney's fees, *Kay* v. *Ehrler*, 499 U.S. 432, 435 (1991), *pro se* litigants cannot receive the full measure of the deterrent from being subjected to abuses of the judicial process by opposing independent counsel. Doc. 26, at 12. "Sanctions are 'not merely to penalize those whose conduct may be deemed to warrant such a sanction, but [also] to deter those who might be tempted to such conduct in the absence of such a deterrent.'" *Chrysler Corp.* v. *Carey*, 186 F.3d 1016, 1022 (CA8 1999) (quoting *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976)). "The district court is not constrained to impose the least onerous sanction available, but may exercise its discretion to choose the most appropriate sanction under the circumstances." *Ibid.*

By not allowing attorney's fees to be awarded to *pro se* litigants, the District Court cannot "exercise its

discretion to choose the most appropriate sanction under the circumstance," *ibid.*, as one of the appropriate sanctions in the form of attorney's fees is unavailable. Doc. 26, at 12-13. A *pro se* litigant can be subjected to a pleading, written motion, or other paper presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; however, since a *pro se* litigant cannot be awarded attorney's fees for violations of FED. R. CIV. P. 11(b), a *pro se* litigant is denied equal protection under the law. Doc. 26, at 13. This is a violation of the Due Process Clause of the Fifth Amendment as are all Rules of the FEDERAL RULES OF CIVIL PROCEDURE in which attorney's fees are an appropriate sanction, yet unavailable to *pro se* litigants. Doc. 26, at 13. *Pro se* litigants can be sanctioned for attorney's fees by perpetrating abuses of the judicial process at independent opposing counsel; however, opposing independent counsel cannot be sanctioned for attorney's fees by perpetrating the very same abuses of the judicial process at *pro se* litigants. *Id.* This represents manifest unequal protection, including a violation of the principle of equal pay for equal work. *Id.*

However, RMA via counsel, the Department of Justice, is actually advocating for the expansion of unequal protection, presumably as a manifest destiny. Doc. 26, at 13. RMA stated, "*Pro se* plaintiffs may not recover attorney fees under FOIA," citing "*Burka* v. *United States Dep't of Health and Human Services*, 142 F.3d 1286, 1288 (D.C.Cir. 1998)." Doc. 20, at 12. RMA also stated, "Moreover, Plaintiff seeks these records for

a private purpose he is not entitled to fees or costs under FOIA. See *Cotton* v. *Heyman*, 63 F.3d 1115, 1123 (D.C. Cir. 1995) (declining an award of fees and costs after finding no public benefit from FOIA release . . .)." *Id.* RMA via counsel, the Department of Justice, after having been informed of the unequal protection concerns of *pro se* litigants who have been treated arbitrarily or capriciously and who cannot be awarded the prerequisite attorney's fees for the court to order a written finding in accordance with 5 U.S.C. §552(a)(4)(F)(i), asked the District Court to expand unequal protection beyond *pro se* litigants to include litigants represented by independent counsel and for which there is no public benefit to FOIA release of records. Doc. 26, at 13. In other words, RMA via counsel, the Department of Justice, is contending the only requesters who cannot be treated arbitrarily or capriciously under FOIA and be denied the full protection that FOIA provides by having the court issue a written finding in accordance with 5 U.S.C. § 552(a)(4)(F)(i) are requesters either represented by independent counsel or artificial persons represented by in-house counsel and for which there is a public benefit to FOIA release of the records. Doc. 26, at 13-14. RMA via counsel, the Department of Justice, is advocating for massive, wholesale violations of requesters' rights under FOIA and of the equal protection guaranteed by the Due Process Clause of the Fifth Amendment. *Id.*, at 14. This is "discrimination that is so unjustifiable as to be violative of due process," *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638, n. 2 (1975) (internal citation omitted). Doc. 26, at 14.

The District Court stated, "So the party in that case would not make any money off it. The lawyer would be compensated, but the party would not be." Transcript 26. The District Court's statement is contrary to binding Supreme Court precedent. Bush CA Principal Brief 42. "Thus it is that a plaintiff's recovery will not be reduced by what he must pay his counsel." *Blanchard* v. *Bergeron*, 489 U.S. 87, 94 (1989); Bush CA Principal Brief 42.

Under current statutory construction, the Court has no objection to providing "reasonable attorney fees," 5 U.S.C. § 552(a)(4)(E)(i), to a litigant who performed no legal work. Bush CA Principal Brief 42. However, the Court finds it objectionable to provide reasonable attorney's fees to a *pro se* litigant who actually performed legal work. *Id.* It is inconceivable that Congress could have ever intended such an irrational construction. *Id.* The Court cannot "properly place on the shoulders of Congress the burden of the Court's own error," *Girouard* v. *United States*, 328 U.S. 61, 69-70 (1946). Bush CA Principal Brief 42.

"[L]awfulness under the Constitution is a separate question to be addressed in a constitutional challenge." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 517 (2009). "A constitutional challenge must be decided based on the constitution, *ibid.*, and cannot be defeated based on a statutory interpretation, *ibid.*" Petition for Rehearing 12.

RMA did not defend against this claim on constitutional grounds in either the District Court or the

Eighth Circuit and has waived any right to do so in the Supreme Court. See *Chater*, 79 F.3d at 746; see also *Heerman*, 266 F.2d at 940.

IX. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT IS VIOLATED DUE TO UNEQUAL PROTECTION OF NATURAL PERSONS

The Due Process Clause of the Fifth Amendment is violated due to unequal protection of natural persons due to an artificial person possessing a right that cannot be held by a natural person, specifically the right of attorney-client relationship which entitles an artificial person to be eligible for attorney's fees as held in *Kay* v. *Ehrler*, 499 U.S. 432 (1991). Complaint ¶¶ 32-34.

If a natural person cannot have an attorney-client relationship with oneself, then no artificial person, such as a corporation or other entity, can have an attorney-client relationship with itself. Complaint ¶ 33. Relying on dictum in *Kay*, the D.C. Circuit held that a law firm representing itself is eligible for attorney's fees. *Baker & Hostetler LLP* v. *U.S. Department of Commerce*, 473 F.3d 312, 324 (CADC 2006); Complaint ¶ 33. "[A]n organization is not comparable to a *pro se* litigant, because the organization is always represented by counsel, whether in-house or *pro bono*, and thus, there is always an attorney-client relationship." *Kay*, *supra*, at 436, n. 7; Complaint ¶ 33.

If an individual representing oneself is not eligible for attorney's fees then a corporation or other entity

representing itself via in-house counsel is not eligible for attorney's fees. Complaint ¶ 34. Whether natural or artificial, a person is a person under the Constitution, as interpreted by the Court. *Id.* It is unconstitutional under the Due Process Clause of the Fifth Amendment for an artificial person to possess a right that cannot be held by a natural person. *Id.*

RMA did not defend against this claim on constitutional grounds in either the District Court or the Eighth Circuit, and has waived any right to do so in the Supreme Court. See *Chater*, 79 F.3d at 746; see also *Heerman*, 266 F.2d at 940.

X. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT IS VIOLATED DUE TO THE EIGHTH CIRCUIT'S FAILURE TO UPHOLD SUPREME COURT AND EIGHTH CIRCUIT DECISIONS, AND SANCTIONING SAID CONDUCT IN THE DISTRICT COURT

The Due Process Clause of the Fifth Amendment is violated due to the Eighth Circuit's failure to uphold Supreme Court and Eighth Circuit decisions, and sanctioning said conduct in the District Court, which renders the law "so standardless that it invites arbitrary enforcement." Cf. *Johnson* v. *United States*, 135 S.Ct. 2551, 2556 (2015). See Petition for Rehearing 16-17 ("Should the Eighth Circuit not grant this petition, the only plausible conclusion is that the *modus operandi* of the Eighth Circuit is to deny non-attorney[-at-law]

pro se litigants access to the Rule of Law,[6] meaning the Eighth Circuit 'has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.' SUP. CT. R. 10(a).") (italics added).

CONCLUSION

The petition for a writ of certiorari should be granted to resolve the conflicts among the Courts of Appeals, decide the constitutional challenges, uphold the Rule of Law, and preserve equal justice under law for all.

Respectfully submitted,

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[6] "Rule of law is a principle under which all persons, institutions, and entities are accountable to laws that are:" "[p]ublicly promulgated," "[e]qually enforced," and "[i]ndependently adjudicated." Overview – Rule of Law, available at http://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law (last accessed on August 2, 2018).