No. _____

In the Supreme Court of the United States

MICHAEL W. GAHAGAN,

Applicant,

v.

UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES,

Respondent.

MICHAEL W. GAHAGAN,

Applicant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, *et al.,*

Respondents.

MICHAEL W. GAHAGAN,

Applicant,

v.

UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES;
U.S. CUSTOMS & BORDER PROTECTION,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

APPLICATION FOR A 45-DAY EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To: The Honorable Samuel A. Alito, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Fifth Circuit

Applicant Michael W. Gahagan ("Gahagan") respectfully seeks a 45-day extension from May 27, 2019, to and including July 11, 2019, within which to file a petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit in the above-captioned consolidated appeals.

The present deadline for a certiorari petition is May 27, 2019. The Fifth Circuit issued its precedential opinion in these consolidated appeals on December 20, 2018. Then, on February 26, 2019, the Fifth Circuit denied Gahagan's timely rehearing petition. This time-extension application is being filed on May 16, 2019—more than 10 days before Gahagan's certiorari petition is due. *See* S. Ct. R. 13.5. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1). Copies of the Fifth Circuit's precedential opinion and subsequent denial of rehearing are included with this application. *See* Appendix (cited as "App.").

The following grounds support this time-extension application:

1. This case is about the proper interpretation of fee-shifting statutes. In particular, this case is about whether attorneys who represent themselves and prevail in suits under the Freedom of Information Act (FOIA) may recover the value of their skilled labor under FOIA's fee-shifting provision, 5 U.S.C. § 552(a)(4)(E)—and the rules of statutory interpretation that govern this question.

2. In 1991, this Court ruled in *Kay v. Ehrler*, 499 U.S. 432, that pro se attorney-plaintiffs who prevail in federal civil-rights suits cannot recover fees under

the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. *See id.* at 437–38. The Court reached this conclusion based solely on the Court's estimation of § 1988's purpose, after concluding that § 1988's text and history were ambiguous on the question. *See id.* at 435–36. The Court declared that "the successful prosecution of meritorious [civil rights] claims" was "better served by a rule that creates an incentive to retain counsel in every such case." *Id.* at 438.

3. The question presented in *Kay* was limited to § 1988. *See* Cert. Petition at i, *Kay*, 499 U.S. 432 (No. 90-79). And the Court's decision in *Kay* adheres to this limit. *See* 499 U.S. at 435–38. Nowhere does the Court declare in *Kay*—as it has in other cases—that the Court is setting a bright-line rule for all fee-shifting statutes. *See, e.g., Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001) (addressing the "[n]umerous federal statutes [that] allow courts to award attorney's fees and costs to the 'prevailing party'").

4. Three years after *Kay*, in *Fogerty v. Fantasy Inc.*, 510 U.S. 517 (1994), this Court rejected the argument that the Copyright Act's fee-shifting provision had to be read just like § 1988 and Title VII's fee-shifting provision, 42 U.S.C. § 2000e-5(k). The *Fogerty* petitioner urged this argument based on the Court's earlier-stated view that "fee-shifting statutes' similar language is a strong indication that they are to be interpreted alike." *Id.* at 523 (quoting *Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989)). This Court replied that the jurisprudential factors that justified its earlier interpretations of § 1988 and § 2000e-5(k) —all rooted in statutory purpose and history—were "absent in the case of the Copyright Act." *Id.*

5. Lower courts quickly absorbed the lesson of *Fogerty*. In an opinion by Judge Easterbrook, the Seventh Circuit emphasized that "[a]ny tendency to treat all attorneys' fees statutes as if they were insignificant variations on § 1988 was squelched by *Fogerty*." *Stomper v. Amalgamated Transit Union, Local 241*, 27 F.3d 316, 318 (7th Cir. 1994). Indeed, *Fogerty* established that "even a statute with the same *text* as § 1988 does not necessarily have the same *meaning*." *Id.* The Seventh Circuit also noted *Fogerty* made it clear § 1988 and § 2000e-5(k) "were laws with a unique background and history of interpretation, **which cannot be generalized** to other statutes authorizing the award of fees." *Id.* (bold added).

6. Under FOIA's fee-shifting provision, 5 U.S.C. § 552(a)(4)(E), "a court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any [FOIA] case ... in which the complainant has substantially prevailed." This provision is part of a carefully-integrated scheme that is meant not only to incentivize citizen suits to enforce FOIA, but also to deter and penalize government wrongdoing. For example, FOIA's disciplinary provision, 5 U.S.C. § 552(a)(4)(F), expressly identifies FOIA fee awards as a necessary trigger for disciplinary action against government employees who have committed FOIA violations. Congress has also mandated that FOIA fee awards have to be paid by the offending federal agency, rather than from the public fisc. *See* Pub. L. No. 110–175, § 4(b), 121 Stat. 2524, 2525; *cf. Orner v. Shalala*, 30 F.3d 1307, 1309 (10th Cir. 1994) ("[F]ees under the EAJA penalize ... [an agency] for assuming an unjustified legal position and, accordingly, are paid out of agency funds.").

7. Applicant Michael W. Gahagan is an immigration attorney who often uses FOIA to obtain government documents. App.2. In this instance, he represented himself successfully in three separate FOIA suits. *See id.*

8. Gahagan moved for costs and was granted $1,485.52 across all three FOIA suits. App.2. Gahagan also moved for fees in each FOIA suit. *See id.* Under then-governing Fifth Circuit precedent, pro se attorney-plaintiffs were eligible to recover fees under FOIA. *See Texas v. ICC*, 935 F.2d 728, 731–32 (5th Cir. 1991); *Cazalas v. Dep't of Justice*, 709 F.2d 1051, 1057 (5th Cir. 1983). Gahagan was a past recipient of such fees. *See, e.g., Gahagan v. U.S. Citizenship & Immigration Servs.*, 2016 U.S. Dist. LEXIS 36931, at *63 (E.D. La. Mar. 21, 2016).

9. The district courts below each refused to award fees to Gahagan. The first district court to refuse held that this Court's decision in *Kay* erected a "bright line rule" that "pro se attorney litigants are not entitled to attorney's fees under ... 42 U.S.C. § 1988" and "the same bright line rule applie[d] to .... FOIA." *Gahagan v. USCIS*, No. 2:16-cv-15438, 2017 U.S. Dist. LEXIS 147002, at *12–13 (E.D. La. Sept. 12, 2017). The other two district courts then adopted the first district court's view in succession. *See Gahagan v. USCIS & CBP,* No. 2:15-cv-6218, 2017 U.S. Dist. LEXIS 209748, at *3 (E.D. La. Dec. 19, 2017); *Gahagan v. DOJ, et al.*, No. 2:13-cv-5526, 2017 U.S. Dist. LEXIS 156880 at *2 (E.D. La. Sept. 20, 2017).

10. Gahagan timely appealed each fee-denial order under 28 U.S.C. § 1291.

11. The Fifth Circuit subsequently agreed to consolidate Gahagan's three appeals for purposes of briefing, argument, and decision.

12. On December 20, 2018, a Fifth Circuit panel issued a precedential decision affirming the district courts' respective judgments. App.11.

13. The panel agreed with the district courts that *Kay* was controlling. *See* App.7–10. The panel thereby overruled the Fifth Circuit's decisions in *Cazalas* and *ICC*. *See* App.10 ("After *Kay*, *Cazalas* no longer represents binding precedent ...."). The panel also overruled a third decision, *Cofield v. City of Atlanta*, 648 F.2d 986, 988 (5th Cir. 1981), in which the Fifth Circuit had ruled that because FOIA's "history, language, and purpose ... differ[] significantly from those of the civil rights statutes," § 1988 cases were "inapposite" to deciding the scope of FOIA's fee-shifting provision. *See* App.8 n.3 ("*Cofield* ... does not survive ... subsequent Supreme Court decisions interpreting all federal fee-shifting provisions consistently.").

14. The panel held that absent express textual differences, all federal fee-shifting statutes must be read the same exact way, making *Kay* a bright-line rule. The panel emphasized that "[t]he Supreme Court has repeatedly instructed ... consistent interpretation" of federal fee-shifting statutes. App.8. This analysis conflicts with this Court's later decision in *Fogerty*, which—as the Seventh Circuit has expressly recognized—requires "individual analysis" of federal fee-shifting statutes, as opposed to "treat[ing] all [federal] attorneys' fees statutes as if they were insignificant variations on [42 U.S.C.] § 1988." *Stomper v. Amalgamated Transit Union, Local 241*, 27 F.3d 316, 318 (7th Cir. 1994).

15. The panel also held that the word "incurred" in FOIA's fee-shifting provision further supported the panel's analysis because "incurred" means "a legal

obligation to pay" some third-party, and pro se attorney-plaintiffs have "no legal obligation to pay" attorney's fees to a third-party. App.10–11. If correct, this holding eliminates the fee-award eligibility of a myriad of FOIA litigants beyond just pro se attorney-plaintiffs. For example, non-profits, businesses, law firms, and government entities have no legal obligation to pay fees when they are represented by in-house counsel in a FOIA suit. This places the panel's holding in direct conflict with the Seventh Circuit, which has recognized that attorney's fees are also "incurred" when "time and resources ... devote[d] to one case are not available for other work"—a reading that covers in-house counsel and pro-se attorney-plaintiffs alike. *Wisconsin v. Hotline Indus., Inc.*, 236 F.3d 363, 365–66 (7th Cir. 2000).

16. Finally, the panel held that pro se attorney-plaintiffs cannot recover attorney's fees under FOIA. *See* App.11. This holding is contrary to FOIA's text, structure, history, and purpose, as carefully analyzed in the Fifth Circuit decisions that the panel overruled. *See Texas v. ICC*, 935 F.2d 728, 731–32 (5th Cir. 1991); *Cazalas v. Dep't of Justice*, 709 F.2d 1051, 1055–57 (5th Cir. 1983).

17. Gahagan timely petitioned for rehearing. *See* App.12–14. On February 26, 2019, the Fifth Circuit denied Gahagan's rehearing petition. *See id.*

18. While Gahagan's rehearing petition was pending, the Government filed a bill-of-costs with the Fifth Circuit for copying and bookbinding expenses. Gahagan objected. Gahagan argued that FOIA's fee-shifting provision did not authorize cost-shifting to the Government, and even if it did, the panel decision precluded a cost award. This was because the panel decision defined "incurred" to mean a legal

obligation to pay a third party, versus simply expending one's own resources. The Government, in turn, furnished no evidence (e.g., a receipt) to show that it had paid (or was bound to pay) its requested costs to a third-party (e.g., FedEx). On February 6, 2019, the Fifth Circuit granted Gahagan's objection. App.16.

19. The Fifth Circuit's precedential decision here raises three important questions that merit Supreme Court review. First, whether all federal fee-shifting statutes must be read identically—a rule that this Court (*Fogerty*) and the Seventh Circuit (*Stomper*) have rejected. Second, whether the word "incurred" in a federal fee-shifting statute means a "legal obligation to pay" a third-party—a rule that the Seventh Circuit has rejected (*Hotline*). Third, whether under a fair reading of FOIA's text, structure, history, and purpose, FOIA's fee-shifting provision allows prevailing pro se attorney-plaintiffs to recover attorney's fees.

20. Given the importance of the preceding questions, Gahagan respectfully requests a 45-day extension of his deadline to file a certiorari petition.

21. Good cause exists to grant this request. Gahagan's appellate counsel-of-record, Mahesha P. Subbaraman, has been subject to many competing obligations between March 2019 and May 2019. These obligations have included:

- Preparation of a merits amicus brief for this Court in *Mitchell v. Wisconsin*, No. 18-6210 (U.S.) (filed Mar. 4, 2019);
- Presentation of oral argument in *DeLuna v. Mower County*, No. 18-1933 (8th Cir.) (argument heard Mar. 12, 2019);
- Preparation of an opening brief for Appellant Stephen Nichols in *Nichols v. Wayne County*, No. 19-1056 (6th Cir.) (filed Apr. 10, 2019);
- Preparation of a panel-stage amicus brief in *Serrano v. U.S. Customs & Border Patrol*, No. 18-50977 (5th Cir.) (filed Apr. 23, 2019);

- Preparation of a panel-stage amicus brief in *Vizaline, L.L.C. v. Tracy*, No. 19-60053 (5th Cir.) (filed May 1, 2019);
- Preparation of a joint amici brief in support of rehearing in *Jessop v. City of Fresno*, No. 17-16756 (9th Cir.) (filed May 13, 2019)

22. Current competing obligations on Mr. Subbaraman's time include: (1) preparation of a certiorari petition to be filed with this Court in *Harrington, et al. v. Berryhill*, No. 18A1060 (U.S.) (extending certiorari deadline to June 7, 2019); and (2) preparation of an reply brief to be filed with the Sixth Circuit in *Nichols v. Wayne County*, No. 19-1056 (6th Cir.) (due July 3, 2019).

23. Based on the above obligations, Mr. Subbaraman is unable to prepare an adequate certiorari petition in this case absent the requested time extension. Mr. Subbaraman is a solo practitioner with no partners, associates, or legal support staff. Mr. Subbaraman is further representing Gahagan *pro bono*.

Gahagan thus respectfully asks the Court to extend his time within which to file a certiorari petition to and including July 11, 2019.

Respectfully submitted,

Dated: May 16, 2019

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