No. _____

In The
Supreme Court of the United States

MICHAEL W. GAHAGAN,

Petitioner,

v.

UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fifth Circuit's rule that all federal fee-award laws must be read identically (i.e., absent express textual differences) contravene this Court's decision in *Fogerty v. Fantasy Inc.*, 510 U.S. 517 (1994)—and Seventh Circuit precedent implementing *Fogerty*—which call for individual analysis of federal fee-award laws based on each law's respective text, structure, history, and purpose?

2. Does Congress's use of the word "incurred" in a fee-award law refer solely to a legal obligation to pay attorney fees, as the Fifth Circuit has ruled, or does "incurred" also refer to any expended lawyer time, as the Seventh Circuit has ruled, thus allowing a fee-award law to compensate the work of pro bono attorneys, in-house attorneys, government attorneys, and self-representing attorneys alike?

3. Does a fair reading of the federal Freedom of Information Act (FOIA) and its fee-award provision, 5 U.S.C. § 552(a)(4)(E), allow attorney-fee awards in "any case" under FOIA where the "complainant" has substantially prevailed—including cases where the complainant is a self-representing attorney?

PARTIES TO THE PROCEEDING

The parties to this proceeding are identified in the caption of this petition, except as follows.

Besides U.S. Citizenship & Immigration Services and the U.S. Department of Justice, the Respondents here also include:

- U.S. Department of Homeland Security;
- U.S. Immigration & Customs Enforcement;
- the Executive Office of Immigration Review (part of the U.S. Department of Justice); and
- U.S. Customs & Border Protection.

DIRECTLY RELATED PROCEEDINGS

- ***Gahagan v. U.S. Citizenship & Immigration Services***—United States District Court for the Eastern District of Louisiana; Docket No. 2:16-cv-15348-MLCF-JVM; Final Judgment Entered March 9, 2017; Final Order on Costs and Attorney Fees Entered September 12, 2017.
- ***Gahagan v. U.S. Citizenship & Immigration Services***—United States Court of Appeals for the Fifth Circuit; Docket No. 17-30898; Final Judgment Entered December 20, 2018; Final Order on Appellate Costs Entered February 6, 2019; Final Order Denying Rehearing En Banc and Panel Rehearing Entered February 26, 2019.
- ***Gahagan v. U.S. Dep't of Justice, U.S. Dep't of Homeland Security, U.S. Immigration & Customs Enforcement, Executive Office of Immigration Review (U.S. Dep't of Justice)***—United States District Court for the Eastern District of Louisiana; Docket No. 2:13-cv-5526-KDE-DEK; Final Judgment Entered January 26, 2017; Final Order on Costs and Attorney Fees Entered on September 20, 2017.
- ***Gahagan v. U.S. Dep't of Justice, U.S. Dep't of Homeland Security, U.S. Immigration & Customs Enforcement, Executive Office of Immigration Review (U.S. Dep't of Justice)***—United States Court of Appeals for the Fifth Circuit; Docket No. 17-30901; Final Judgment Entered December 20, 2018; Final Order on Appellate Costs Entered February 6, 2019; Final Order Denying

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—Continued

Rehearing En Banc and Panel Rehearing Entered February 26, 2019.

- ***Gahagan v. U.S. Citizenship & Immigration Services, U.S. Customs & Border Protection—*** United States District Court for the Eastern District of Louisiana; Docket No. 2:15-cv-6218-JCZ-DEK; Final Judgment Entered November 3, 2017; Final Order on Costs and Attorney Fees Entered December 21, 2017.

- ***Gahagan v. U.S. Citizenship & Immigration Services, U.S. Customs & Border Protection—*** United States Court of Appeals for the Fifth Circuit; Docket No. 17-30999; Final Judgment Entered December 20, 2018; Final Order on Appellate Costs Entered February 6, 2019; Final Order Denying Rehearing En Banc and Panel Rehearing Entered February 26, 2019.

- ***Gahagan v. U.S. Citizenship & Immigration Services, et al.—***Supreme Court of the United States; Docket No. 18A1209; Final Order by Justice Alito Extending Time to File a Petition for a Writ of Certiorari Until July 11, 2019.

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Michael W. Gahagan respectfully petitions this Court for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

OPINION & ORDERS BELOW

The Fifth Circuit's December 20, 2018 panel opinion is published at 911 F.3d 298 and reproduced at App. 1–14. The Fifth Circuit's February 26, 2019 denial of rehearing is reproduced at App. 72–74. And reproduced at App. 70–71 is the Fifth Circuit's February 6, 2019 order granting Gahagan's objection to the government's appellate cost bill.

The district court's September 12, 2017 order in *Gahagan v. USCIS* (E.D. La. No. 2:16-cv-15438; 5th Cir. No. 17-30898) granting costs and denying fees under FOIA is reproduced at App. 15–34. The magistrate judge's preceding April 27, 2017 report-and-recommendation advising a grant of both costs and fees is reproduced at App. 35–61.

The district court's September 20, 2017 order in *Gahagan v. DOJ* (E.D. La. No. 2:13-cv-5526; 5th Cir. No. 17-30901) granting costs and denying fees under FOIA is reproduced at App. 62–65.

The district court's December 21, 2017 order in *Gahagan v. USCIS/CBP* (E.D. La. No. 2:15-cv-6218; 5th Cir. No. 17-30999) granting costs and denying fees under FOIA is reproduced at App. 66–69.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) based on: (1) the Fifth Circuit's December 20, 2018 entry of final judgment (App. 1–14); and (2) the Fifth Circuit's February 26, 2019 denial of Gahagan's timely rehearing petition (App. 72–74).

On May 22, 2019, Justice Alito granted an extension of time to file a petition for a writ of certiorari to and including July 11, 2019.

STATUTORY PROVISION INVOLVED

The **Freedom of Information Act (FOIA)** provides under **5 U.S.C. § 552(a)(4)(E)** that:

> (i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any 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 complain-ant's claim is not insubstantial.

STATEMENT

1. The Freedom of Information Act (FOIA), 5 U.S.C. § 552 is meant to "open agency action to the light of public scrutiny." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). To fully achieve this goal, in 1974, Congress amended FOIA to establish that courts "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." Pub. L. No. 93-502, § 1(b)(2), 88 Stat. 1561, 1562 (Nov. 21, 1974) (codified at 5 U.S.C. § 552(a)(4)(E)).

Congress then made this fee-award provision an integral part of FOIA's scheme for securing agency compliance with FOIA's requirements. When a court "assesses . . . reasonable attorney fees" under FOIA, this event (along with other factors) will "initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding" of requested information. 5 U.S.C. § 552(a)(4)(F)(i). The Attorney General must also report to Congress every court-granted FOIA fee award. *See* 5 U.S.C. § 552(e)(6)(A)(ii)(III). Finally, FOIA fee awards must be paid by the offending agency alone. *See* OPEN Government Act of 2007, Pub. L. No. 110-175, § 4(b), 121 Stat. 2524, 2525 (Dec. 31, 2007).

Given this legislative plan, it makes no sense to read artificial limits into the inherently flexible text of FOIA's fee-award provision. Such limits would risk a

greater number of FOIA violations going either unpunished, underreported, or undeterred—i.e., for lack of a fee award to trigger disciplinary action, inform Congress, or make FOIA abuses too costly for agencies to tolerate. Reading artificial limits into FOIA's fee-award provision also undercuts FOIA as an "equal-opportunity" statute that "treats all requests and requesters the same." *Morley v. CIA*, 719 F.3d 689, 691 (Kavanaugh, J., concurring).

For this reason, courts have recognized that fees may be granted under FOIA's fee-award provision so long as a lawyer's work is involved in a FOIA case. The reason is simple: "FOIA's fees provision applies to all 'complainants' who have 'substantially prevailed.'" *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 324 (D.C. Cir. 2006) (Kavanaugh, J.). This means that a layperson complainant may "claim[] fees for lawyers with whom he consulted" as part of his FOIA case. *Blazy v. Tenet*, 194 F.3d 90, 94 (D.C. Cir. 1999). So may a law-firm complainant that opts to represent itself. *Baker & Hostetler*, 473 F.3d at 326. The same should then be true when the law-firm complainant is a law firm of one: a self-representing attorney.[1]

In this case, the Fifth Circuit said no. App. 14. The Fifth Circuit thus denied Michael W. Gahagan—an immigration lawyer with his own solo law firm—any

[1] This petition uses the phrase "self-representing" rather than "pro se" to promote clarity. *See Parrins v. Cummins Power South*, 18 So. 3d 967, 967 (Fla. Dist. Ct. App. 2013) (Makar, J., concurring) ("[U]se of archaic Latin phrases does not facilitate understanding . . . [and] should be avoided.").

ability to recover the litigation value of his time as a lawyer in winning three separate FOIA actions. App. 2–3. In seeking a FOIA fee award in each action, Gahagan cited previous well-reasoned Fifth Circuit decisions holding that "if . . . a lawyer has handled [a FOIA] case, even if the lawyer is the plaintiff himself . . . he may recover . . . fees." *Texas v. ICC*, 935 F.2d 728, 731–32 (5th Cir. 1991). Put another way, a fair reading of FOIA's fee-award provision—i.e., text, structure, history, and purpose—allows fees to self-representing attorneys because "[n]o class of complainants . . . is excluded." *Id.*

In this case, however, the Fifth Circuit changed its mind, concluding that *Kay v. Ehrler*, 499 U.S. 432 (1991), foreclosed reading FOIA this way. App. 6–12. In *Kay*, this Court determined that the public policy of 42 U.S.C. § 1988—a law that permits fee awards in civil-rights cases—was "better served" by denying fees to self-representing attorneys. 499 U.S. at 438. But superimposing this conclusion onto FOIA poses a problem as FOIA's "history, language, and purpose . . . differ[] significantly from those of the civil rights statutes." *Cofield v. City of Atlanta*, 648 F.2d 986, 988 (5th Cir. 1981). So, the Fifth Circuit announced a broad new rule: absent express textual differences, all federal fee-award laws must be read identically. App. 9–10 & n.3. The Fifth Circuit justified this rule by pointing to various cases before 1994 in which this Court spoke of "apply[ing] consistent interpretations to federal fee-shifting statutes." App. 9–10.

Such analysis warrants this Court's review. In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), this Court made it clear that even when fee-award laws say the same thing, differences in context, history, and purpose must be respected. *Id.* at 523–25. The Court thus refused in *Fogerty* to read the Copyright Act's fee-award provision the same way as § 1988, even though the language at issue in both laws was the same. The Seventh Circuit has carried this lesson forward, explaining 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) (Easterbrook, J.). The Fifth Circuit's decision here now creates a deep circuit split on this point—one that affects every federal fee-award law on the books.

This domino effect points to another important reason why the Court should take this case. The Fifth Circuit held that a separate textual basis for its decision was the fact that FOIA's fee-award provision uses the word "incurred," and fees are "incurred" only upon a "legal obligation to pay them." App. 12–14. This conflicts with the Seventh Circuit's decision in *Wisconsin v. Hotline Industries, Inc.*, which holds that fees are "incurred" when "[attorney] time and resources . . . devote[d] to one case are not available for other work." 236 F.3d 363, 365–66 (7th Cir. 2000). This analysis respects the flexible ordinary meaning of "incurred," enabling fees to be claimed for work done by pro bono, in-house, government, and self-representing attorneys alike. The Fifth Circuit's decision here must then be

understood to eliminate FOIA fee awards for all these attorneys.

The Court should finally grant review based on the Fifth Circuit's ultimate conclusion that FOIA's fee-award provision does not allow fee awards to self-representing attorneys. Though the Fifth Circuit's decision eliminates a previously-existing circuit split on this point, the analysis underlying this decision stands in direct conflict with this Court's consistent teaching in recent years that courts can no longer do what this Court did in *Kay*: read artificial limits into fee-award laws or FOIA based on their own sense of good public policy. *See*, *e.g.*, *Food Mktg. Inst. v. Argus Leader Media*, No. 18-481, slip op. at 11 (U.S. June 24, 2019) (explaining that courts "cannot arbitrarily constrict" FOIA for public-policy reasons that seek to "add[] limitations found nowhere in [FOIA's] terms"); *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 555 (2014) (holding that courts cannot "superimpose[] an inflexible framework" onto text in a fee-award law "that is inherently flexible").

2. In considering the questions presented here—and why they merit this Court's attention—it is important to start with "the bedrock principle known as the American Rule": that "[e]ach litigant pays his own attorney's fees, win or lose." *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015). This principle stands in opposition to the English Rule, which for generations has "regularly allowed [counsel fees] to the prevailing party." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). Indeed, "[a]s

early as 1278, the courts of England were authorized to award counsel fees to successful plaintiffs in litigation." *Id.* at 247 n.18.

This distinction matters because when Congress "authoriz[es] the award of a reasonable attorney's fee" to a "prevailing party" in an "adversarial action," Congress is enacting the English Rule. *Baker Botts L.L.P.*, 135 S. Ct. at 2164 (punctuation omitted). This includes the common-law tradition surrounding the English Rule, because a statute that "covers an issue previously governed by the common law" comes "with the presumption that Congress intended to retain the substance of the common law." *Samantar v. Yousuf*, 560 U.S. 305, 320 n.13 (2010). And where this presumption applies, courts must follow the common law unless the statute "'speaks[s] directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993).

One example of this is when a fee-award law says that a court "may" award fees to a prevailing litigant, instead of using the word "shall." By making the award of fees discretionary, the law speaks directly to (and abrogates) the common law of the English Rule, which dictates that "counsel fees are [to be] regularly awarded to the prevailing party." *Fogerty*, 510 U.S. at 534 (noting the English Rule is not adopted in full when Congress "allow[s] an award of attorney's fees in the court's discretion").

When this kind of textual difference is lacking, however, the common law applies. And on this score,

the common law of the English Rule has long held that attorneys who represent themselves in litigation may recover attorney's fees (lumped under the term "costs"[2]) for the time they spend litigating on their own behalf. As a respected treatise on British legal practice explains: "Where an attorney is a party to an action, and obtains a judgment in his favour, he is entitled to the same costs as if he had conducted the action as attorney for some other person, and not merely to the costs which another person suing or defending in person would be entitled to."[3]

This reality was not lost on American courts during the 1800s—especially when construing state and local fee-award laws. Consider *Kopper v. Willis*, 9 Daly 460 (N.Y. Ct. Com. Pl. 1881).[4] A New York court had to decide whether a "plaintiff, who is an attorney, [and] conducted the action himself" could be granted fees under a state law providing that "neither party shall recover extra costs unless he has an attorney actually engaged in the prosecution or defense of the action." *Id.* at 468. The court held that such fees could be awarded. *See id.* at 469.

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[2] *See Alyeska Pipeline Serv. Co.*, 421 U.S. at 247 ("[F]or centuries in England there has been statutory authorization to award costs, including attorneys' fees.").

[3] 1 SAMUEL PRENTICE, CHITTY'S ARCHBOLD'S PRACTICE 78 (11th ed. London, H. Sweet; V. & R. Stevens 1862).

[4] The full reporter for *Kopper* is 9 CHARLES P. DALY, REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS FOR THE CITY AND COUNTY OF NEW YORK 460–69 (New York, Banks & Bros. 1882).

Tracing the history of the English Rule from Edward I forward, the court observed there was "no authority . . . for giving a party costs for conducting . . . his suit in person." *Id.* at 466–67. At the same time, there was "an established exception to this rule"—"the case of an attorney or solicitor acting in his own behalf." *Id.* at 468. This exception recognized that an attorney "is paid for his time and services, and if he renders them in the management and trial of his own cause it may amount to as much pecuniary loss or damage to him as if he paid another attorney for doing it." *Id.* at 469. It also made "no difference" to the "defeated party" who was required by law to pay the fees of the prevailing party's attorney whether that attorney was "the prevailing party himself or another attorney employed by him." *Id.*

This common law tradition then informs those "specific and explicit provisions for the allowance of attorneys' fees" that Congress has passed over the last two centuries. *Alyeska Pipeline Serv. Co.*, 421 U.S. at 260–61. In replanting the English Rule, these fee-award laws bring with them the "old soil" of common law tradition, including its allowance of fees to self-representing attorneys. *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019). This includes the fee-award provision that Congress added to FOIA.

3. Congress passed FOIA in 1966 with the ideal of securing "full agency disclosure unless information is exempted under clearly delineated statutory language." *Dep't of the Air Force*, 425 U.S. at 360–61. But Congress soon discovered that FOIA had a fatal flaw:

FOIA's civil remedy for FOIA violations was too "cumbersome and costly" for most persons.[5]

So, after great deliberation, in 1974, Congress amended FOIA to allow courts to grant "reasonable attorney fees and other litigation costs reasonably incurred in any [FOIA] case . . . in which the complainant has substantially prevailed." Pub. L. No. 93-502, § 1(b)(2), 88 Stat. 1561, 1562 (Nov. 21, 1974). Through this amendment, Congress sought to ensure that no person, regardless of their income, was "forced to suffer any possible irreparable damage because the Government failed to live up to the letter and spirit of the Freedom of Information Act."[6]

Congress also declared in the same amendment that when courts granted FOIA fee awards, this reality together with several other factors would spur "proceeding[s] to determine whether disciplinary action is warranted against the officer or employee . . . primarily responsible for" a FOIA violation. Pub. L. No. 93-502, § 1(b)(2), 88 Stat. at 1562 (codified at 5 U.S.C. § 552(a)(4)(F)). Congress thus affirmed that FOIA's fee-award provision was meant to penalize the

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[5] H.R. COMM. ON GOV'T OPERATIONS & S. COMM. ON THE JUDICIARY, 94TH CONG., FREEDOM OF INFORMATION ACT & AMENDMENTS OF 1974 (P.L. 93-502) / SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, & OTHER DOCUMENTS 15 (Joint Comm. Print 1975).

[6] *Id.* at 264 (quoting Representative Alexander).

government, compelling agencies "to take full responsibility for litigating indefensible cases."[7]

4. Following Congress's passage of FOIA's fee-award provision, the circuits divided over granting fees to self-representing FOIA complainants:

On one end was the D.C. Circuit. It ruled that **all** self-representing FOIA complainants may recover fees—attorney and layperson alike. *See Cox v. DOJ*, 601 F.2d 1, 6 (D.C. Cir. 1979); *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1366 (D.C. Cir. 1977). The D.C. Circuit found the "policy considerations underlying" FOIA's fee-award provision justified this conclusion. *Cuneo*, 553 F.2d at 1366. Among these considerations were "the barriers facing the average person requesting information" and the need to "bring[ ] the government into compliance" with FOIA. *Id.*

The First Circuit and Sixth Circuit took the opposite view. They found that **no** self-representing FOIA complainants may recover fees, even those who are lawyers. *See Aronson v. HUD*, 866 F.2d 1, 5 (1st Cir. 1989); *Falcone v. IRS*, 714 F.2d 646, 647 (6th Cir. 1983). The circuits justified this view through thinly-sourced notions of legislative intent and public policy. The Sixth Circuit, for example, declared that FOIA's fee-award provision was "intended to relieve . . . legal costs" and "not . . . as a penalty against the government." *Falcone*, 714 F.2d at 647. The First Circuit, in turn, rejected FOIA fee awards to self-representing

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[7] *Id.*

attorneys because this did not promote "the type of image that enhances public respect for the bar or judiciary." *Aronson*, 866 F.2d at 6.

The Fifth Circuit staked out a middle ground. Consistent with the common law of the English Rule (though perhaps not aware of this at the time), the Fifth Circuit held that only **some** self-representing FOIA complainants may recover fees: those who are lawyers. *See Cazalas v. DOJ*, 709 F.2d 1051, 1057 (5th Cir. 1983) (FOIA's fee-award provision reaches self-representing attorneys); *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1089 (5th Cir. 1981) (FOIA's fee-award provision does not reach self-representing laypersons); *see also ICC*, 935 F.2d at 731–32.

The Fifth Circuit drew this conclusion from legislative history, after finding statutory text to be ambiguous. *See Cazalas*, 709 F.2d at 1057 & n.9. This history showed that Congress "designed" FOIA's fee-award provision "to deter the government from opposing justifiable requests for information" and "to punish the government where such opposition is unreasonable." *Id.* at 1057. These goals applied "with equal force where an attorney litigant proceeds pro se." *Id.* Such litigants could not then be excluded from FOIA's fee-award provision. *See id.* Rather, in using their "legal skills to vindicate an important public right," these self-representing attorneys—unlike self-representing

laypersons—were "entitled to be compensated for the[ir] work."[8] *Id.*

5. On the heels of the above circuit split, the Court granted review in *Kay v. Ehrler*, 499 U.S. 432 (1991). Richard Kay was a licensed attorney who filed a civil-rights suit in his own name to enforce his right to appear on a state primary ballot. *Id.* at 433–35. He prevailed. *Id.* He then sought fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, which allows "the prevailing party, other than the United States, a reasonable attorney's fee" in federal civil-rights actions. Kay's request was denied, and the Sixth Circuit affirmed based on its conclusion that § 1988 did not allow fee awards to self-representing attorneys. 499 U.S. at 435.

This Court granted review in *Kay* "to resolve . . . whether a pro se litigant who is also a lawyer may be awarded attorney's fees under § 1988." 499 U.S. at 435. And that is all the Court sought to resolve.[9]

Starting with text and history, the Court noted that Richard Kay was an attorney and that he had successfully represented himself. *Id.* at 435–36. On the

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[8] Judge Garwood dissented, finding that FOIA's fee-award provision "contemplate[d] payment for services rendered to the litigant by someone else." *Cazalas*, 709 F.2d at 1060.

[9] In setting forth the procedural history of *Kay*, this Court noted the district court's reliance on *Falcone*—a Sixth Circuit case holding that self-representing attorneys may not recover fees under FOIA. 499 U.S. at 434–35 & n.4. The Court offered a brief, neutral description of *Falcone*. *See id.* The Court did not endorse *Falcone* or mention FOIA beyond this. *See id.*

other hand, the word "attorney" suggested "an agency relationship"[10] and it seemed likely Congress had "contemplated an attorney-client relationship as the predicate for an award under § 1988." *Id.* Stuck between these views, the Court held that neither text nor history afforded "a clear answer" on granting § 1988 fees to self-representing attorneys. *Id.*

So, the Court resorted to public-policy analysis—an approach "from a 'bygone era of statutory construction.'" *Food Mktg. Inst.*, No. 18-481, slip op. at 8. The Court held that "effective prosecution" of civil-rights cases was "better served by a rule that creates an incentive to retain counsel."[11] 499 U.S. at 437–38. Retained counsel made life easier for civil-rights litigants (including lawyers) when it came to many of the principal tasks in civil-rights litigation, including "framing the theory of the case, evaluating alternative methods of presenting the evidence, [and] cross-examining hostile witnesses." *Id.*

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[10] The Court relied on this point to affirm the eligibility of organizations for attorney's fees, because the "organization is always represented by counsel . . . and thus, there is always an attorney-client relationship." *Kay*, 499 U.S. at 436 n.7.

[11] In *McNeil v. United States*, a case about administrative exhaustion, this Court cited *Kay* as an example of the "systemic interest in having a party represented by independent counsel." 508 U.S. 106, 113 n.10 (1993). The Court offered this point as further reason to reject the argument that "procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel." 508 U.S. at 113. The Court did not purport to extend *Kay* to all fee-award laws, and *McNeil* had nothing to with fee awards.

6. After this Court decided *Kay*, various circuits opted to read *Kay* as eliminating fee awards to self-representing attorneys in all situations, including FOIA cases. The Eleventh Circuit started this trend in *Ray v. DOJ*, ruling that "the principles announced in *Kay* apply with equal force in this [FOIA] case." 87 F.3d 1250, 1251 (11th Cir. 1996). *Ray* did not reach this conclusion based on a careful analysis of FOIA's text, structure, history, and purpose. *See id.* Rather, *Ray* concluded that "the policies behind" § 1988 and FOIA were "the same" simply because the appellant had "ma[de] no arguments" otherwise. *Id.*

The D.C. Circuit and Second Circuit followed suit.[12] *See Pietrangelo v. U.S. Army*, 568 F.3d 341, 344 (2d Cir. 2008); *Burka v. HHS*, 142 F.3d 1286, 1288–90 (D.C. Cir. 1998); *Benavides v. Bureau of Prisons*, 993 F.2d 257, 258–60 (D.C. Cir. 1993). In this regard, the D.C. Circuit dismissed the idea that FOIA's fee-award provision was unique insofar as it "help[ed] deter [FOIA] violations." *Benavides*, 993 F.2d at 260. The D.C. Circuit deemed this outcome to be "only a serendipitous by-product of encouraging aggrieved individuals to obtain an attorney." *Id.*

7. In 2007, Congress passed the OPEN Government Act (OGA), Pub. L. No. 110-175, 121 Stat. 2524 (Dec. 31, 2007). Congress recognized "lax FOIA enforcement ha[d] undermined FOIA." S. REP. NO.

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[12] In a non-precedential opinion, the Tenth Circuit also followed suit. *See Searcy v. SSA*, No. 91-4181, 1992 U.S. App. LEXIS 3805, at *14–15 (10th Cir. Mar. 2, 1992).

110-59, at 3 (2007). To rectify this, Congress amended FOIA's fee-award provision in three ways to enhance this provision's deterrent role.

First, Congress established that fees may be awarded under FOIA even based on "a voluntary or unilateral change in position by the agency." Pub. L. No. 110–175, § 4(a), 121 Stat. at 2525. Second, Congress required FOIA fee awards to "be paid only from funds annually appropriated for . . . the [f]ederal agency against which a claim or judgment has been rendered." Pub. L. No. 110–175, § 4(b), 121 Stat. at 2525 Third, Congress increased the amount of legislative oversight enabled by FOIA's disciplinary provision (i.e., as triggered by a FOIA fee award). *See* Pub. L. No. 110–175, § 5, 121 Stat. at 2525–26.

8. Petitioner Michael Gahagan is a Louisiana immigration attorney with his own solo law firm. App. 2. An integral part of Gahagan's successful immigration practice has been using FOIA to compel agency production of records needed to defend his immigration clients. *Id.* This has led Gahagan to file FOIA actions in his name and then litigate these actions himself to protect his clients' privacy. *See Gahagan v. USCIS*, 655 F. App'x 210, 210–11 (5th Cir. 2016). And until recently, Gahagan used to be granted fee awards in these cases. *See*, *e.g.*, *Gahagan v. USCIS*, No. 14-cv-2233, 2016 U.S. Dist. LEXIS 36931, at *63 (E.D. La. Mar. 21, 2016).

9. Between 2013 and 2017, Gahagan litigated and obtained the production of records (or adequate

searches for records) in three separate FOIA actions, each brought in his own name. Two of these actions concerned FOIA requests for agency records that Gahagan needed to aid immigration clients. *See* App. 15–61 (*USCIS*), 66–69 (*USCIS/CBP*). The remaining action concerned FOIA requests for agency records that Gahagan needed to defend himself against an unfounded state bar disciplinary complaint filed by a DOJ attorney. *See* App. 62–65 (*DOJ*).

10. Based on his success, Gahagan moved for costs and fees in each FOIA action, as allowed by then-governing Fifth Circuit law. App. 2–3, 40 n.1. The district courts below agreed that Gahagan had substantially prevailed and granted him over $1,400 in costs. App. 2–3, 34, 65, 69. But the district courts refused to award fees. The first district court to do so held that *Kay* erected a "bright line rule" that "pro se attorney litigants are not entitled to attorney's fees." App. 25–27 (*USCIS*). The other two courts then agreed. App. 63 (*DOJ*), 67–68 (*USCIS/CBP*),

11. Gahagan timely appealed each fee denial to the Fifth Circuit under 28 U.S.C. § 1291. App. 3. The Fifth Circuit then consolidated these appeals for briefing, argument, and decision. App. 2–3.

12. On December 20, 2018, a Fifth Circuit panel affirmed all three judgments below. App. 14. The panel decided that *Kay* overcame the Fifth Circuit's past decisions allowing FOIA fee awards to self-representing attorneys. App. 12. The panel also overruled the Fifth Circuit's past conclusion that § 1988 cases were

"inapposite" to construing FOIA because of significant differences between § 1988 and FOIA's text, history, and purpose. App.8 n.3.

The panel justified this holding on two grounds:

First, the panel held that absent express textual differences, lower courts must read federal fee-award laws identically. *See* App. 9 ("The Supreme Court has . . . instructed us to apply consistent interpretations of federal fee-shifting statutes."); App. 11 ("We would not apply [this principle] . . . when statutes have materially different texts."). The panel extracted this rule from several pre-1994 decisions of this Court—most notably, *Flight Attendants v. Zipes*, in which this Court observed in a footnote that "fee-shifting statutes' similar language is a strong indication that they are to be interpreted alike." 491 U.S. 754, 758 n.2 (1989) (citations and punctuation omitted); App. 10 (quoting *Zipes*). The panel then declared this new rule meant that the panel had to read FOIA's fee-award provision identically to § 1988. App. 12.

Second, the panel held that when a fee-award law uses the word "incurred"—as FOIA's fee-award provision does—this means having "a legal obligation to pay" fees to someone else. App. 13. The panel cast aside earlier Fifth Circuit analysis recognizing that "incurred" also means "foregone" legal work. *Cazalas*, 709 F.2d at 1056. This left the panel free to hold that because "Gahagan had no legal obligation to pay himself, he did not 'incur' . . . fees." App. 13.

13. After the panel issued its decision, the government filed an appellate bill-of-costs. Gahagan objected, arguing that the panel decision precluded a cost award because (among other things): (1) the panel had defined "incurred" to mean an obligation to pay someone else; and (2) the Government had not proven that it had paid—or would pay—its requested costs (printing expenses) to someone else.[13] The panel granted the objection. App. 71.

14. Gahagan timely petitioned for rehearing. The Fifth Circuit denied the petition. App. 73.

15. This certiorari petition follows.

REASONS TO GRANT THE PETITION

I. The Fifth Circuit's rule that federal fee-award laws must be read identically (i.e., absent express textual differences) stands in direct conflict with this Court's decision in *Fogerty* and divides the circuits.

A. *Fogerty* mandates individual analysis of federal fee-award laws.

In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), this Court took on interpreting the scope of 17 U.S.C. § 505—the Copyright Act's fee-award provision. The respondent in *Fogerty* argued that the Court had to

[13] *See* Plaintiff-Appellant Michael W. Gahagan's Objections to Defendants-Appellees' Bill of Costs 6–8, Nos. 17-30898, 17-30901, 17-30999 (5th Cir. filed Jan. 9, 2019).

read § 505 just like Title VII's fee-award provision, 42 U.S.C. § 2000e-5(k), as defined by this Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). *See Fogerty*, 510 U.S. at 520–23.

This meant holding that § 505 and § 2000e-5(k) allowed fee awards to prevailing defendants only when a plaintiff's lawsuit was "frivolous or brought in bad faith." 510 U.S. at 520–21. The respondent in *Fogerty* argued that no other conclusion was possible given the "virtually identical language" of § 505 and § 2000e-5(k) and the Court's previous observation "in *Flight Attendants v. Zipes* . . . that fee-shifting statutes' similar language is a strong indication that they are to be interpreted alike." *Fogerty*, 510 U.S. at 522–23 (citation and punctuation omitted).

This Court disagreed. *See id.* at 523–24. The Court explained that "the factors relied upon in . . . *Christiansburg* . . . [were] absent in the case of the Copyright Act." *Id.* Specifically, the Copyright Act's "legislative history" gave "no support for treating prevailing plaintiffs and defendants differently" under § 505. *Id.* The Court also recognized that Title VII's "goals and objectives" were not similar to those of the Copyright Act. *Id.* at 524. While Title VII's fee-award provision was meant to "provide incentives for the bringing of meritorious [civil-rights] lawsuits," the Copyright Act's fee-award provision was meant to aid the Copyright Act's goal of "encourag[ing] the production of original literary, artistic, and musical expression for the good of the public." *Id.*

In short, this Court affirmed in *Fogerty* that interpretation of federal fee-award laws is not a one-size-fits-all proposition. *See id.* at 523–25. Even when two fee-award laws use the exact same words (e.g., "prevailing party"), these words can mean entirely different things depending on the laws' respective structures, histories, and purposes. *See id*. *Fogerty* thus dictates that fee-award laws must be read just like any other law: not with a pre-determined agenda of imposing uniformity, but with the more humble goal of achieving a fair reading based on "text, context, and history." *United States v. Davis*, No. 18-431, slip op. at 8 (U.S., June 24, 2019).

This means pursuing "a fair understanding of the legislative plan." *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015). It also means recognizing when "words, placed in different contexts, sometimes mean different things." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015). Simply put, reading a fee-award law—like any other law—means "start[ing] with . . . a problem" rather than with "an answer." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947).

The Fifth Circuit's decision here defies these settled principles. The Fifth Circuit declares that it must "apply consistent interpretations to federal fee-shifting statutes." App. 9. But *Fogerty* expressly says that this "normal indication is overborne" when the histories, goals, and objectives of federal fee-award laws diverge. 510 U.S. at 523–24. Such divergence is legion between FOIA and § 1988. *See Cofield*, 648 F.2d at 988.

Yet, the Fifth Circuit ruled that none of this matters. *See* App. 10 n.3 (holding that any differences between FOIA and § 1988 in history and purpose "do[] not survive . . . interpreting all federal fee-shifting provisions consistently").

At a minimum, this kind of reasoning merits summary reversal. *See Tolan v. Cotton*, 572 U.S. 650, 659 (2014) (summarily reversing the Fifth Circuit for its "clear misapprehension" of a legal standard). But a grant of full review on the merits is equally warranted given that the Fifth Circuit's new rule of identical interpretation now places it in conflict with the Seventh Circuit, which has endeavored to honor *Fogerty* in construing fee-award laws.

B. By failing to follow *Fogerty*, the Fifth Circuit has divided the circuits.

In *Stomper v. Amalgamated Transit Union, Local 241*, 27 F.3d 316 (7th Cir. 1994), the Seventh Circuit reversed a grant of fees under § 201(c) of the Labor-Management Reporting and Disclosure Act (LMRDA) (codified at 29 U.S.C. § 431(c)). The grant was based on a district court's decision to "brush[] aside . . . difference[s] between § 201(c) and § 1988." *Id.* at 318. Writing for the *Stomper* panel majority, Judge Easterbrook explained in blunt terms where the district court had gone wrong: "Any tendency to treat all attorneys' fees statutes as if they were insignificant variations on § 1988 was squelched by *Fogerty* . . . which holds that even a statute with the same *text* as § 1988 does not

necessarily have the same *meaning*." *Id.* (emphasis in original).

Writing in dissent, Judge Cudahy agreed with the panel on this point: "*Fogerty*, as the majority indicates, counsels that attorney'[s] fees provisions should turn in part on the purpose of the underlying statute." *Id.* at 321 (Cudahy, J., dissenting). It is the Seventh Circuit's settled rule, then, that "[d]ifferent [fee-award] statutes receive individual analysis." *Id.* at 318 (majority op.); *see also*, *e.g.*, *Wisconsin v. Hotline Indus., Inc.*, 236 F.3d 363, 366 (7th Cir. 2000) ("After *Fogerty*, different [fee-award] statutes receive individual analysis, or should." (some punctuation omitted)); *Citizens for a Better Environment v. Steel Co.*, 230 F.3d 923, 931 (7th Cir. 2000).

The Fifth Circuit here adopts the opposite rule: because "*Kay*[ ] rul[ed] that *pro se* attorneys cannot recover fees under § 1988," this means "*pro se* attorneys are ineligible for fee awards under FOIA." App. 14. The Fifth Circuit thus embraces "treat[ing] all attorneys' fees statutes"—including FOIA's fee-award provision—as "insignificant variations on § 1988." *Stomper*, 27 F.3d at 318. The Court should grant review to resolve this deep split.

II. The Fifth Circuit's holding that attorney fees are "incurred" only when a party has a legal duty to pay attorney fees divides the circuits and risks denying fee awards to countless deserving litigants.

FOIA's fee-award provision allows the recovery of "reasonable attorney fees and other litigation costs reasonably incurred." 5 U.S.C. § 552(a)(4)(E). It is then fair to conclude that "the phrase 'reasonably incurred' modifies the phrase 'other litigation costs,' and not the larger phrase 'reasonable attorney fees and other litigation costs.'" *Cuneo*, 553 F.2d at 1366. After all, "use of the word 'reasonable' immediately preceding and modifying 'attorney fees'" makes it unlikely that "another phrase containing the word 'reasonable' . . . modif[ies] 'attorney fees' as well." *Id.* This interpretation then disposes of the notion that self-representing attorneys cannot recover fees under FOIA because they do not "incur" them. *Id.*

But assuming that "incurred" does in fact modify "reasonable attorney fees" in FOIA's fee-award provision, the Fifth Circuit's narrow definition of "incurred" here warrants this Court's review. According to the Fifth Circuit, the sole meaning that "incurred" can have in a fee-award law is to establish that "fees are incurred when the litigant has a legal obligation to pay them." App. 13 (citation and some punctuation omitted). This definition then precludes FOIA fee awards to self-representing attorneys like Gahagan because "Gahagan ha[s] no legal obligation to pay himself." *Id.* The problem with this reasoning is that it precludes

fee awards to many other persons as well, not to mention dividing the circuits.

A. Unlike the Fifth Circuit, the Seventh Circuit defines "incurred" to reach any expended lawyer time.

The Seventh Circuit defines "incurred" in a manner that respects the flexible nature of this term. This can be seen in *Wisconsin v. Hotline Industries, Inc.*, 236 F.3d 363 (7th Cir. 2000). The Seventh Circuit confronted the argument that the State of Wisconsin—a prevailing plaintiff—could not be granted a fee award because the State "did not incur" fees. *Id.* at 365. The fee-award law at issue, 28 U.S.C. § 1447(c), allowed courts to order "payment of actual expenses, including attorney fees, incurred" by plaintiffs in opposing the improper removal of their cases from state court to federal court. *Id.*

This led the losing defendant in *Hotline* to assert that § 1447(c) did not support a fee award to the State because the State's lawyers "were on the government payroll as salaried employees"—i.e., the State had no legal obligation to pay attorney fees to anyone. *Id.* The Seventh Circuit responded that this did not matter: "salaried government lawyers, like in house and nonprofit counsel, do incur expenses if the time and resources [that] they devote to one case are not available for other work." *Id.*

The Seventh Circuit thus recognizes that one does not need a bill from counsel to "incur" fees. One may

also "incur" fees in giving them up to litigate the case at hand. As Judge Easterbrook notes: "Lawyers who devote their time to one case are unavailable for others, and in deciding whether it is prudent to pursue a given case a firm must decide whether the cost—including opportunities foregone in some other case, or the price of outside counsel to pursue that other case—is worthwhile." *Cent. States, Se., & Sw. Areas Pension Fund v. Cent. Cartage Co.*, 76 F.3d 114, 116 (7th Cir. 1996) (Easterbrook, J.). Hence, "[o]pportunity cost, rather than cash outlay, is the right way to value legal services." *Id.*

A deep circuit split therefore exists between the Seventh Circuit and the Fifth Circuit on the meaning of "incurred" in fee-award laws. The Fifth Circuit here did more than just hold that "incurred" means having "a legal obligation to pay" fees. App. 13. The Fifth Circuit also overruled past Fifth Circuit cases that defined "incurred" to include "work foregone" by an attorney. *Cazalas*, 709 F.2d at 1056; App. 12–13. By adopting this inflexible stance, the Fifth Circuit contradicts not only Seventh Circuit law, but also this Court's own recent teachings on how fee-award laws and FOIA should be interpreted.

B. The Fifth Circuit's inflexible definition of "incurred" contravenes this Court's decisions in *Octane Fitness* and *Food Marketing Institute*.

This Court's decision in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545 (2014), establishes that courts must respect broad language in fee-award laws. At issue was the Patent Act's fee-award provision, 35 U.S.C. § 285, which allows courts "in exceptional cases" to "award reasonable attorney fees to the prevailing party." 572 U.S. at 548. This raised the following question: what is an "exceptional" case? *Id.* at 553. Section 285 does not say. So, the Federal Circuit decided to fill this gap by narrowing the meaning of "exceptional" to two situations: (1) "material inappropriate conduct"; and (2) cases "brought in subjective bad faith" that were also "objectively baseless." *Id.* at 548, 550.

This Court reversed. *See id.* at 554–55. The Court explained that since § 285 did not provide its own definition of "exceptional," this term had to be given "its ordinary meaning" as reflected by the dictionaries of the day. *Id.* at 553 (punctuation omitted). This approach then established that the "exceptional case" was "simply one that stands out from others with respect to the substantive strength of a party's litigating position." *Id.* at 554.

The Federal Circuit's reading of "exceptional," by contrast, "superimpos[ed] an inflexible framework onto statutory text that [was] inherently flexible." *Id.*

at 554–55. The Fifth Circuit's reading of "incurred" here does the same thing. One definition of "incur" is to "become liable"[14]—e.g., having a "legal obligation to pay" fees. App. 13. But "incur" also means to "bring down upon oneself."[15] Attorneys who litigate their own cases bring down upon themselves this work to the exclusion of paying clients. The ordinary meaning of "incurred" then readily supports granting fee awards to self-representing attorneys.

There lies the other major conflict between the Fifth Circuit's narrow reading of "incurred" here and this Court's precedents. In *Food Marketing Institute v. Argus Leader Media*, this Court emphasizes that no court may "arbitrarily constrict" FOIA by "adding limitations found nowhere in its terms." No. 18-481, slip op. at 8, 11 (U.S. June 24, 2019). Yet, the Fifth Circuit here arbitrarily constricts FOIA's fee-award provision by holding that "incurred" refers only to an obligation to pay fees, contrary to this word's broad ordinary meaning. That merits review—or at least a grant-vacate-remand (GVR) so the Fifth Circuit may consider *Food Marketing Institute* (a later decision). *See Lawrence v. Chater*, 516 U.S. 163 (1996).

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[14] *Incur*, MERRIAM-WEBSTER, https://bit.ly/2AmEr5Y (last accessed July 10, 2019).

[15] *Id.*

C. The Fifth Circuit's view of "incurred" fees eliminates fees under FOIA for pro bono, in-house, government, and self-representing attorneys alike.

While the Fifth Circuit may have assumed that its constricted definition of "incurred" would affect self-representing attorneys and no one else, "history exemplifies the 'tendency of a principle to expand itself to the limit of its logic.'" *Krulewitch v. United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring). The Fifth Circuit's decision unsettles the availability of fees under FOIA as to every form of legal representation that does not involve or give rise to a "legal obligation to pay" fees. App. 13.

This means pro bono attorneys. *See* BLACK'S LAW DICTIONARY 1240–41 (8th ed. 2004) (definition of "pro bono" is "uncompensated legal services"). It means in-house attorneys for non-profits, businesses, and law firms—i.e., salaried professionals who do not "charge a client for services performed." *Id.* at 139 (definition of "attorney's fees"). And it means government attorneys, who tend to be forbidden by law from receiving fees. *See*, *e.g.*, 18 U.S.C. § 209(a); *see also Hotline Indus.*, 236 F.3d at 365.

Perhaps recognizing this, the Fifth Circuit opines that its incurred-fee rule may be subject to "exceptions" for "legislative history about *pro bono* representation." App. 14. But statutory construction "cannot arbitrarily depend on who is being tested—strict for some, loose for others." *Cadena Comercial USA Corp.*

v. Tex. Alcoholic Beverage Comm'n, 518 S.W.3d 318, 352 (Tex. 2017) (Willett, J., dissenting). It then becomes clear that the Fifth Circuit's incurred-fee rule is not so much a "textual argument for denying fee awards to *pro se* attorneys," as it is a judicial exercise in picking favorites. App. 13.

For an example of what the Fifth Circuit's incurred-fee rule looks like when it is consistently enforced, consider Illinois law. The Illinois Supreme Court has ruled that Illinois's freedom-of-information law precludes fees to self-representing attorneys, declaring: "[a] lawyer representing himself or herself simply does not incur legal fees." *Hamer v. Lentz*, 547 N.E.2d 191, 197–98 (Ill. 1989). This rule has then been enforced by Illinois courts everywhere it applies—even against law firms and nonprofit legal services groups. *See*, *e.g.*, *In re Marriage of Tantiwongse*, 863 N.E.2d 1188, 1191–92 (Ill. App. Ct. 2007) (law firm); *Uptown People's Law Ctr. v. Dep't of Corrections*, 7 N.E.3d 102, 110 (Ill. App. Ct. 2014) (nonprofit legal services group); *see also State ex rel. Schad, Diamond & Shedden, P.C. v. My Pillow, Inc.*, 115 N.E.3d 923, 929–30 (Ill. 2018) (collecting examples).

Ample reason then exists for the Court to take this case. Applied consistently, the Fifth Circuit's incurred-fee rule means that FOIA fee awards are no longer available to self-representing attorneys, pro bono attorneys, in-house attorneys, and government attorneys alike. And applied *inconsistently*, the Fifth Circuit's incurred-fee rule means that provision of FOIA fee awards will now involve courts "drawing arbitrary and

unfair distinctions among FOIA requesters" to the detriment of FOIA's status as an "equal-opportunity" statute. *Morley v. CIA*, 719 F.3d 689, 691, 693 (Kavanaugh, J., concurring).

III. The Fifth Circuit's holding that FOIA bars fee awards to self-representing attorneys is contrary to a fair reading of FOIA.

A. Plain text, structure, the common law, and history support granting FOIA fee awards to self-representing attorneys.

The ultimate object of statutory interpretation is a "fair reading of legislation." *King*, 135 S. Ct. at 2496. A fair reading of FOIA's fee-award provision supports the conclusion that this provision allows fees to self-representing attorneys.

Text: FOIA allows courts to grant "reasonable **attorney fees** . . . reasonably **incurred** in **any case** under [FOIA] . . . in which the **complainant** has substantially prevailed." 5 U.S.C. § 552(a)(4)(E).

In *Kay*, this Court found the phrase "attorney fees" provided no "clear answer" about granting fees to self-representing attorneys. *Kay*, 499 U.S. at 435–36. But this view merits reexamination in light of the Court's later admonition in *Octane Fitness* that "inherently flexible" language in a fee-award law should be respected. 134 S. Ct. at 1756.

The word "attorney" means "a legal agent." BLACK'S LAW DICTIONARY 138 (8th ed. 2004). It also

means "a person who practices law." *Id.* Without a doubt, the second definition covers self-representing attorneys. So does the first. A "pro se lawyer/litigant does represent a client": "himself/herself." *Sprauve v. Mastromonico*, 86 F. Supp. 2d 519, 530 n.37 (D.V.I. 1999). This supports reading "attorney fees" to include self-representing attorneys. as the opposite conclusion means "superimpos[ing] an inflexible framework onto statutory text that is inherently flexible." *Octane Fitness*, 134 S. Ct. at 1756.

The word "incurred" equally supports granting fees to self-representing attorneys. When this term is given its ordinary meaning—versus the constricted one adopted by the Fifth Circuit here—fees are "incurred" not only when one is obligated to pay them but also when "[attorney] time and resources . . . devote[d] to one case are not available for other work." *Hotline Indus.* 236 F.3d at 365–66. This term then covers pro bono, in-house, government, and self-representing attorneys alike. *See id.*

Finally, "complainant" and "any case" embrace fee awards to self-representing attorneys. "FOIA's fees provision applies to all 'complainants.'" *Baker & Hostetler*, 473 F.3d at 324. "And the word 'any' naturally carries 'an expansive meaning.'" *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018).

Structure: FOIA's fee-award provision cannot be read "in isolation"; it must also be informed by "the remainder of the statutory scheme." *King*, 135 S. Ct. at 2492. FOIA fee awards play an integral role in

triggering (or amplifying) FOIA's disciplinary and reporting provisions. *See* 5 U.S.C. § 552(a)(4)(F)(i); *id.* § 552(e)(6)(A)(ii)(III). The effectiveness of these latter provisions depends on FOIA fee awards being available to redress as many FOIA violations as possible. *Cazalas*, 709 F.2d at 1057. Denying fees to self-representing attorneys weakens this structure, while granting them demonstrates respect for "what [Congress] has done." *King*, 135 S. Ct. at 2496.

One other aspect of FOIA's structure must be noted: 5 U.S.C. § 559. This provision establishes that a "[s]ubsequent statute may not be held to supersede or modify" FOIA "except to the extent that it does so expressly." This provision effectively bars cross-application of § 1988 (and this Court's decisions construing § 1988) to FOIA. Section 1988 was passed in 1976—two years after FOIA's fee-award provision was enacted. *See* Pub. L. No. 93-502, § 1(b)(2), 88 Stat. 1561, 1562 (Nov. 21, 1974). And there is no express language in § 1988 that purports to modify either FOIA or FOIA's fee-award provision.

Common Law: The common law of the English Rule supports granting FOIA fee awards to self-representing attorneys. The common law has long recognized when an attorney litigates his own cause, "it may amount to as much pecuniary loss or damage to him as if he paid another attorney for doing it." *Kopper v. Willis*, 9 Daly 460, 469 (N.Y. Ct. Com. Pl. 1881). Hence, when "an attorney is a party to an action, and obtains a judgment in his favour, he is entitled to the same costs as if he had conducted the action as attorney for

some other person."[16] And FOIA's fee-award provision contains no language that contradicts this common-law rule. *Cf. United States v. Texas*, 507 U.S. 529, 534 (1993).

History: The legislative history of FOIA's fee-award provision amply supports fee awards to self-representing attorneys. *See Texas v. ICC*, 935 F.2d 728, 731–32 (5th Cir. 1991); *Cazalas v. DOJ*, 709 F.2d 1051, 1057 (5th Cir. 1983). This history shows that Congress designed FOIA's fee-award provision to do more than just compensate FOIA requesters. Congress also meant "to deter the government from opposing justifiable requests for information under . . . FOIA and to punish the government where such opposition is unreasonable." *Cazalas*, 709 F.2d at 1057. And those goals "apply with equal force where an attorney litigant proceeds *pro se*." *Id.*

The history of the OPEN Government Act of 2007 (OGA) bolsters this conclusion. The OGA establishes that FOIA fee awards must "be paid only from funds annually appropriated for . . . the [f]ederal agency against which a [FOIA] claim or judgment has been rendered." Pub. L. No. 110–175, § 4(b), 121 Stat. at 2525. This amendment repudiates the First Circuit's view that FOIA's fee-award provision does not serve a punitive function since "[t]he fees do not come out of the pockets of those who obdurately refuse to disclose." *Aronson*, 866 F.2d at 5.

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[16] 1 SAMUEL PRENTICE, *supra* note 3, at 78.

B. This Court's mode-of-analysis in *Kay* supports granting FOIA fee awards to self-representing attorneys.

While this Court concluded in *Kay* that granting § 1988 fee awards to self-representing attorneys was not sound policy, that does not mean *Kay* compels the same view as to FOIA. As *Fogerty* reveals, *Kay* poses no obstacle to the allowance of FOIA fee awards to self-representing attorneys to the extent that "the factors relied upon in . . . [*Kay*] are absent in the case of [FOIA]." *Fogerty* 510 U.S. at 523.

The factors that drove this Court in *Kay* to reject § 1988 fees to self-representing attorneys had to do with the "effective prosecution of meritorious [civil-rights] claims." 499 U.S. at 435. The Court was concerned with the disadvantages that attorneys who represented themselves faced in performing tasks like "cross-examining hostile witnesses." *Id.*

Those factors are not a part of FOIA litigation, which is "an iterative motions process." *Wisdom v. United States Tr. Program*, 266 F. Supp. 3d 93, 102 (D.D.C. 2017). Just so: FOIA is meant to be "a speedy remedy in district courts" where "the burden is on the agency to sustain its action." *EPA v. Mink*, 410 U.S. 73, 79 (1973). Finally, unlike § 1988, FOIA's "legislative history" and "goals and objectives" equally support granting fees to self-representing attorneys. *Fogerty*, 510 U.S. at 522–23; *see Cazalas*, 709 F.2d at 1057; *ICC*, 935 F.2d at 731–32.

C. The D.C. Circuit's allowance of FOIA fee awards to law firms amounts to a functional circuit split.

The D.C. Circuit has recognized that law-firm FOIA requesters may be granted FOIA fee awards because "FOIA's fees provision applies to all 'complainants' who have 'substantially prevailed.'" *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 324 (D.C. Cir. 2006) (Kavanaugh, J.). It should then make no difference whether the law firm in question has 100 lawyers, 10 lawyers, or just one lawyer. Yet, the D.C. Circuit has ruled that self-representing attorneys—i.e., law firms of one—cannot recover fees under FOIA. *See Burka v. HHS*, 142 F.3d 1286, 1288–90 (D.C. Cir. 1998). This kind of arbitrary distinction only underscores the questions presented here and why they merit review.

CONCLUSION

The Court should grant this petition.

Respectfully submitted,

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