No. 19-73

In the Supreme Court of the United States

MICHAEL W. GAHAGAN, PETITIONER

v.

CITIZENSHIP & IMMIGRATION SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
CHARLES W. SCARBOROUGH
CASEN B. ROSS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a pro se litigant who is also a lawyer may obtain attorney fees under the Freedom of Information Act, 5 U.S.C. 552(a)(4)(E).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 911 F.3d 298. The order of the district court in No. 16-cv-15438 (Pet. App. 15-34) is not published in the Federal Supplement but is available at 2017 WL 4003851. The order of the district court in No. 13-cv-5526 (Pet. App. 62-65) is not published in the Federal Supplement but is available at 2017 WL 4168409. The order of the district court in No. 15-cv-6218 (Pet. App. 66-69) is not published in the Federal Supplement but is available at 2017 WL 6540409.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2018. A petition for rehearing was denied on February 26, 2019 (Pet. App. 72-74). On May 22, 2019, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including July 11, 2019, and the petition was filed on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, who is a lawyer, filed three pro se lawsuits in the Eastern District of Louisiana, seeking documents from federal agencies under the Freedom of Information Act (FOIA), 5 U.S.C. 552 (2012 & Supp. V 2017). Pet. App. 2. In two of the suits, petitioner sought documents that he intended to use to assist his clients in separate immigration proceedings. *Id.* at 15-16, 66-67. In the third suit, petitioner sought documents to assist his own defense in a state bar disciplinary proceeding. *Id.* at 62, 64. After substantially prevailing in all three FOIA suits, petitioner moved for awards of attorney fees and costs under FOIA's attorney-fee provision, 5 U.S.C. 552(a)(4)(E). Pet. App. 3, 34, 65, 69. In each suit, the district court awarded petitioner costs, but not attorney fees. *Ibid.*

a. Based principally on *Kay* v. *Ehrler*, 499 U.S. 432 (1991), the district court in the first suit held that petitioner was not entitled to attorney fees. Pet. App. 15-34. In *Kay*, this Court held that a pro se attorney was not entitled to attorney fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988. Based on the text and purposes of the statute, the Court concluded that Congress likely "contemplated an attorney-client relationship as the predicate for an award under § 1988." Pet. App. 20 (quoting *Kay*, 499 U.S. at 436). Here, the district court observed that courts had "uniformly" held that in light of *Kay*, attorneys proceeding pro se could not recover attorney fees under FOIA's fee-shifting provision. *Id.* at 22. The district court also concluded that *Kay* had "implicitly overruled" a prior Fifth Circuit decision, *Cazalas* v. *United States Dep't of*

Justice, 709 F.2d 1051 (1983), that had allowed attorneys proceeding pro se to recover attorney fees under FOIA. Pet. App. 25. The district court therefore declined to award petitioner attorney fees but awarded him costs under FOIA. *Id.* at 34.

b. The district courts in the second and third suits also declined to award attorney fees to petitioner, relying on the reasoning of the district court in petitioner's first suit. Pet. App. 63, 67-68.

2. The court of appeals consolidated petitioner's appeals from the three district court rulings and affirmed in a single decision. Pet. App. 1-14. The court of appeals observed that, although it had issued pre-*Kay* decisions that allowed attorneys proceeding pro se to recover attorney fees under FOIA, *id.* at 4-5, it had not yet decided whether that holding survived *Kay*, *id.* at 6. Addressing that question, the court agreed with every circuit that has considered the issue post-*Kay* that attorneys proceeding pro se cannot recover attorney fees under FOIA. *Id.* at 10-11.

The court of appeals observed that "[t]he Supreme Court has repeatedly instructed us to apply consistent interpretations to federal fee-shifting statutes." Pet. App. 9 (citing cases). The court recognized that this principle is "not limitless" and will not control "when statutes have materially different texts." *Id.* at 11. But the court found that this principle counseled in favor of applying *Kay*'s reasoning to FOIA, because there was "no textual difference suggesting a prevailing *pro se* attorney is eligible for an award of fees under FOIA but not § 1988." *Id.* at 12.

Specifically, the court of appeals observed that "*Kay* considered the meaning of 'attorney' in § 1988's use of 'a reasonable attorney's fee,'" and the court found FOIA

to be "materially identical in that regard." Pet. App. 13 (citation omitted). The court added that "the textual argument for denying fee awards to *pro se* attorneys is even stronger under FOIA than under § 1988" because FOIA, unlike Section 1988, limits awards "to those fees 'reasonably incurred.'" *Ibid.* (citation omitted). It determined that petitioner did not "incur" fees "[b]ecause [petitioner] had no legal obligation to pay himself." *Ibid.* The court found it unnecessary to decide whether attorney fees can sometimes be awarded even when the litigant has no obligation to pay counsel, such as when counsel performs work pro bono or when litigation costs are covered by insurance. *Id.* at 14. The court concluded by summarizing the four primary bases for its holding that pro se attorneys are not eligible for fee awards under FOIA: "(1) *Kay*'s ruling that *pro se* attorneys cannot recover fees under § 1988; (2) Supreme Court instructions that federal fee-shifting statutes should be interpreted consistently; (3) the uniform agreement of our sister circuits that *pro se* attorneys cannot recover attorney fees under FOIA after *Kay*; and (4) statutory text supporting that result." *Ibid.*

ARGUMENT

The court of appeals correctly held that petitioner was not entitled to attorney fees in this case. As petitioner acknowledges (Pet. 7), there is no current disagreement among the courts of appeals regarding attorney fees for pro se attorney litigants under FOIA. Further review is not warranted.

1. The court of appeals correctly held that attorneys proceeding pro se cannot recover attorney fees under FOIA. In interpreting particular fee-shifting statutes, this Court has long relied on the constructions that it

has given to other, similarly worded fee-shifting provisions. See *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 n.4 (2001); *City of Burlington* v. *Dague*, 505 U.S. 557, 562 (1992); *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 758 n.2 (1989); *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 n.7 (1983).

Accordingly, the court of appeals began its analysis with *Kay* v. *Ehrler*, 499 U.S. 432 (1991), in which this Court unanimously held that an attorney who had represented himself in a successful civil rights case could not recover attorney fees under 42 U.S.C. 1988. Pet. App. 4-5. While acknowledging that the pro se litigant in that case had performed his professional responsibilities competently, this Court concluded that "the word 'attorney' assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under § 1988." *Kay*, 499 U.S. at 435-436 (footnote omitted). The Court further explained that permitting pro se plaintiffs who are attorneys to recover attorney fees would frustrate the statutory purpose of ensuring "effective prosecution of meritorious claims," because it "would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf." *Id.* at 437-438. The Court concluded that the "statutory policy of furthering the successful prosecution of meritorious claims" would be "better served by a rule that creates an incentive to retain counsel in every such case." *Id.* at 438.

As the court below and every other court of appeals to consider the question have recognized, *Kay*'s reasoning applies here. FOIA allows recovery of "attorney fees"—a term that is materially indistinguishable from

the term "attorney's fees" that this Court construed in *Kay*. And the statutory objective on which the *Kay* Court relied is also implicated under FOIA. The Court in *Kay* determined that "[t]he statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel" instead of proceeding pro se. 499 U.S. at 438. That is so, the Court determined, because "[e]ven a skilled lawyer who represents himself is at a disadvantage in contested litigation," including because a pro se lawyer "is deprived of the judgment of an independent third party in framing the theory of the case" and in "formulating legal arguments." *Id.* at 437.

Petitioner does not dispute that the key term in FOIA's fee-shifting provision is materially indistinguishable from the key term at issue in *Kay*. Nor does he dispute that FOIA's fee-shifting provision is also intended to further the prosecution of meritorious claims. And while he posits that one task the *Kay* Court described an independent attorney as better suited to performing—"cross-examining hostile witnesses"—would not arise in FOIA litigation, Pet. 36 (citation omitted), the Court also described independent attorneys as better suited to responsibilities that *do* arise in FOIA cases, see *Kay*, 499 U.S. at 437-438 (describing independent counsel as better situated to formulate legal arguments and frame the plaintiff's theory of the case).

The Court in *Kay* "implicitly reject[ed] the posited distinction between fee claims arising under section 1988 and FOIA," by favorably citing a FOIA decision on "attorney fees" in the course of construing Section 1988. *Benavides* v. *Bureau of Prisons,* 993 F.2d 257, 259 (D.C. Cir.), cert. denied, 510 U.S. 996 (1993). The Court's

opinion in *Kay* contained a "lengthy discussion" of *Falcone* v. *IRS*, 714 F.2d 646 (6th Cir. 1983), cert. denied, 466 U.S. 908 (1984), in which the Sixth Circuit had held that pro se attorney litigants are ineligible for attorney's fees under FOIA. *Burka* v. *United States Dep't of Health & Human Servs.*, 142 F.3d 1286, 1289 (D.C. Cir. 1998). The *Kay* Court signaled approval of *Falcone* by describing the decision in its analysis and "sa[ying] absolutely nothing to suggest that the rationale given to support the holding in *Falcone* was wanting or that the considerations affecting the disposition of fee claims under FOIA and section 1988 should be viewed differently." *Benavides*, 993 F.2d at 260.

Petitioner argues (Pet. 32-33) that the use of common terms like "attorney fees," "incurred," "any case," and "complainant" in Section 552(a)(4)(E) suggests that this provision should be read broadly to permit fee awards to pro se attorneys. But Section 1988 contains similarly expansive language, stating that a prevailing party may be entitled to attorney fees in "any action or proceeding," 42 U.S.C. 1988(b), and this Court in *Kay* declined to construe that language as expansively as petitioner advocates here. 499 U.S. at 435-436. Indeed, in *Kay* this Court drew precisely the opposite inference from the term "attorney's fee," construing that term to "contemplate[] an attorney-client relationship," *ibid.*, that is absent in litigation involving a pro se litigant who happens to be an attorney.

Petitioner also argues (Pet. 33-35) that FOIA's structure and history support attorney fees for pro se attorney litigants. He argues that such fees would further the objective of "redress[ing] as many FOIA violations as possible," Pet. 34, and describes the legislative history as evincing an intent "to deter the government

from opposing justifiable requests for information," Pet. 35 (citation omitted). But as explained above (see pp. 6-7, *supra*), the Sixth Circuit in *Falcone* held that pro se attorney litigants may not recover attorney fees under FOIA because the statute was intended to encourage potential claimants to obtain objective legal advice and "to relieve plaintiffs with legitimate claims of the burden of legal costs." 714 F.2d at 647. This Court endorsed that reasoning in *Kay*, where it concluded that the policy of advancing meritorious claims would be better served by making attorney fees unavailable to pro se litigants, on the ground that even skilled attorneys can better pursue their claims through independent counsel. 499 U.S. at 438; see *id.* at 434 n.4. *Kay*'s reasoning demonstrates that the court of appeals' construction serves the statutory aims petitioner identifies—redressing FOIA violations and deterring unjustified government opposition—by creating incentives for litigants to retain counsel who can effectively advance their FOIA claims.

2. There is no disagreement among the courts of appeals on the question presented. As petitioner acknowledges (Pet. 7), since *Kay* was decided, every court of appeals to consider the question has held that attorneys litigating pro se may not recover attorney fees under FOIA. See *Pietrangelo* v. *United States Army*, 568 F.3d 341, 344-345 (2d Cir. 2009) (per curiam); *Burka*, 142 F.3d at 1289-1290; *Ray* v. *U.S. Dep't of Justice*, 87 F.3d 1250, 1251 n.2 (11th Cir. 1996).

a. Petitioner relies on several decisions that do not address attorney fees for pro se litigants under FOIA. Petitioner first suggests (Pet. 20-24) that the decision below conflicts with *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517 (1994), and *Stomper* v. *Amalgamated Transit Union,*

Local 241, 27 F.3d 316 (7th Cir. 1994). In *Fogerty*, this Court construed the fee-shifting provision of the Copyright Act of 1976, 17 U.S.C. 505, differently from an almost identically worded provision in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k). The Court had previously construed Title VII to require that "different standards * * * be applied to successful plaintiffs than to successful defendants," such that "a prevailing plaintiff 'should ordinarily recover an attorney's fee.'" *Fogerty*, 510 U.S. at 522-523 (citation omitted). In *Fogerty*, however, this Court held that the Copyright Act of 1976 did not contemplate such differential treatment, relying on differences between the two statutes' legislative histories and objectives. *Id.* at 523-524.

In *Stomper*, the Seventh Circuit invoked *Fogerty* in interpreting a provision in the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. 431(c). The *Stomper* court read *Fogerty* to discountenance an interpretive approach under which "all attorneys' fee statutes" would be treated "as if they were insignificant variations on § 1988." *Stomper*, 27 F.3d at 318. The court concluded that the language of Section 431(c) did not support attorney fees for litigants unless they had obtained judgments in their favor. *Ibid.*

Petitioner contends (Pet. 20-24) that the decision below conflicts with *Fogerty* and *Stomper* because those decisions establish that courts should undertake individualized analysis of different fee-shifting laws. But the court below did not "adopt[] the opposite rule." Pet. 24. To the contrary, the court of appeals recognized that the principle of giving federal fee-shifting statutes consistent application was "not limitless." Pet. App. 11. And it discussed not only the similarities between FOIA and Section 1988, but the differences as well, concluding

that "the textual argument for denying fee awards to *pro se* attorneys is even stronger under FOIA than under § 1988, which does not contain the independent requirement that fees be 'incurred.'" *Id.* at 13. Thus, rather than rejecting "individual analysis" of fee-shifting statutes, Pet. 20 (emphasis omitted), the court simply held that such analysis provided no sound basis for construing FOIA's fee-shifting provision differently from Section 1988 with respect to pro se attorneys. See Pet. App. 13-14.

b. Petitioner alternatively asserts (Pet. 25-32) that this Court should grant review to analyze the court of appeals' reasoning regarding the term "incurred" in the FOIA fee-shifting provision. See Pet. App. 13-14 (concluding that FOIA's limitation of awards to fees "'reasonably incurred'" reinforced the conclusion that attorneys proceeding pro se were not eligible for attorney fees under FOIA, since a pro se litigant does "not 'incur' any attorney fees") (citation omitted). Petitioner's arguments lack merit.

i. Petitioner asserts (Pet. 28-29) that the court of appeals' construction of the term "incurred" conflicts with *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 572 U.S. 545 (2014), and *Food Marketing Institute* v. *Argus Leader Media*, 139 S. Ct. 2356 (2019). That is incorrect. Those decisions did not interpret the term "incurred" or address the question that is presented here.

Octane Fitness concerned the definition of "exceptional" under the fee-shifting provision of the Patent Act of 1952, 35 U.S.C. 285, see 572 U.S. at 553-554, and *Food Marketing Institute* concerned the definition of "confidential" under FOIA Exemption 4, 5 U.S.C. 552(b)(4), see 139 S. Ct. at 2362-2363. Petitioner invokes those decisions' statements that statutory terms should receive

their "ordinary meaning," Pet. 28 (quoting *Octane Fitness*, 572 U.S. at 553), and that statutes should not be "arbitrarily constrict[ed]" through "limitations found nowhere in [their] terms," Pet. 29 (quoting *Food Mktg. Inst.*, 139 S. Ct. at 2366). But the decision below is consistent with those principles. The court of appeals grounded its interpretation in the text, relying on this Court's construction of the term "attorney's fee," Pet. App. 9-12, and on the ordinary meaning of the term "incurred," *id.* at 13 (citing cases construing that term).

ii. Petitioner also suggests that the court of appeals' interpretation of "'incurred' fees eliminates fees under FOIA for pro bono, in-house, government, and self-representing attorneys alike." Pet. 30 (emphasis omitted). Petitioner contends (Pet. 26-27) that the decision therefore conflicts with *Wisconsin* v. *Hotline Industries, Inc.*, 236 F.3d 363 (2000), in which the Seventh Circuit held that a State represented by salaried government lawyers may be entitled to attorney fees under the improper-removal statute, 28 U.S.C. 1447(c). 236 F.3d at 365.

Petitioner's claim of a circuit conflict is unfounded, since this case and *Hotline Industries* involve different statutes and different arrangements for counsel. See Pet. App. 13-14. Although the court below viewed the FOIA term "incurred" as supporting its conclusion, it noted that "courts 'have recognized exceptional situations for which an award of attorney's fees is *not* contingent upon an obligation to pay counsel,' despite the 'incurred' requirement." *Ibid.* (quoting *United States* v. *Claro*, 579 F.3d 452, 465 (5th Cir. 2009)). The court concluded that, because the rationales for those decisions "would not apply to [petitioner] in any event," the court "need not decide their validity here." *Id.* at 14. The

court's decision on pro se litigants thus does not generate any conflict regarding fees for other classes of attorneys.

c. Finally, petitioner briefly contends that the court of appeals' decision created a "functional circuit split" with the D.C. Circuit, Pet. 37 (emphasis omitted), which has held that "a law firm that represents itself remains eligible for attorney's fees" under FOIA. *Baker & Hostetler LLP* v. *United States Dep't of Commerce*, 473 F.3d 312, 326 (2006). But the D.C. Circuit agrees with the court below that attorneys proceeding pro se cannot recover fees under FOIA. *Burka*, 142 F.3d at 1289-1290. In concluding that *law firms* representing themselves may recover attorney fees, the D.C. Circuit relied on *Kay*'s conclusion that an attorney-client relationship exists in such cases—unlike in cases involving individual pro se litigants. See *Baker & Hostetler*, 473 F.3d at 325-326 (discussing *Kay*, 499 U.S. at 436 n.7). The D.C. Circuit also determined that such representations do not pose the impediments to effective prosecution of claims that *Kay* found existed in individual pro se representations. *Ibid.*

The *Baker & Hostetler* court noted that its decision aligned with those of other courts of appeals, including a decision in which the Fifth Circuit had construed *Kay* as drawing a "distinction between individual and organizational litigants," and had held that a law firm representing itself could recover under a Louisiana statute shifting "attorney fees." 473 F.3d at 325-326 (discussing *Gold, Weems, Bruser, Sues & Rundell* v. *Metal Sales Mfg. Corp.*, 236 F.3d 214, 218-219 (5th Cir. 2000)); see *Gold, Weems, Bruser, Sues & Rundell*, 236 F.3d at 217, 220. Particularly because courts of appeals (including

the court below) have found that individual pro se litigants and law firms representing themselves warrant different treatment under *Kay*, the panel's decision regarding individual pro se litigants does not establish a conflict on whether law firms representing themselves can recover attorney fees under FOIA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
CHARLES W. SCARBOROUGH
CASEN B. ROSS
Attorneys

SEPTEMBER 2019