No. 19-73

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

PETITIONER'S REPLY BRIEF

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INTRODUCTION

On three separate occasions, federal agencies wrongfully denied Petitioner Michael W. Gahagan what the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, promises every American: "full agency disclosure unless information is exempted under clearly delineated statutory language." *Dep't of Air Force v. Rose*, 425 U.S. 352, 360–61 (1976). The government's FOIA violations in one of these cases were so egregious that they prompted the assigned magistrate judge to observe: "[i]f this case has proven anything, it is that . . . when it comes to recordkeeping and record production, [the government] is ***not*** a steward of good government practices." Pet. App. 46 n.4 (emphasis in original) (punctuation omitted).

Recognizing the need to deter and penalize this kind of government misconduct, Congress amended FOIA in 1974 to allow court awards of attorney fees to prevailing FOIA litigants. *See* Pub. L. No. 93-502, § 1(b)(2), 88 Stat. 1561 (1974) (codified at 5 U.S.C. § 552(a)(4)(E)). Through this provision and later amendments to it, Congress made FOIA fee awards the linchpin for ensuring that every FOIA violation is met with consequences. Disciplinary consequences for the agency employees involved. *See* 5 U.S.C. § 552(a)(4)(F). Financial and reporting-to-Congress consequences for the agencies involved. *See* 5 U.S.C. § 552(e)(6)(A)(ii)(III); Pub. L. No. 110-175, §§ 4(b), 5, 121 Stat. 2524 (2007).

Yet, when the district courts here found that the government had repeatedly violated FOIA's mandates, no FOIA fee award was granted, allowing the offending agencies to escape the above consequences.

Why?

Not because Gahagan's FOIA cases lacked an attorney—something that, if true, would make an *attorney* fee award impossible. Gahagan was a licensed attorney, fully accountable for his conduct as an officer of the court. Pet. App. 2; *see also Sprauve v. Mastromonico*, 86 F. Supp. 2d 519, 530 n.37 (D.V.I. 1999) ("The plaintiff is an attorney whenever he appears before the Court, the public, or the mirror.").

Not because the government's FOIA violations left Gahagan unscathed. These violations consumed an inordinate amount of Gahagan's most precious resource as an attorney: time. *See*, *e.g.*, Pet. App. 59 (finding Gahagan lost 42 hours in one case); *see also* Pet. App. 46–47 ("USCIS . . . could have precluded an attorney's fees award by delivering a copy of the Receipt Notice before this lawsuit was filed.").

No, the sole reason why the district courts here did not award fees under FOIA is because Gahagan represented himself. *See* Pet. App. 25–27, 63, 67–68. Put another way, the district courts opted to give the government a free pass for FOIA violations when prosecuted by self-representing attorneys. The Fifth Circuit then expanded that free pass to include pro bono, in-house, and government attorneys—indeed any

FOIA case in which the FOIA requester fails to retain separate fee-based counsel. Pet. App. 8–13.

In its brief-in-opposition to certiorari (BIO), the government makes no real effort to defend what the Fifth Circuit's decision actually means. *See* BIO 4–13. The government instead rebuilds the Fifth Circuit's analysis to create an impression of harmony with this Court's cases and sister circuit decisions. The result is a Frankenstein's monster. For example, according to the government's BIO, the Fifth Circuit correctly held that FOIA's fee-award provision bars fee awards to self-representing attorneys based on an individualized analysis of this provision that categorically excluded consideration of the provision's distinct structure, history, and purpose.

The government's BIO thus illustrates why the Court should grant review in this case. The Fifth Circuit held that FOIA's fee-award provision was not entitled to a fair reading—only a one-size-fits-all reading to conform this provision to other fee-award laws. This decision subsequently jeopardizes FOIA's disciplinary, financial, and reporting provisions, as well as the fee-award rights of countless deserving FOIA requesters. The Court should therefore either summarily reverse (based on *Fogerty*), grant-vacate-remand (based on *Food Marketing Institute*), or grant full review (based on any of the circuit splits or important federal questions involved).

ARGUMENT

I. The government's BIO affirms that the Fifth Circuit's identical-interpretation rule for fee-award laws directly conflicts with *Fogerty* and splits the circuits.

The government does not dispute that *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) and *Stomper v. Amalgamated Transit Union, Local 241*, 27 F.3d 316 (7th Cir. 1994) establish the rule that "courts should undertake individualized analysis of different fee-shifting laws" that accounts for "differences . . . [in] legislative histories and objectives." BIO 9. The government also does not dispute that the Fifth Circuit here described itself as carrying out the rule that "all federal fee-shifting provisions" must be read "consistently"—regardless of differences in legislative history and purpose—because these differences "do[] not survive" the rule. Pet. App. 9–10 & n.3.

A direct conflict then exists between the Fifth Circuit's *identical*-interpretation rule for fee-award laws and this Court's *individualized*-interpretation rule for the same laws (which the Seventh Circuit joins). The first rule casts aside material differences in legislative history and purpose; the second rule honors these differences. Perhaps recognizing this, the government proceeds to maintain that the Fifth Circuit did in fact perform an individualized analysis of FOIA's fee-award provision. BIO 9–10.

The government's only support for this view, however, is the Fifth Circuit's self-justifying analysis of the word "incurred," BIO 9–10—*not* any Fifth Circuit discussion of FOIA's structure, history, or purpose resembling this Court's individualized analysis of the Copyright Act's fee-award provision in *Fogerty*. For good reason: had the Fifth Circuit analyzed FOIA's fee-award provision in a manner faithful to *Fogerty*, the Fifth Circuit would have been obliged to conclude—as it did over two decades earlier—that FOIA does allow fee awards to self-representing attorneys. *See*, *e.g.*, *Texas v. ICC*, 935 F.2d 728, 731–32 & n.17 (5th Cir. 1991) (finding the "legislative history" of FOIA's fee-award provision "la[id] . . . to rest" any doubt about this provision allowing fee awards to self-representing attorneys and state government attorneys alike).

The same goes for the Fifth Circuit's handling of the word "incurred." Individualized analysis of this word means reading it *in context*—i.e., in light of FOIA's structure, history, and purpose. This context establishes that "FOIA is an equal-opportunity disclosure statute." *Morley v. CIA*, 719 F.3d 689, 691 (D.C. Cir. 2013) (Kavanaugh, J., concurring). It then follows that "incurred" should be given its full equal-opportunity meaning (*see* Pet. 29), which covers the "work foregone and . . . personal energy" spent by attorneys who represent themselves in FOIA cases. *Cazalas v. DOJ*, 709 F.2d 1051, 1056 (5th Cir. 1983). This reading observes that "[w]ords are not pebbles in alien juxtaposition." *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (Hand, L., J.).

By contrast, "alien juxtaposition" is exactly how the Fifth Circuit went about defining "incurred" here. *See* Pet. App. 13–14. Without any reference to FOIA, the Fifth Circuit held that "incurred" under FOIA's fee-award provision carries the same narrow legal-duty-to-pay definition that the Fifth Circuit gave to this word under the Hyde Amendment, Pub. L. No. 105-119, § 617, 111 Stat. 2519 (1997), which allows prevailing criminal defendants to recover fee awards in narrow circumstances. Pet. App. 13 (quoting *United States v. Claro*, 579 F.3d 452 (5th Cir. 2009)). As such, the Fifth Circuit's reading of "incurred" here is just another iteration of the Fifth Circuit's identical-interpretation rule. The government's spotlighting of this analysis then only affirms why this case merits review—if not a grant of summary reversal based on the Fifth Circuit's tacit refusal to follow *Fogerty*.

II. The government's BIO affirms that the Fifth Circuit's legal-duty-to-pay definition of "incurred" is an arbitrary one that splits the circuits, defies this Court, and harms numerous deserving FOIA litigants.

In *Food Marketing Institute (FMI) v. Argus Leader Media*, this Court establishes that "a court's proper starting point" in reading FOIA "lies in a careful examination of the ordinary meaning and structure of the law itself." 139 S. Ct. 2356, 2364 (2019). Applied to FOIA's use of the word "incurred," since "FOIA nowhere defines the term," a court's job is to ask what the "ordinary, contemporary, common meaning" of this

term was "when Congress enacted" FOIA's fee-award provision back in 1974. *Id.* at 2362. This means consulting, at a minimum, "dictionary definitions" and "early case law." *Id.* at 2363.

The government disputes none of this. BIO 11–12. Nor does the government dispute that from 1974 to today, the ordinary meaning of "incurred" has been "to become liable or subject to" or "bring down upon oneself." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 425 (1971); *see also Incur*, MERRIAM-WEBSTER, https://bit.ly/2AmEr5Y (last accessed Sept. 24, 2019) ("to become liable or subject to: bring down upon oneself"). Finally, the government does not dispute that the ordinary meaning of "incur" covers fee awards to self-representing attorneys, as these attorneys "bring down upon themselves" the devotion of attorney time required to litigate their cases. *Compare* BIO 11–12 *with* Pet. 28–29, 33.

The government's BIO then affirms why this Court should grant-vacate-remand in light of *FMI*. The Fifth Circuit ruled here that "incurred" has only one meaning: "a legal obligation to pay." Pet. App. 13. This is exactly what *FMI* says courts cannot do when reading FOIA: "arbitrarily constrict it . . . by adding limitations found nowhere in its terms." 139 S. Ct. at 2366. Against this reality, the government insists "the decision below is consistent with [*FMI*]." BIO 11. But the government fails to explain how this can be true given the Fifth Circuit's failure to consult a single dictionary, much less any early case law—authority that disproves the Fifth Circuit's constricted definition of

"incurred." *See*, *e.g.*, *Kopper v. Willis*, 9 Daly 460, 468–69 (N.Y. Ct. Com. Pl. 1881) (noting that under "general rule" that fees must be "actually incurred," fees may be granted to a self-representing attorney because his self-employment "may amount to as much pecuniary loss . . . to him as if he paid another attorney").

The government is also unable to overcome the fact that the Fifth Circuit's constrained definition of "incurred" stands in direct conflict with *Wisconsin v. Hotline Industries, Inc.*, 236 F.3d 363 (7th Cir. 2000). The Seventh Circuit ruled in *Hotline* that "incurred" covers more than a duty to pay fees—it also covers what attorneys suffer "if the time and resources they devote to one case are not available for other work." *Id.* at 365–66. The government argues that *Hotline* and the present case "involve different statutes and different arrangements for counsel." BIO 11. But that is a reason to grant review, as this Court's fee-award decisions show. *See*, *e.g.*, *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of H.H.S.*, 532 U.S. 598, 600–02 (2001) (review granted to resolve circuit split over the term "prevailing party" that spanned "[n]umerous" different federal fee-award laws).

Such review is also especially important in this case given that under the Fifth Circuit's reading of "incurred," FOIA fee awards are no longer available to countless deserving FOIA litigants beyond self-representing attorneys. The government does not dispute that if the definition of "incurred" is limited to having a legal duty to pay fees, then FOIA fee awards can no longer be granted based on work done by either

pro bono, in-house, or government counsel. *Compare* Pet. 30–32 *with* BIO 10–12.

The government instead argues that the Court need not worry about this given the Fifth Circuit's stated willingness to abandon its definition of "incurred" in "exceptional situations." BIO 11 (citing Pet. App. 13–14). But once again, the government's own analysis shows why the Court should grant review: because the alternative is to allow the Fifth Circuit to replace the ordinary meaning of FOIA's fee-award provision "[w]ith a vast body of artificial, judge-made doctrine . . . [that] meanders its well-intentioned way through the legal landscape leaving waste and confusion (not to mention circuit splits) in its wake." *Hensley v. Eckerhart*, 461 U.S. 424, 455 (1983) (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., concurring in part and dissenting in part).

III. The government's BIO affirms that the Fifth Circuit's bar on FOIA fee awards to self-representing attorneys does not derive from a fair reading of FOIA.

Time and again in recent years, this Court has emphasized that statutory interpretation is a matter of securing the people's right to "rely on the original meaning of the written law." *Wisc. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). Every federal statute is thus entitled to a fair reading—i.e., a principled effort to determine the law's "ordinary, contemporary, common meaning" at the time Congress passed

the law. *Id.* Otherwise, "[w]ritten laws . . . [cannot] be understood and lived by," and "the point of reducing them to writing . . . [is] lost." *Id.*

Based on these fundamental principles, it is clear that FOIA's fee-award provision did not receive a fair reading in this case. The Fifth Circuit made no effort to decide the status of self-representing attorneys under FOIA's fee-award provision based on analysis of this provision's original meaning in 1974. Pet. App. 8–14. The government, in turn, does not dispute that self-representing attorneys are covered by the original ordinary meaning of every relevant term in FOIA's fee-award provision. *Compare* Pet. 32–33 (defining the words "attorney fees," "incurred," "any case," and "complainant") *with* BIO 7.

The government instead presumes—as the Fifth Circuit did—that the original meaning of FOIA's fee-award provision no longer matters in light of *Kay v. Ehrler*, 499 U.S. 432 (1991). Because *Kay* "declined" to allow fee awards to self-representing attorneys under 42 U.S.C. § 1988, the government maintains that no different answer is possible for any fee-award law that contains any of the same terms as § 1988 (e.g., "attorney fees"). BIO 7. The government refuses to acknowledge that "the presumption of consistent usage readily yields to context." *UARG v. EPA*, 134 S. Ct. 2427, 2441 (2014) (punctuation omitted).

And here, context is everything. Unlike § 1988, FOIA's fee-award provision is part of a broader statutory scheme to ensure that no FOIA violation goes

unreported or unpunished. Pet. 33–34. Unlike § 1988, FOIA's fee-award provision is informed by an extensive body of legislative history demonstrating that Congress wanted to ensure "no plaintiff should be forced to suffer any possible irreparable damage" due to a FOIA violation.[1] And unlike § 1988, FOIA's fee-award provision is subject to an express mandate that "[s]ubsequent statute[s]" like § 1988 "may not be held to supersede or modify" this provision—or any other FOIA provision—"except to the extent that [the statute] does so expressly." 5 U.S.C. § 559.

The government has no answer to any of this, or to the plethora of common-law authority that further supports the conclusion that FOIA fee awards may be granted to self-representing attorneys. *Compare* Pet. 33–36 *with* BIO 4–8. The only arrow in the government's quiver is *Kay*: one of the last cases of a bygone time when this Court "felt free to pave over bumpy statutory text[] in the name of more expeditiously advancing a policy goal." *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019). In *Kay*, that policy goal was "furthering the successful prosecution of meritorious [civil-rights] claims." 499 U.S. at 438.

Kay furnishes no reason then for the Court to deny review here. To the contrary, *Kay* is a reason for the Court to grant review, so as to reaffirm this Court's

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[1] 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 264 (Joint Comm. Print 1975) (quoting Representative Alexander).

more recent statutory-interpretation jurisprudence. Review is also warranted based on D.C. Circuit's allowance of FOIA fee awards to law firms, but not to solo practitioners like Gahagan who litigate in their own name. *See* Pet. 37. The government argues that the organizational status of law firms makes a meaningful difference under *Kay*. BIO 12. But the government fails to explain how any such difference can be squared with FOIA's original meaning, which "treats all requests and requesters the same—no matter the identity of the requesters." *Morley*, 719 F.3d at 691 (Kavanaugh, J., concurring).

CONCLUSION

The Court should grant review in this case.

Respectfully submitted,

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