NO. _____

IN THE

Supreme Court of the United States

RYAN NOAH SHAPIRO,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must a plaintiff facing a motion for summary judgment provide evidence that the movant has acted in bad faith before obtaining discovery under Rule 56(d), where the sole reason that bad faith is being required is that the case arises under the Freedom of Information Act (FOIA)?

2. If there is a FOIA-specific requirement that a plaintiff provide evidence of agency bad faith before obtaining discovery under Rule 56(d), does the requirement extend to situations in which the government agency has failed to meet its initial burden of proof under the summary judgment standard?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States District Court for the District of Columbia included Plaintiff Ryan Noah Shapiro and Defendant Department of Justice.

The parties to the proceedings in the United States Court of Appeals for the D.C. Circuit included Appellant Ryan Noah Shapiro, and Appellee Department of Justice.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia:

- *Ryan Noah Shapiro v. Department of Justice*, No. 1:12-cv-313 (D.D.C. July 2, 2020)
- *Ryan Noah Shapiro v. Department of Justice*, No. 20-5318 (D.C. Cir. July 15, 2022)

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Dr. Ryan Noah Shapiro respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The district court's opinion is not reported, but is available at 2020 U.S. Dist. LEXIS 115871 and 2020 WL 361551 and reprinted as Appendix B. App. 16a. The D.C. Circuit's opinion is reported at 40 F.4th 609 (D.C. Cir. 2022) and reprinted as Appendix A. App. 1a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on July 15, 2022. App. 1a. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. § 552, provides in relevant part:

> "In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation

> of the agency's automated information system."

5 U.S.C. § 552(a)(3)(C).

INTRODUCTION

The Freedom of Information Act (FOIA) is an indispensable tool for keeping citizens informed about what their government is up to. However, the ability of citizens to vindicate their rights under FOIA has been severely compromised by rulings in some circuits that strip plaintiffs' ability to effectively respond to summary judgment motions.

In typical civil litigation, premature summary judgment motions are dealt with by Rule 56(d), which allows the summary judgment opponent to obtain a reprieve simply by submitting a declaration or affidavit showing why discovery is needed to obtain relevant facts. Several circuits, however, have imposed a heightened Rule 56(d) standard, unique to cases arising under FOIA, under which plaintiffs must provide sufficient evidence of agency bad faith before any opportunity for discovery will be allowed. Given the informational asymmetry in FOIA cases, where any evidence of agency bad faith is almost invariably in the sole possession of the agency, plaintiffs are almost never able to meet this standard. Thus, in these jurisdictions, agencies are often able to obtain summary judgment without meaningful adversarial testing of their factual assertions.

The D.C. Circuit, in this and other cases, applies a particularly stringent version of this FOIA-specific Rule 56(d) standard. Under the D.C. Circuit's standard, the requirement to provide evidence of agency bad faith before obtaining discovery under Rule 56(d) applies even in cases where the agency has failed to meet its initial burden of showing it has complied with FOIA. The only other circuit to follow this approach is the Sixth Circuit. Several other circuits require FOIA plaintiffs to provide evidence of bad faith only where the agency has met its initial burden of showing entitlement to summary judgment. Still other circuits do not base their Rule 56(d) standard for obtaining discovery on the cause of action under which the case is brought.

In this case, the district court denied Plaintiff Dr. Shapiro's Rule 56(d) motion solely on the grounds that he did not present evidence that the FBI had acted in bad faith in conducting its search for responsive records. Applying its longstanding precedent requiring plaintiffs in cases arising under FOIA to provide sufficient evidence of bad faith, the D.C. Circuit largely affirmed. Even as to the one discrete part of the FBI's affidavit that the D.C. Circuit found insufficient on its face, the D.C. Circuit held that on remand the district court could choose to forego discovery in favor of allowing the agency to submit further declarations.

This Court should grant Dr. Shapiro's petition for a writ of certiorari for several reasons. First, the D.C. Circuit's bad faith standard conflicts with the plain

language and purpose of Rule 56(d). Second, the creation of a FOIA-specific standard for Rule 56(d) undermines the subject-matter neutrality of the Federal Rules of Civil Procedure. Third, even if a FOIA-specific standard for Rule 56(d) was desirable from a policy perspective, any changes to the rule would need to occur through amendments to the Federal Rules of Civil Procedure or legislation by Congress. Finally, the intractable split between the circuits on the issue of whether a FOIA-specific standard applies to Rule 56(d) motions for discovery threatens the uniformity of federal law on an issue of great importance to the functioning of American democracy.

STATEMENT OF THE CASE

A. Legal background

As a matter of substantive law in the D.C. Circuit, "an agency responding to a FOIA request must conduct[] a search reasonably calculated to uncover all relevant documents, and, if challenged, must demonstrate beyond material doubt that the search was reasonable." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (internal quotation marks omitted, alteration in original). In this case, Plaintiff Dr. Ryan Noah Shapiro argued that the FBI had not conducted a search reasonably calculated to uncover all electronic surveillance records relevant to the subjects of his request. The FBI moved for summary judgment in its favor, contending that its search for

electronic surveillance records had been reasonable. [ECF dkt: 97].

The applicable standard for adjudication of summary judgment motions "is well settled in Freedom of Information Act cases as in any others[.]" *Founding Church of Scientology, Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 836 (D.C. Cir. 1979) (internal quotation marks omitted). The standard is "that summary judgment may be granted only if the moving party proves that no substantial and material facts are in dispute and that he is entitled to judgment as a matter of law." *Id.* Applying this summary judgment standard in the context of a FOIA case involving the adequacy of the search, the D.C. Circuit has held that an agency may meet its burden by "submitting [a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Reporters Comm. for Freedom of the Press v. FBI*, 877 F.3d 399, 402 (D.C. Cir. 2017) (internal quotation marks omitted, alteration in original). However, "[e]ven if these conditions are met the requester may nonetheless produce countervailing evidence, and if the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order." *Founding Church of Scientology*, 610 F.2d at 836.

Dr. Shapiro sought to demonstrate the insufficiency of the FBI's identification and retrieval procedure by presenting evidence that the agency

improperly limited its search for the requested electronic surveillance records to the agency's Central Records System even though other record systems existed which were likely to contain responsive electronic surveillance records. *See Oglesby v. United States Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) ("the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested.")

However, Dr. Shapiro was unable to produce this evidence in opposition to the agency's motion for summary judgment because the evidence was solely in the possession of the agency, and he had not yet had an opportunity for discovery. Accordingly, Dr. Shapiro responded to the FBI's motion for summary judgment by filing a motion and declaration under Rule 56(d), which provides "that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986).

Under Rule 56(d), "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. Pro. Rule 56(d). While this Court has not elaborated on the Rule 56(d) standard, there is a consensus among the federal circuit courts of appeals as to when such motions

should be granted. The consensus in these circuits, including the D.C. Circuit, is that a properly supported Rule 56(d) motion should be routinely granted where the nonmovant has had no opportunity for discovery, particularly where the evidence sought is in the exclusive possession of the party moving for summary judgment. *Convertino v. United States DOJ*, 684 F.3d 93, 99 (D.C. Cir. 2012) ("[S]ummary judgment is premature unless all parties have had a full opportunity to conduct discovery. A Rule 56(f) [now Rule 56(d)] motion requesting time for additional discovery should be granted almost as a matter of course unless the non-moving party has not diligently pursued discovery of the evidence") (internal quotation marks and citations omitted); *Maz Partners LP v. PHC, Inc. (In re PHC S'holder Litig.)*, 762 F.3d 138, 145 (1st Cir. 2014); *Sutera v. Schering Corp.*, 73 F.3d 13, 18 (2nd Cir. 1995); *Costlow v. United States*, 552 F.2d 560, 564 (3rd Cir. 1977); *McCray v. Md. DOT*, 741 F.3d 480, 483-84 (4th Cir. 2014); *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1267 (5th Cir. 1991); *Vance v. United States*, 90 F.3d 1145, 1148 (6th Cir. 1996); *Smith v. OSF Healthcare Sys.*, 933 F.3d 859, 866 (7th Cir. 2019); *Robinson v. Terex Corp.*, 439 F.3d 465, 467 (8th Cir. 2006); *Jones v. Blanas*, 393 F.3d 918, 930 (9th Cir. 2004); *Weir v. Anaconda Co.*, 773 F.2d 1073, 1081 (10th Cir. 1985); *WSB-TV v. Lee*, 842 F.2d 1266, 1269 (11th Cir. 1988).

Specifically for cases arising under FOIA, however, the D.C. Circuit applies a different standard. In the D.C. Circuit, to obtain discovery under Rule 56(d) in a

case brought pursuant to FOIA, the nonmoving plaintiff[1] must generally submit evidence that the agency acted in bad faith. App. 11a. This standard is intended to keep discovery "rare" in FOIA cases, App. 11a, and thus applies even where the agency has not met its initial burden of providing a declaration that is legally sufficient on its face.

B. Factual and Procedural History

While a doctoral candidate at the Massachusetts Institute of Technology, Dr. Ryan Noah Shapiro was conducting research for his dissertation about "the nature and evolution of federal law enforcement agencies' understanding and handling of the animal rights and animal protection movements from the Cold War era to the present." [ECF dkt: 13.] To this end, Dr. Shapiro submitted a series of FOIA requests to the FBI seeking records concerning individuals, organizations, publications, and events related to the animal rights and animal protection movements. App. 3a.

Dr. Shapiro filed suit, alleging that the FBI had violated FOIA by failing to provide a timely response to some requests, improperly withholding records, and failing to perform an adequate search for still

[1] The agency-defendant in FOIA cases is not subjected to the heightened "bad faith" standard for obtaining discovery from the plaintiff-requester. *Weisberg v. Webster*, 749 F.2d 864, 869 (D.C. Cir. 1984).

other records.[2] [ECF dkt: 13]. Over the course of the next five years, the FBI processed Dr. Shapiro's requests and produced additional responsive records. App. 2a. The FBI then moved for summary judgment, contending that it had fulfilled its obligations under FOIA. [ECF dkt: 97.] Since Dr. Shapiro had not had an opportunity for discovery and was unable to present facts justifying his opposition to certain aspects of the FBI's search for electronic surveillance records, he filed a motion and declaration pursuant to Rule 56(d) seeking limited discovery. App. 172a. The FBI opposed Dr. Shapiro's Rule 56(d) motion, arguing that Dr. Shapiro had failed to present sufficient evidence of bad faith. [ECF dkt:113]. In his reply, Dr. Shapiro contended that bad faith was not a requirement for obtaining relief under Rule 56(d). [ECF dkt: 123.]

The district court denied Dr. Shapiro's Rule 56(d) motion, holding that discovery should be "eschewed in FOIA litigation absent a showing of agency bad faith." App. 41a. With one minor exception, the district court granted the FBI motion for summary judgment. App. 160a. After the remaining outstanding issues were resolved, judgment was entered for the government and Dr. Shapiro appealed to the D.C. Circuit. [ECF dkt: 139].

On appeal, Dr. Shapiro argued that the district court abused its discretion in denying his Rule 56(d)

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[2] Jurisdiction over the case was vested in the district court pursuant to 5 U.S.C. § 552(a)(4)(B).

motion for discovery because submission of evidence of bad faith is not a requirement for obtaining relief under that rule. The D.C. Circuit disagreed, holding that "discovery in a FOIA case is rare and courts should generally order it only where there is evidence—either at the affidavit stage or (in rarer cases) before—that the agency acted in bad faith in conducting the search." App. 11a (internal quotation marks omitted). Since the district court found "no evidence of bad faith—a finding Shapiro does not challenge on appeal—the district court acted within its broad discretion to manage the scope of discovery when it denied Shapiro's request" for discovery. App. 11a (internal quotation marks omitted).

The D.C. Circuit went further, however, and held that even where an agency's affidavits are "inadequate to support summary judgment," the "appropriate remedy is usually to allow the agency to submit further affidavits rather than to order discovery." App. 11a (internal quotation marks omitted). Thus, as to the one aspect of the FBI's declaration that was insufficient to justify summary judgment on the agency's search for electronic surveillance records, the D.C. Circuit held that "on remand the district court need not allow discovery if further declarations will suffice." App. 11a.

Rather than immediately remanding to the district court, the D.C. Circuit, on Dr. Shapiro's request, withheld issuance of the mandate while a petition for a writ of certiorari was sought before this Court. Order, *Ryan Noah Shapiro v. United States*

Department of Justice, Case No. 20-5318 (Aug. 12, 2022), Document #1959103.

REASONS FOR GRANTING THE PETITION

I. There is no legal authority to support the D.C. Circuit's FOIA-specific limitation on discovery under Rule 56(d).

To prevent a party from being railroaded by a premature summary judgment motion, a plaintiff must only present affirmative evidence to defeat a properly supported motion for summary judgment where the plaintiff has had a full opportunity to conduct discovery. *Cf. Anderson*, 477 U.S. at 257 ("[T]he plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, *as long as the plaintiff has had a full opportunity to conduct discovery*") (emphasis added). A plaintiff who has not had an opportunity to conduct discovery may invoke the protection of Rule 56(d), which "qualifie[s]" the movant's right to summary judgment. *Id.* at 250 n.5. Through this mechanism, Rule 56(d) permits a plaintiff a fair opportunity to defendant against an early summary judgment motion.

The D.C. Circuit purports to adhere to *Anderson*, holding that "summary judgment is premature unless

all parties have 'had a full opportunity to conduct discovery.'" *Convertino*, 684 F.3d at 99, *quoting Anderson*, 477 U.S. at 257. However, the D.C. Circuit has taken a very different approach in this case and others simply because the cause of action arises under FOIA. The D.C. Circuit's FOIA-specific approach generally requires a plaintiff to present affirmative evidence to defeat a properly supported motion for summary judgment even where the plaintiff has had no opportunity for discovery unless the plaintiff presents sufficient evidence of agency bad faith. App. 11a.

As explained below, the D.C. Circuit's standard for deciding Rule 56(d) motions in FOIA cases has no basis in the text or purpose of Rule 56(d) or FOIA. Further it is fundamentally inconsistent with the subject matter-neutral principle of the Federal Rules of Civil Procedure.

A. The D.C. Circuit's FOIA-specific approach to Rule 56(d) has no basis in the text or purpose of Rule 56(d) or FOIA.

As with any of the federal rules of civil procedure, the proper interpretation of Rule 56(d) begins with its plain meaning. *Bus. Guides, Inc. v. Chromatic Communs. Enters.*, 498 U.S. 533, 540-41 (1991). Under Rule 56(d), the nonmovant must "show[] by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition[.]" Fed. R. Civ. Pro. Rule 56(d). In this case and others, however, the D.C. Circuit has required not

just a "show[ing]" by declaration or affidavit, but rather "evidence" to support an allegation of bad faith. App. 11a ("We have repeatedly made clear that 'discovery in a FOIA case is rare' and courts should generally order it only 'where there is *evidence*—either at the affidavit stage or (in rarer cases) before—that the agency acted in bad faith in conducting the search.' *In re Clinton*, 973 F.3d at 113 (internal quotation marks omitted); *see*, *e.g.*, *Freedom Watch, Inc. v. NSA*, 783 F.3d 1340, 1345–46 (D.C. Cir. 2015) (holding that 'the district court had discretion to forgo discovery' absent '*evidence* to support [an] allegation" of bad faith (cleaned up)" (emphasis added).

Nothing in the text of Rule 56(d), however, requires a showing of bad faith, much less "evidence" of bad faith. Had the Advisory Committee intended to limit the application of Rule 56(d) in cases arising under FOIA to situations in which the nonmovant provided evidence of bad faith, it would surely have said so. *Cf. Bus. Guides*, 498 U.S. at 545. The Advisory committee is well-aware of how to impose a "bad faith" standard, the difference between a "show[ing]" and "evidence," and the general applicability of the rules of discovery to all civil actions except where explicitly exempted. *See* Fed. R. Civ. Pro. Rule 56(h); Fed. R. Civ. Pro. Rule 56(c); Fed. R. Civ. Pro. Rule 26(a)(1)(B)(i)-(ix); Fed. R. Civ. Pro. Rule 81(a). Even if the D.C. Circuit believed that requiring plaintiffs in a FOIA case to submit evidence of bad faith before having an opportunity for discovery would produce a better result, it was not free to discard the natural reading of Rule 56(d). *Bus. Guides*, 498 U.S. at 547

("[T]his Court will not reject the natural reading of a rule or statute in favor of a less plausible reading, even one that seems to us to achieve a better result.")

Not only is it an unnatural reading of Rule 56(d) to interpret it as requiring a plaintiff in a FOIA case to produce evidence of bad faith before being permitted an opportunity for discovery, such a reading is also not sensible. The reason that only a "showing" of the need for discovery is required under Rule 56(d) is that a party "cannot, of course, predict with accuracy precisely what further discovery will reveal; the whole point of discovery is to learn what a party does not know or, without further information, cannot prove." *Stevens v. CoreLogic, Inc.*, 899 F.3d 666, 678 (9th Cir. 2018).

Further, a FOIA plaintiff with "evidence" of agency bad faith could defeat a summary judgment motion on the merits without the need to resort to Rule 56(d). *Cf. Military Audit Project v. Casey*, 656 F.2d 724, 745 (D.C. Cir. 1981). Rule 56(d), by its terms, is designed for situations in which a party "cannot present facts essential to justify its opposition" without discovery. It would make little sense for the protections of Rule 56(d) to be available in FOIA cases only in circumstances where they are not needed because the plaintiff already possesses "evidence" of bad faith.

Evidence of bad faith is also a standard that is a poor fit to measure the need for discovery. "Bad faith" in the submission of an affidavit or declaration is the standard for determining whether conduct should be punished by sanctions. Fed. R. Civ. Pro. Rule 56(h). It

makes little sense for bad faith to also be the standard for determining whether a party should be entitled to collect evidence to support their case because "[d]iscovery in FOIA cases is not a punishment," *In re Clinton*, 973 F.3d 106, 115 (D.C. Cir. 2020), but a truth-finding tool. *Wash. Post Co. v. United States Dep't of State*, 840 F.2d 26, 38 (D.C. Cir. 1988), *vacated*, 898 F.2d 793 (D.C. Cir. 1990) ("In FOIA cases, as in other litigation, discovery is an important tool for truth-testing[.]")

For its part, the D.C. Circuit has never offered a textual basis justifying its "bad faith" standard for Rule 56(d) discovery in FOIA cases. The origin of the "bad faith" requirement for discovery was the D.C. Circuit's majority opinion in *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978) ("*Goland I*"). There, the majority stated, "[t]he agency's affidavits, naturally, must be 'relatively detailed' and nonconclusory and must be submitted in good faith. But if these requirements are met, the district judge has discretion to forgo discovery and award summary judgment on the basis of affidavits." *Id.* at 352. The majority opinion, however, contained no analysis to support this conclusion and did not cite to the Federal Rules of Civil Procedure or the text, legislative history, or purpose of FOIA. Instead, it relied on two district court opinions and a Fifth Circuit opinion, none of which provided a textual basis for requiring evidence of bad faith before discovery could be obtained under Rule 56(d). *Id.* at 352 n.78, *citing Nolen v. Rumsfeld*, 535 F.2d 890 (5th Cir. 1976), *Association of Nat'l Advertisers, Inc. v. FTC*, 38 Ad.L.2d 643, 644 (D.D.C.

1976), *Exxon Corp. v. Fed. Trade Com.*, 384 F. Supp. 755 (D.D.C. 1974).

Over the past few decades, the *Goland I* "bad faith" standard has become entrenched in D.C. Circuit case law. However, the D.C. Circuit has never cited binding authority justifying this rule beyond the circuit's own precedent. One rationale offered a similar FOIA-specific rule in another circuit is that "[w]hile ordinarily the discovery process grants each party access to evidence, in FOIA and Privacy Act cases discovery is limited because the underlying case revolves around the propriety of revealing certain documents." *Lane v. DOI*, 523 F.3d 1128, 1134 (9th Cir. 2008). Whatever the merits of this argument might be where withholdings pursuant to one of FOIA's nine exemptions are involved, 5 U.S.C. § 552(b)(1)-(9), it does not make sense as a blanket rule to be applied in a case solely because the cause of action arises under FOIA. For example, in a case like this one, discovery into the factual question of the agency's search efforts would not generally be expected to reveal the contents of the documents requested.

More persuasive than the majority's holding in *Goland I* is Judge's Bazelon's dissent in that case. Judge Bazelon saw the majority's approach as an understandable attempt "to protect the CIA from the burden of processing meritless FOIA requests for vital security information[.]" 607 F.2d at 358. However, he found the majority's bad faith standard to be an overreaction to this potential danger because "the CIA

offers neither evidence nor reason to find that a complete bar to discovery was necessary to protect its personnel from harassment." *Id.* Instead, he sensibly concluded that "supervision of the discovery process . . . could have avoided such problems." *Id.* Relying on the sound discretion of the district court to manage discovery is the norm in civil litigation and consistent with the Federal Rules of Civil Procedure. *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 531 (2009) ("Judges are trusted to prevent 'fishing expeditions' or an undirected rummaging through bank books and records for evidence of some unknown wrongdoing.") There is no reason to believe that FOIA cases present a unique situation in which district courts would be unable to manage Rule 56(d) discovery. Not only does Rule 56(d) require permission from the district court before any discovery takes place, the discovery available under Rule 56(d) is much more limited in scope than the discovery available under Rule 26. *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 265 (1968).

B. The D.C. Circuit's FOIA-specific approach to Rule 56(d) is fundamentally inconsistent with the subject matter-neutral purpose of the Federal Rules of Civil Procedure.

Rule 1 sets forth the subject matter-neutral principle of the Federal Rules of Civil Procedure. Rule 1 provides that the "rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81." Fed. R.

Civ. Pro. Rule 1. Rule 81 contains no exception for cases arising under FOIA. Fed. R. Civ. Pro. Rule 81. Therefore, the Federal Rules of Civil Procedure, including Rule 56(d) and other rules governing discovery, apply as written in cases arising under FOIA.

The D.C. Circuit's holdings supplanting the text of Rule 56(d) with a different, heightened standard specific to cases arising under FOIA is contrary to the general subject matter-neutrality of the Federal Rules of Civil Procedure. This Court has repeatedly invalidated similar attempts by lower courts to supplant the standards contained in the Federal Rules of Civil Procedure with new standards specific to particular causes of action. *See e.g.*, *Jones v. Bock*, 549 U.S. 199, 212 (2007) ("In a series of recent cases, we have explained that courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns"); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993) (rejecting heightened pleading standard for § 1983 cases alleging municipal liability); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) ("the Federal Rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater specificity for particular claims is a result that must be obtained by the process of amending the Federal Rules, and not by judicial interpretation") (internal quotation marks omitted); *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) ("Respondent first says that our decision in *Twombly* should be limited to

pleadings made in the context of an antitrust dispute. This argument is . . . incompatible with the Federal Rules of Civil Procedure") (internal citation omitted); *Calder v. Jones*, 465 U.S. 783, 790 (1984) ("We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions[.]") Similar to municipal liability, employment discrimination, antitrust, and libel and defamation actions, the Federal Rules of Civil Procedure do not distinguish cases arising under FOIA from cases arising under other laws. If cases arising under FOIA are to be treated differently for discovery purposes, such a result must be obtained by amendment of the Federal Rules of Civil Procedure or an act of Congress, not through policy decisions of the lower courts. *See Weisberg*, 749 F.2d at 868 ("When Congress intended to created (sic) exceptions to regular civil procedures in FOIA litigation, it has stated these exceptions specifically"); 5 U.S.C. § 552(a)(4)(C) (shortening the period of time within which the defendant must file a responsive pleading).

II. The D.C. Circuit's approach to Rule 56(d) squarely conflicts with decisions from several other circuits.

The circuits are irreconcilably split on the question of whether and when evidence of bad faith is required before a plaintiff may obtain discovery under Rule 56(d) in cases arising under FOIA. The D.C. Circuit and Sixth Circuit hold that bad faith must generally be shown to obtain Rule 56(d) discovery in a case

arising under FOIA even where the agency's affidavit is insufficient on its face to entitle it to summary judgment. In contrast, the Second, Third, and Ninth Circuits have found Rule 56(d) discovery appropriate in cases arising under FOIA when the government's affidavit is insufficient on its face, without requiring the plaintiff to provide evidence that the agency acted in bad faith. Other circuits, even when presented with an opportunity to do so, have declined to take a nonmovant's bad faith into consideration when ruling on Rule 56(d) motions.

A. The holdings of the Second, Third, and Ninth Circuits

The Second Circuit has required a showing of bad faith to obtain discovery under Rule 56(d) only where the agency has met its initial burden of proof of submitting a sufficiently detailed affidavit. In *Ruotolo v. DOJ*, 53 F.3d 4, 9 (2nd Cir. 1995), the district court had "granted the summary judgment motion without reference to the Ruotolos' discovery motion" under what is now Rule 56(d). The Second Circuit reversed, concluding that it did not believe the agency "has yet demonstrated" that the request "calls for an unreasonably burdensome search." Although there was no evidence of bad faith in the record, the Second Circuit held that "[f]urther discovery should have been afforded to the Ruotolos" because the information requested in discovery, which "could shed light on the scope of that burden clearly is material to this case." *Id.* at 11. A requirement that a plaintiff make a showing of bad faith under Rule 56(d) has only

come into play in FOIA cases in the Second Circuit where the government has met its initial burden of proof of establishing its entitlement to summary judgment.

> As we stated in *Carney*, discovery relating to [an] agency's search and the exemptions it claims for withholding records generally is unnecessary if the agency's submissions are adequate on their face. . . . In *Carney*, we further noted that 'in order to justify discovery *once the agency has satisfied its burden*, the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations

Grand Cent. P'ship., Inc. v. Cuomo, 166 F.3d 473, 488-89 (2nd Cir. 1999), *quoting Carney v. United States Dep't of Justice*, 19 F.3d 807, 812 (2nd Cir. 1994 (bracket in original, ellipsis and emphasis added).

In the D.C. Circuit, by contrast, a plaintiff is not entitled to discovery under Rule 56(d) without evidence of bad faith, even where the agency has not satisfied its burden. App. 11a ("[E]ven where we have found an agency's affidavits to be inadequate to support summary judgment, we have held that the appropriate remedy is usually to allow the agency to 'submit further affidavits' rather than to order discovery.") In this case, the D.C. Circuit applied this rule in permitting the district court to forgo discovery even on the issue as to which the agency's declarations were insufficient. App. 11a ("Consistent with these

principles, on remand the district court need not allow discovery if further declarations will suffice.")

Similar to the Second Circuit, the Third Circuit has held, citing what is now Rule 56(d), that discovery is appropriate in a case arising under FOIA where the record "demonstrate[s] the need for further inquiry[.]" *Porter v. United States Dep't of Justice*, 717 F.2d 787, 793 (3rd Cir. 1983). Although there was no suggestion of bad faith on the part of the government, the Third Circuit held that if additional information had been provided by the government, the "trial court could then have considered the appropriateness of limited discovery[.]" *Id.*

In *Church of Scientology of S.F. v. IRS*, 991 F.2d 560 (9th Cir. 1993), *vacated in part on other grounds*, 30 F.3d 101 (9th Cir. 1994), the Ninth Circuit found that the trial court had abused its discretion in denying discovery to the FOIA requester because, among other things, the agency's affidavits were insufficient. "Considering the questionable sufficiency of the *Vaughn* index, the apparent evasiveness of the IRS responses, the slim showing of a need for as extensive a cloak of secrecy as the Government claimed, and the absence of any opportunity for the Churches to conduct discovery on the adequacy of the *Vaughn* index and completeness and truthfulness of the Government declarations, it was an abuse of discretion entirely to bar discovery by the plaintiffs prior to the granting of summary judgment against them. On remand, the district court is directed to provide the plaintiffs in both appeals reasonable

opportunity to conduct discovery relevant to applicability of the FOIA exemptions or accuracy and completeness of the Vaughn index and declarations." *Id.* at 563. The Ninth Circuit's opinion explicitly declined to follow *Goland I*, both because "the case before us does not threaten the disclosure of sensitive government information" and because of a subsequent statement by the D.C. Circuit that "the *government* should be able to use the discovery rules in FOIA suits *like any other litigant*, to uncover facts which will enable it to meet its burden of proving . . . the adequacy of its search." *Id.* (second emphasis in original), *quoting Weisberg*, 749 F.2d at 868. As is clear from the D.C. Circuit's opinion in this case, however, evidence of bad faith is required for a *plaintiff* to obtain discovery under Rule 56(d), and the inquiry is not predicated on a finding that discovery would threaten the disclosure of sensitive government information. App. 11a. Thus, despite the Ninth Circuit's interpretation of the case law in the D.C. Circuit, there is a clear conflict between the standards employed by these two circuits.

B. The holdings of the D.C. and Sixth Circuits

The only circuit to agree with the D.C. Circuit that bad faith must generally be shown before a Rule 56(d) motion for discovery is granted, even where the record is not fully developed, is the Sixth Circuit. The Sixth Circuit, however, leaves open the possibility that discovery may be appropriate not only in cases involving bad faith, but also where the plaintiff

presents certain unspecified "other evidence[.]" *CareToLive v. FDA*, 631 F.3d 336, 345 (6th Cir. 2011). Moreover, there is a subsidiary split between the D.C. Circuit and the Sixth Circuit as to what constitutes "bad faith." In this case, the D.C. Circuit held that "bad faith means bad faith in conducting the search." App. 11a. *See also In re Clinton*, 973 F.3d at 115 ("[A] bad-faith inquiry in a FOIA context is only relevant as it goes to the actions of the individuals who conducted the search.") The Sixth Circuit has a more expansive definition of bad faith than the D.C. Circuit, however. In *Jones v. FBI*, 41 F.3d 238, 242 (6th Cir. 1994), the Sixth Circuit held that "[e]ven where there is no evidence that the agency acted in bad faith with regard to the FOIA action itself there may be evidence of bad faith or illegality with regard to the underlying activities which generated the documents at issue." The Sixth Circuit subsequently reaffirmed this holding in *Rugiero v. United States DOJ*, 257 F.3d 534, 544 (6th Cir. 2001) ("Evidence of bad faith on the part of the agency can overcome this presumption, even when the bad faith concerns the underlying activities that generated the FOIA request rather than the agency's conduct in the FOIA action itself.") Although the instant case does not involve an allegation of underlying bad faith in the activities that generated the documents, if this Court were to grant certiorari and hold that bad faith is not a prerequisite to obtaining discovery under Rule 56(d), such a holding would eliminate the split between the D.C. and Sixth Circuit on what constitutes bad faith.

C. Other circuits

The First Circuit, while not specifically citing to Rule 56(d), held that discovery may be appropriate in a case arising under FOIA where the government's affidavit in insufficient, even where no showing of bad faith has been established. In *Church of Scientology Int'l v. United States Dep't of Justice*, 30 F.3d 224, 239 (1st Cir. 1994), the government "failed to provide adequate support for withholding" many of the documents at issue. Although there was "[a] lack of bad faith on the part of the government," *id.* at 233, the First Circuit held that if the government did not provide additional support on remand for its withholding, the district court "could choose to permit discovery limited to specified documents," *id.* at 240. Thus, although the First Circuit's decision in *Church of Scientology* does not specifically reference Rule 56(d), it nevertheless directly conflicts with the D.C. Circuit's longstanding rule, which it applied in this case, that there generally must be evidence of bad faith before a plaintiff may be afforded discovery in a case arising under FOIA, even where the agency's affidavit is insufficiently detailed. App. 11a.

The Tenth Circuit in *World Publ'g Co. v. United States DOJ*, 672 F.3d 825, 832 (10th Cir. 2012), affirmed the denial of a 56(d) motion in a FOIA case without any discussion of the presence or absence of bad faith by the agency. The Tenth Circuit, "[a]fter reviewing the district court's treatment of each type of discovery requested by Tulsa World," held "that the court did not abuse its discretion in denying discovery." *Id.* The district court's opinion also contained no mention of the presence or absence of

bad faith. *World Publ'g Co. v. United States DOJ*, No. 09-CV-574-TCK-TLW, 2011 U.S. Dist. LEXIS 32594 at *15-*23, 2011 WL 1238383 (N.D. Okla. Mar. 28, 2011).

In *Trentadue v. FBI*, 572 F.3d 794, 806 (10th Cir. 2009), the Tenth Circuit was directly presented with the issue of whether a plaintiff was required to show bad faith in the agency's conduct of its search for records, though not in the Rule 56(d) context. The FBI argued that discovery was inappropriate because, among other reasons, the agency had "submitted detailed affidavits establishing the reasonableness of its search, and the district court never found the described search to be inadequate or to have been conducted in bad faith[.]" *Id.* That would have been the end of the matter under the D.C. Circuit's analysis in this case. App. 11a. The Tenth Circuit, however did not adopt the FBI's argument that discovery may only occur upon a finding of bad faith by the district court. Instead, the court ruled that the plaintiff "failed to show any possibility that the depositions of [non-agency individuals] would produce relevant evidence in this case." *Id.* at 808. Thus, while the Tenth Circuit has not squarely come down on either side of the circuit split, it has, at a minimum, declined to join the D.C. Circuit's view that the presence or absence of bad faith is the *sine qua non* of whether discovery is appropriate under Rule 56(d) in FOIA cases.

The Fourth and Fifth Circuits have not specifically addressed a properly supported Rule 56(d) motion in a FOIA case, but in non-FOIA cases they have held

that discovery may be appropriate under that rule without a showing of bad faith if the nonmoving party has not had an opportunity for discovery. In *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council Balt.*, 721 F.3d 264, 280 (4th Cir. 2013) (*en banc*), the Fourth Circuit held that a district court "must refuse summary judgment where the nonmoving party has not had the opportunity to discover information that is essential to [its] opposition." *Id.* (alteration in original, internal quotation marks omitted).

In *Brown v. Miss. Valley State Univ.*, 311 F.3d 328, 333 (5th Cir. 2002), the Fifth Circuit similarly held that "when a party is not given a full and fair opportunity to discover information essential to its opposition to summary judgment, the limitation on discovery is reversible error" (internal quotation marks and citation omitted). The Fifth Circuit further noted that at least some discovery is needed when a proper Rule 56(d) motion has been filed. *Id.* at 333 n.5.

Neither *Greater Baltimore* nor *Brown* contain any indication that a different conclusion would be reached in a FOIA case. Indeed, given the sweeping language of the opinions in both cases, there is little or no room for those courts to reach a different conclusion in a future case on the sole ground that the cause of action arises under FOIA.

III. This case is worthy of this Court's review.

A. The issues presented are important and recurring.

The proper operation of FOIA is of great significance not only to individual requesters, but to the functioning of democracy. "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). However, "[i]f the agency can lightly avoid its responsibilities by laxity in identification or retrieval of desired materials, the majestic goals of the Act will soon pass beyond reach." *Founding Church of Scientology*, 610 F.2d at 837.

One significant way that an agency can avoid its responsibility to locate responsive material is through the premature grant of a motion for summary. The "potential problem with such premature motions can be adequately dealt with under Rule 56(f) [now Rule 56(d)], which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986).

By imposing a heightened "bad faith" standard for Rule 56(d) motions in cases arising under FOIA, the D.C. Circuit deprives requesters of their only defense against premature summary judgment motions.

"Without discovery, a party to litigation may not have access to facts necessary to oppose a motion for summary judgment. This problem is especially acute for plaintiffs in FOIA cases." *Goland I*, 607 F.2d at 357 (Bazelon, J., dissenting).

The events that transpired after the D.C. Circuit's decision in *Goland I* provide a stark example of how the adversarial process can be undermined in FOIA cases by denying access to discovery when there is no evidence of bad faith. After the D.C. Circuit issued its opinion in *Goland I* adopting the bad faith standard and finding that the CIA had not engaged in bad faith, the government revealed that "[w]hile litigating the appeal whose disposition is here questioned, the CIA discovered but failed to disclose within any reasonable time hundreds of documents which were arguably responsive to plaintiff-appellants' Freedom of Information Act request." *Goland v. CIA*, 607 F.2d 339, 367 (D.C. Cir. 1979) ("*Goland II*").

The panel majority in *Goland II* observed that "[t]he failure to make the disclosure plainly called for naturally casts a cloud over the entire proceeding" and expressed that it was acting "without the barest intention of countenancing the CIA's untimely disclosure[.]" *Id.* at 367. Nevertheless, the panel declined to rehear or vacate the case and accepted the factually untested representation by the CIA that "the discovery of these documents was entirely adventitious." *Id.* at 370. Judge Bazelon, again dissenting, wrote that "[t]he majority's extreme reluctance to permit plaintiffs to explore the factual

basis of the CIA's assertions thus repeats the basic error of the original panel opinion." *Id.* at 376.

The majority decisions in *Goland I* and *Goland II* make two things clear. First, even significant government misconduct in processing a FOIA request does not count as sufficient evidence of "bad faith" under D.C. Circuit law. Second, the application of a "bad faith" standard to obtain discovery under Rule 56(d) in FOIA cases leaves plaintiffs and the courts largely at the mercy of derelict government agencies to admit their own misbehavior. While it is impossible to say whether the proceedings would have turned out differently had Ms. Goland been permitted to take discovery during the district court proceedings, the history of the *Goland* litigation brings into sharp relief the damage to the traditional adversarial process and truth-finding functions of the court that can be caused by imposing too high a standard for relief under Rule 56(d) in FOIA cases.

Part of the reason that FOIA cases are particularly susceptible to this kind of distortion of the adversarial process when discovery is not readily available is that plaintiffs are generally in the dark about the agency's recordkeeping systems, the extent of its search, and the contents of the withheld information. *See Vaughn v. Rosen*, 484 F.2d 820, 824 (D.C. Cir. 1973) ("lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution"); *Ray v. Turner*, 587 F.2d 1187, 1218 (D.C. Cir. 1978) ("Interrogatories and depositions are especially important in a case

where one party has an effective monopoly on the relevant information"); *King v. DOJ*, 830 F.2d 210, 218 (D.C. Cir. 1987) (noting the "asymmetrical distribution of knowledge that characterizes FOIA cases"). By imposing a bad faith standard before plaintiffs may obtain discovery under Rule 56(d) in a FOIA case, the D.C. Circuit has cut off the ability of requesters to participate in their case by gathering evidence about the adequacy of the agency's search.

In addition to being unfair to plaintiffs, the D.C. Circuit's bad faith standard restricts the efficient operation of the courts. With discovery occurring in only extremely limited circumstances in FOIA cases, courts are required to focus their resources on adjudicating questions about the sufficiency of the government's declaration describing the search rather than the merits issue of the legal sufficiency of the search itself.

> "Discovery is especially important in cases, such as this, where a person requesting access to agency records under the Privacy Act or FOIA is entitled to as complete and accurate an explanation of the reasons for nondisclosure of sought-after information as the agency is able to provide. In this context, discovery benefits not only the requester but also the court, which must review an agency decision not to release."

Londrigan v. FBI, 670 F.2d 1164, 1175 n.6 (D.C. Cir. 1981).

In addition to impairing the functioning of FOIA, the D.C. Circuit's subject matter-specific Rule 56(d) standard infringes on the exclusive power of this Court and Congress to amend the Federal Rules of Civil Procedure. The Rules Enabling Act grants authority only to this Court to promulgate rules of procedure, subject to Congress's review. 28 U.S.C. § 2072(a). Lower courts may only create rules which are "consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title." 28 U.S.C. § 2071(b).

Whether or not a specific category of cases should be subject to different discovery rules is an important enough question that the Federal Rules of Civil Procedure have been substantively amended three times to confront the issue. The 1993 Amendment to the Federal Rules of Civil Procedure permitted courts, "by local rule, to exempt all or particular types of cases from these disclosure requirement[s] or to modify the nature of the information to be disclosed." Rule 26, Notes of Advisory Committee on Rules, 1993 Amendment (alteration in original). After an extensive review of local courts' experience exempting different categories of cases, the Federal Rules of Civil Procedure were again amended in 2000 to remove the authority of local courts to exempt categories of cases by local rule or standing order and made a list of eight categories of proceedings the exclusive exemptions. Rule 26, Notes of Advisory Committee on Rules, 2000 Amendment. The reason for this change was that Rules "discerned widespread support for national uniformity. . . . National uniformity is also a central

purpose of the Rules Enabling Act of 1934, as amended, 28 U.S.C. §§2072–2077." *Id.* Proceedings under FOIA were not included in the list. In 2006, the Federal Rules of Civil Procedure were again amended to add civil forfeiture actions to the list of exemptions. Rule 26, Committee Notes on Rules, 2006 Amendment.

This history of amendments to the Federal Rules of Civil Procedure demonstrates both that setting categorical rules of discovery for particular types of proceedings is an important issue and also that setting such rules is within the exclusive prerogative of this Court, with review by Congress. The goal of national uniformity of the rules for discovery proceedings, as articulated by the Advisory Committee on Rules, is threatened where different jurisdictions have different standards for obtaining discovery in specific categories of case.

Finally, the application of the bad faith standard for obtaining discovery in cases arising under FOIA is a frequently recurring issue. In fact, *Goland I*, "has been cited for its discovery ruling nearly a hundred times." Margaret B. Kowka, Judicial Rejection of Transsubstantivity: The FOIA Example, 15 Nev. L.J. 1493, 1508 (Summer 2015). The problem of lower courts applying differential treatment to FOIA cases in the discovery context is also well-documented in academic literature.

> "The need for discovery is particularly true for the plaintiff in a FOIA case, because the agency almost always has all the relevant

> evidence. Outside the FOIA context, litigants use discovery to gather the evidence necessary to prove or defend the case. In FOIA cases, however, courts refuse to allow discovery as a matter of routine."

Margaret B. Kwoka, Article: Leaking and Legitimacy, 48 U.C. Davis L. Rev. 1387, 1430 (April 2015). *See also* Amir Shachmurove, Article: Attorneys' Fees Under the Post-2007 Freedom of Information Act: A Onetime Test's Restoration and an Overlooked Touchstone's Adoption, 85 Tenn. L. Rev. 571, 649 (Winter 2018) (noting the district courts' "loatheness . . . to authorize minimal discovery in spite of a typical complainant's limited ken").

B. This case is an excellent vehicle for resolving the questions presented.

The case presents an excellent vehicle to resolves the questions presented because the answer to these questions and resolution of the circuit split will be outcome-determinative. First, although review of the denial of a motion for discovery under Rule 56(d) is for abuse of discretion, a "district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996). Since this issue presented in this case involves only the proper legal standard to apply in adjudicating Rule 56(d) motions in cases arising under FOIA, this Court's determination of the proper standard will dictate the outcome of the case.

Further, neither the district court nor the D.C. Circuit rested their respective holdings on alternative grounds. The sole reason that the district court denied Dr. Shapiro's Rule 56(d) motion was that he "failed to show why discovery, eschewed in FOIA litigation absent a showing of agency bad faith, is 'necessary' in this case." App. 41(a). Nothing in the district court's opinion indicates that it would have reached the same conclusion under a different standard. Similarly, the D.C. Circuit's finding that the district court had not abused its discretion in denying discovery was premised entirely on its the trial court correctly concluding that there was "no evidence of bad faith—a finding Shapiro does not challenge on appeal[.]" App. 11a. Alternatively, if this Court holds that evidence of bad faith is a requirement for obtaining relief under Rule 56(d) in cases brought under FOIA, the decision below would necessarily be affirmed because Dr. Shapiro does not challenge the absence of bad faith and does not contend that he carried his burden of opposing the motion for summary judgment. *Cf. Inst. for Justice v. IRS*, 941 F.3d 567, 573 (D.C. Cir. 2019) ("Because we conclude that appellant carried [its] burden of opposing the motion for summary judgment on the search's adequacy, however, we do not reach the issue whether the denial of additional discovery was appropriate under Rule 56(d)") (internal quotation marks omitted, alteration in original).

This case is also a desirable vehicle for resolving the issues presented because the matter about which discovery was sought pertains to the adequacy of the

search. In contrast, cases involving withholdings pursuant to one of FOIA's nine exemptions are less suitable for Rule 56(d) relief because of the risk that discovery would tend to reveal the very information being withheld. *See Lane*, 523 F.3d at 1134. Thus, a case involving the adequacy of the search is the most appropriate vehicle for resolving the discovery standards presented here. *Rashad Ahmad Refaat El Badrawi v. Dep't of Homeland Sec.*, 583 F. Supp. 2d 285, 301 (D. Conn. 2008) ("When the courts have permitted discovery in FOIA cases, it is generally limited to the scope of the agency's search.")

Even among the smaller class of cases involving Rule 56(d) motions relating to the adequacy of the search in a FOIA case, many cases are unsuitable for this Court's review because the plaintiffs have been denied Rule 56(d) relief for reasons having nothing to do with a showing of bad faith. For example, the plaintiff in *Rocky Mt. Wild, Inc. v. United States BLM*, 455 F. Supp. 3d 1005, 1015 (D. Colo. 2020) was denied discovery under Rule 56(d) relating to the adequacy of the search because the plaintiff had not only "failed to submit the requisite declaration or affidavit — a sufficient basis, standing alone, to deny plaintiff's Rule 56(d) request," the plaintiff also had "not made an effort to describe, with any specificity, the facts plaintiff seeks to discovery, plaintiff's previous efforts to obtain those facts, and how the facts are essential to rebutting defendants' summary judgment motion." In contrast, this case presents an ideal vehicle for resolving the questions presented because Dr.

Shapiro's Rule 56(d) motion solely based on his failure to meet the D.C. Circuit's bad faith standard.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 13, 2022