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 Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* PUBLIC RECORD MEDIA IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* AND DISCLOSURE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 3

I. FOIA enforcement actions brought by public requesters play an essential role in FOIA compliance 4

A. PRM's own FOIA litigation demonstrates that the availability of attorney fees in FOIA litigation is an important mechanism for ensuring FOIA compliance and government accountability 9

B. The plain language of FOIA allows courts the ability to award attorney fees and costs to a complainant who "substantially prevails" 15

II. The Fifth Circuit's holding in "*Gahagan*" frustrates FOIA compliance by improperly barring a class of requesters from fully utilizing its fee-shifting provisions 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Sandoval, 532 U.S. 275 (2001) 20

Barr v. Matteo, 360 U.S. 564 (1959) 4

Brayton v. Office of the U.S. Trade Representative, 641 F.3d 521 (D.C. Cir. 2011).....18

Buckhannon Board and Home Care, Inc. v. West Virginia Dep't of Health and Human Resources, 532 U.S. 598 (2001).....7

Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice, 820 F.Supp.2d 39 (D.D.C. 2011) 10, 15

Dep't of Air Force v. Rose, 425 U.S. 352 (1976).....4

Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994) 20

Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356 (2019) 18

Milner v. Dep't of Navy, 562 U.S. 562 (2011) 18

Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty., Wash., 554 U.S. 527 (2008) 18

Pub. Record Media, LLC v. U.S. Dep't of Justice, No. CIV. 12-1225 MJD/AJB, 2013 WL 3024091 (D. Minn. Jan. 29, 2013), *aff'd*, No. CIV. 12-1225 MJD/AJB, 2013 WL 1900622 (D. Minn. May 7, 2013) 10, 14

TABLE OF AUTHORITIES—Continued

Page

STATUTES

5 U.S.C. § 552(a)(3)(A) 15

5 U.S.C. § 552(a)(4)(A)(ii) 19

5 U.S.C. § 552(a)(4)(B) 5

5 U.S.C. § 552(a)(4)(E) 10, 20

5 U.S.C. § 552(h)(1–6) 5

28 U.S.C. § 2412(c) 20

Civil Rights Act 20

Equal Access to Justice Act 20

Freedom of Information Act, 5 U.S.C. § 552 .....*passim*

Minnesota Government Data Practices Act 2

OPEN Government Act of 2007, Pub. L. No. 110-175, §§ 2(5), 3, 4(a), 5, 121 Stat. 2524 (Dec. 31, 2007) 9

RULES AND REGULATIONS

U.S. Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

153 Cong. Rec. 6345 (2007) 7

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153 Cong. Rec. 6350 (2007) 7, 17

153 Cong. Rec. 6351 (2007) 8

153 Cong. Rec. 22943 (2007) 17

TABLE OF AUTHORITIES—Continued

Page

153 Cong. Rec. 22947 (2007).....17

H.R. Rep. No. 110-45 (2007) 8

About PRM, PUBLIC RECORD MEDIA, http://bit.ly/2dwKOaS (last visited Aug. 14, 2019).....1

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Complaint, *Brennan Center for Justice at New York University School of Law et al. v. United States Department of Justice*, No. Civ. 18-01860 RDM (D.D.C. Aug. 8, 2018).....16

Complaint, *Moeller v. Equal Employment Opportunity Commission*, No. Civ. 19-02330 DLF (D.D.C. Aug. 2, 2019) 16

Complaint, *Public Record Media, LLC v. U.S. Department of Health and Human Services*, No. Civ. 12-03065 (JRT/TNL) (D. Minn. Dec. 7, 2012) 5

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TABLE OF AUTHORITIES—Continued

Page

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Freedom of Information Act Request—Department of the Interior, PUBLIC RECORD MEDIA, http://www.publicrecordmedia.org/freedom-of-information-act-request-department-of-the-interior-documents/ (last visited Aug. 14, 2019) 2

Kevin Duchschere, *A Need to Know Drives St. Paul Nonprofit's Mission*, MINNEAPOLIS STAR TRIB., Jul. 23, 2015, *available at* http://strib.mn/1CTdnZN 1

Obama Administration sets new record for withholding FOIA requests, PBS NEWS HOUR, Mar. 18, 2015, https://www.pbs.org/newshour/nation/obama-administration-sets-new-record-withholding-foia-requests 6

Peter Callaghan, *Lawsuit over Amazon bid reveals the latest way Minnesota officials are attempting to sidestep public disclosure laws*, MINNPOST, June 28, 2018, https://www.minnpost.com/politics-policy/2018/06/lawsuit-over-amazon-bid-reveals-latest-way-minnesota-officials-are-attemptin/ 2

TABLE OF AUTHORITIES—Continued

Page

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Susan B. Long, Harry Hammitt, *Increased Use of the Freedom of Information Act by the Media: Exploring What Took the Media So Long*, 63 Vill. L. Rev. 895 (2018) 16

U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-667, FREEDOM OF INFORMATION ACT: LITIGATION COSTS FOR JUSTICE AND AGENCIES COULD NOT BE FULLY DETERMINED (Sept. 2016), *available at* https://www.gao.gov/assets/680/679631.pdf 6

INTEREST OF *AMICUS CURIAE* AND DISCLOSURE[1]

The *Amicus*, Public Record Media ("PRM"), is a nonpartisan, nonprofit organization concerned with the proper interpretation and enforcement of the Freedom of Information Act, 5 U.S.C. § 552, as amended ("FOIA").

PRM's mission is to advance "transparency and democracy through the use, application, and enforcement of freedom of information laws."[2] PRM uses FOIA and other public records statutes to inspect and publish thousands of government documents, which it makes available on its website at no charge for the benefit of policy makers, the press, and the public at large. In addition, PRM functions as a news organization by creating original articles and reports based on government documents obtained through freedom of information laws.

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[1] The *Amicus* certifies under U.S. Sup. Ct. R. 37.6 that: (1) no counsel for a party authored the brief in whole or in part; and (2) no person or entity has made a monetary contribution to the preparation or submission of the brief other than the *Amicus*, its members, and its counsel. The *Amicus* gave all counsel of record notice of its intention to file a cert-stage *amicus* brief at least ten days before the brief's due date, and received consent to file this brief from all parties.

[2] About PRM, PUBLIC RECORD MEDIA, http://bit.ly/2dwKOaS (last visited Aug. 14, 2019); *see also* Kevin Duchschere, *A Need to Know Drives St. Paul Nonprofit's Mission*, MINNEAPOLIS STAR TRIB., Jul. 23, 2015, *available at* http://strib.mn/1CTdnZN.

PRM also provides a benefit to the public by regularly challenging agency withholding of documents,[3] promoting agency compliance with FOIA and other public record statutes,[4] and publishing its results.[5] In its pursuit of government records, PRM has filed FOIA lawsuits against a variety of federal agencies, and has undertaken numerous FOIA administrative appeals. Finally, PRM provides free education about freedom of information laws, in order to facilitate public access to government information, and to encourage governmental accountability through citizen use of FOIA and similar statutes. PRM's educational programs have been presented to diverse members of the public, including journalists, academics, attorneys, students, and numerous others.

PRM is governed by a volunteer board of directors, and its affairs are largely conducted by volunteer staff.

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[3] *See* Peter Callaghan, *Lawsuit over Amazon bid reveals the latest way Minnesota officials are attempting to sidestep public disclosure laws*, MINNPOST, June 28, 2018, https://www.minnpost.com/politics-policy/2018/06/lawsuit-over-amazon-bid-reveals-latest-way-minnesota-officials-are-attemptin/.

[4] *Data Practices Advisory Opinion 14-011*, Minnesota Department of Administration Data Practices Office, Sept. 17, 2014, https://mn.gov/admin/data-practices/opinions/library/#/detail/appId/1/id/267574 (PRM requested advisory opinion on government entity compliance with the Minnesota Government Data Practices Act).

[5] *See*, *e.g.*, *Freedom of Information Act Request—Department of the Interior*, PUBLIC RECORD MEDIA, http://www.publicrecordmedia.org/freedom-of-information-act-request-department-of-the-interior-documents/ (last visited Aug. 14, 2019).

In those instances in which PRM employs legal counsel, such counsel provide services on either a *pro bono* or discounted basis, in furtherance of PRM's public-facing mission.

SUMMARY OF THE ARGUMENT

FOIA's fee-shifting provision, as amended by the 2007 OPEN Government Act (the "Act"), serves a significant public accountability purpose by allowing requesters the opportunity to seek attorney fee and cost awards if they have "substantially prevailed" during FOIA litigation with the government.

The Fifth Circuit's holding in *Gahagan v. United States Citizenship & Immigration Services, et al.* ignores the plain language of the FOIA fee-shifting provision and unnecessarily constricts the class of requesters who are eligible to seek attorney fee awards, thus limiting access to an accountability and compliance feature specifically added by Congress when it passed the Act.

ARGUMENT

FOIA is essential to the democratic process, and ensures governmental openness and accountability.

> The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the

> widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees.

Barr v. Matteo, 360 U.S. 564, 577 (1959) (Justice Black).

FOIA serves "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

FOIA enforcement relies, in part, on its distinct attorney fee-shifting provision, under which a complainant who "substantially prevails" in litigation brought under FOIA may be awarded attorney fees and costs by the court. In ignoring the plain and simple text of the Act, the Fifth Circuit has improperly introduced barriers to eligibility for attorney fees under FOIA. The Court's review is warranted to ensure that the Act's important fee-award feature may be available to all eligible requesters—including self-represented attorneys who utilize their own legal services.

I. FOIA enforcement actions brought by public requesters play an essential role in FOIA compliance.

Agencies of the federal government do not always comply with their statutory duties—set out in FOIA—to provide public requesters with access to government records. Indeed, FOIA contemplates that in those instances where agencies have failed to abide by FOIA's requirements, enforcement relies upon requesters

filing suit in federal district court to ensure compliance.[6] Under FOIA, requesters who have been unlawfully denied records may petition courts to "order the production of records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

The disclosure of government records is a central—but not exclusive—outcome of successful FOIA litigation, and it is an outcome that PRM has repeatedly achieved as a "complainant" in lawsuits against federal agencies. PRM has sought and obtained thousands of pages of government records through FOIA litigation, including records from the Department of Justice ("DOJ"), the Department of the Interior ("DOI"), and the Department of Health and Human Services ("HHS").[7]

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[6] FOIA, as amended by the Act, also provides for a mediation track, available through the Office of Government Information Services ("OGIS") as a "nonexclusive alternative" to litigation. However, the outcome of the mediation process is not binding on agencies, and any opinions issued by OGIS are advisory only. 5 U.S.C. § 552(h)(1–6).

[7] In the case of HHS, PRM filed suit to obtain agency correspondence related to a Minnesota State Senator who had difficulty receiving information from the Centers for Medicaid and Medicare Services ("CMS") after raising concerns about the use of monies disbursed by CMS. Complaint, *Public Record Media, LLC v. U.S. Dep't of Health and Human Services*, No. Civ. 12-03065 (JRT/TNL) (D. Minn. Dec. 7, 2012), ECF No. 1.

FOIA litigation has increased in recent years,[8] as have agency backlogs in responding to FOIA requests.[9] PRM's operational history has overlapped with this trend, and PRM's use of litigation as a tool to obtain records has been a necessary response to prevailing conditions.

Recognizing ongoing issues with FOIA compliance by federal agencies, Congress passed the 2007 OPEN Government Act, which aimed to address FOIA compliance problems, and made specific changes to FOIA's litigation provisions to ensure their vitality. During a March 14, 2007 floor debate about the Act, Representative William Clay specifically highlighted the problem of agency noncompliance, noting that: "During a hearing in February, this subcommittee heard extensive testimony concerning long delays and bureaucratic obstacles experienced by requesters trying to obtain

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[8] *See*, *e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-667, FREEDOM OF INFORMATION ACT: LITIGATION COSTS FOR JUSTICE AND AGENCIES COULD NOT BE FULLY DETERMINED (Sept. 2016) (finding 57 percent increase in FOIA lawsuits since 2006), *available at* https://www.gao.gov/assets/680/679631.pdf; Christine Mehta, *Annual Report: FOIA Lawsuits Reach Record Highs in FY 2018*, THE FOIA PROJECT, Nov. 12, 2018, http://foiaproject.org/2018/11/12/annual-report-foia-lawsuits-reach-record-highs-in-fy-2018/ (providing nonprofit filers make up 50 percent of all FOIA lawsuits filed in FY 2017 and FY 2018), *FOIA Lawsuits Surge In Trump Administration's First Year*, THE FOIA PROJECT, Jan. 16, 2018, http://foiaproject.org/2018/01/16/lawsuits-trump-first-year/.

[9] *See Obama Administration sets new record for withholding FOIA requests*, PBS NEWS HOUR, Mar. 18, 2015, https://www.pbs.org/newshour/nation/obama-administration-sets-new-record-withholding-foia-requests.

government records under FOIA." 153 Cong. Rec. 6345 (2007).

Similarly, Representative Carolyn Maloney observed that: "The backlogs at agencies and Departments continue to grow, and frequently the only recourse for the denial of requested information is to file lawsuits." 153 Cong. Rec. 6348 (2007).

During the course of the debate, Representative Tom Udall also specifically addressed issues that were constraining FOIA litigants, including the U.S. Supreme Court's opinion in *Buckhannon Board and Home Care, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598 (2001): "Because of delays and backlogs, requesters often have found it hard to learn about the status of their requests, and a recent Supreme Court decision has hampered requesters' ability to litigate their claims." 153 Cong. Rec. 6350 (2007).

In summarizing the impact of *Buckhannon*, a March 12, 2007 report on the Act submitted by the House Committee on Oversight and Government Reform noted that:

> [The change in the Act's fee-shifting provision] responds to the Supreme Court's ruling in *Buckhannon Board and Home Care, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598 (2001) which eliminated the "catalyst theory" of attorney fee recovery under certain federal rights laws. This section makes clear that the *Buckhannon* decision

> does not apply to FOIA cases, and ensures that requesters are eligible for attorneys fees and other litigation costs if they obtain relief from the agency during litigation.

H.R. Rep. No. 110-45 at 6 (2007).

In support of the proposed changes to FOIA's litigation provisions, Representative Udall cited a 2007 Rocky Mountain News editorial which noted that the fee-shifting provisions of the Act were aimed at penalizing the government for deliberately changing positions during FOIA litigation as a tactic for frustrating requesters and avoiding financial liability:

> The Government would have to reimburse the legal fees of more parties that sue under FOIA. Currently, there's only one way a party that's filed suit to enforce a FOIA request can get repaid: The Government has to lose in court. The amendments would force agencies to repay attorneys fees if the government turns over records before a final ruling is issued. This would prevent agencies from sticking media groups with attorneys fees for surrendering records just before a judge rules.

153 Cong. Rec. 6351 (2007).

After passage by both houses of Congress, the Act was signed into law on September 14, 2007. The final form of the Act included FOIA's current fee-shifting language, as well as several other measures designed

to enable requesters to better utilize and enforce the FOIA.[10]

A. PRM's own FOIA litigation demonstrates that the availability of attorney fees in FOIA litigation is an important mechanism for ensuring FOIA compliance and government accountability.

Finding that "in practice, the Freedom of Information Act has not always lived up to the ideals of the Act," as explained above, Congress amended FOIA's fee-shifting provision in 2007 to expressly allow awards of reasonable attorney fees when a lawsuit results in a "voluntary or unilateral change in position by [an] agency." OPEN Government Act of 2007, Pub. L. No. 110-175, §§ 2(5), 4(a), 121 Stat. 2524 (Dec. 31, 2007).

Under FOIA's amended fee-shifting provision, a plaintiff is eligible for reasonable fees and costs in FOIA litigation if the plaintiff's lawsuit served as a "catalyst" in achieving a voluntary change in an agency's position. Under the amendments to FOIA, "a complainant has substantially prevailed" and consequently is eligible for a fee award "if the complainant has obtained relief through either (I) a judicial order, or an enforceable written agreement or consent decree,

[10] The OPEN Government Act of 2007 also included enhanced "copy fee" provisions for news media requesters, and mechanisms for instituting disciplinary actions for "arbitrary and capricious" agency rejections of FOIA requests. OPEN Government Act of 2007, Pub. L. No. 110-175, §§ 3, 5, 121 Stat. 2524 (Dec. 31, 2007).

or (II) a voluntary and unilateral change in position by the agency, if the complainant's claim is not insubstantial." 5 U.S.C. § 552(a)(4)(E); *see also Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 820 F.Supp.2d 39, 43 (D.D.C. 2011).

FOIA's fee-shifting provision, as amended by the Act, has been a meaningful tool for PRM in helping to compensate attorneys working at reduced rates to compel the disclosure of records from federal agencies. FOIA's amended fee-shifting provision has also specifically allowed PRM the opportunity to use fee awards to disincentivize agency misconduct.

In October of 2011, PRM sent a three-part FOIA request to the DOJ's Office of Legal Counsel. Two parts of the request sought information about the use of unmanned aerial vehicles ("UAVs") to conduct lethal force operations against United States citizen Anwar al-Awlaki, or against other United States persons located abroad. The third part sought information about the potential lethal use of UAVs against any persons physically located within areas under the jurisdiction of the United States. *Pub. Record Media, LLC v. U.S. Dep't of Justice*, No. CIV. 12-1225 MJD/AJB, 2013 WL 3024091, at *1 (D. Minn. Jan. 29, 2013), *aff'd*, No. CIV. 12-1225 MJD/AJB, 2013 WL 1900622 (D. Minn. May 7, 2013) (affirming the magistrate judge's order in its entirety, concluding the order is neither clearly erroneous nor contradictory to law).

PRM's FOIA request was submitted during a time period in which the Obama administration was

utilizing UAV-based missile strikes as a counter-terrorism tactic, and in the wake of press reports indicating that DOJ's Office of Legal Counsel had issued a legal opinion setting out its justification for employing lethal force against United States citizens in an extra-judicial context. PRM subsequently learned that while other news and nonprofit organizations had filed FOIA requests for legal opinions about the use of lethal force against U.S. citizens abroad,[11] PRM alone had sought opinions pertaining to the potential lethal use of UAVs on the domestic front.[12]

DOJ responded to the first item of PRM's three-part FOIA request (information pertaining to Anwar al-Awlaki) by stating that pursuant to enumerated exemptions "the Office of Legal Counsel neither confirms nor denies the existence of the documents described in this item." Exhibits in Support of Motion for Fees and Costs at 5, *Pub. Record Media, LLC v. U.S. Dep't of Justice*, No. CIV. 12-1225 MJD/AJB (D. Minn. Oct. 30, 2012), ECF No. 24-1.

Regarding the remainder of PRM's three-part request, DOJ replied that "[w]e have identified several

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[11] The New York Times, the American Civil Liberties Union, and the First Amendment Coalition filed related FOIA requests during the same period, but they did not seek records similar to those detailed in "Item 3" of PRM's request.

[12] Other PRM FOIA requests (to the Federal Aviation Administration) have revealed the use of "Predator" UAVs within the continental United States for border surveillance missions. PUBLIC RECORD MEDIA, http://www.publicrecordmedia.org/2009-wsa-92-documents/ (last visited Aug. 14, 2019). Predator UAVs are also used as mobile armament platforms for military operations overseas.

documents that are responsive to the remaining items in your request. We are withholding these documents pursuant to [several FOIA exemptions]." *Id*. PRM subsequently filed an administrative appeal to contest DOJ's withholding of some of the additional documents "responsive to the remaining items" in PRM's request. *Id*. at 7–14. PRM's administrative appeal was explicitly narrowed to only contest the withholding of documents related to the third part ("Item 3") of PRM's request—information about the use of lethal force (via UAVs) against persons physically located within areas under the jurisdiction of the United States. *Id*.

DOJ confirmed receipt of PRM's administrative appeal, but did not otherwise substantively respond to PRM's appeal. PRM then filed suit on May 22, 2012, seeking "Item 3" documents withheld by DOJ. *Id*. at 16.

On August 3, 2012—more than two months after litigation had commenced—DOJ reversed its initial position, indicating for the first time that it did not have any documents responsive to the third part of PRM's request. PRM's Memorandum in Support of Motion for Fees and Costs at 2, *Pub*. *Record Media*, *LLC v*. *U.S*. *Dep't of Justice*, No. CIV. 12-1225 MJD/AJB (D. Minn. Oct. 30, 2012), ECF No. 23. PRM subsequently sought detailed information (including search declarations) about DOJ's change of position, and then, when unable to confirm the existence of responsive documents, moved for attorney fees under the "catalyst theory" adopted in the 2007 OPEN Government Act. *Id*. at 5. In moving for fees, PRM argued both for eligibility for fees, and entitlement to fees. *Id*. at 5.

In arguing for eligibility, PRM relied on the plain language of FOIA's fee-shifting provision, noting that the organization had "substantially prevailed," as its lawsuit caused a change in position by Defendant DOJ. *Id*. at 8. "Because Plaintiff caused the government to change position, it has substantially prevailed and is eligible for fees. And though the agency's change in position here is a disclosure of dispositive information rather than a disclosure of records, the same statutory basis and rationale for awarding fees applies." *Id*. at 10.

In arguing for its entitlement to fees, PRM stressed the public benefits that accrued from its litigation, including using a fee award to censure the government for unclear and evasive conduct in responding to its FOIA request, and to help stave off similar conduct in the future:

> Without fee awards in cases like this, there will be an incentive for agencies to issue incomplete and unclear responses to proper FOIA requests, and a disincentive for good-faith requesters to venture time and resources in pursuit of the same. Without fee awards in cases like this, agencies could respond in an incomplete or unclear manner, as they have here, delay FOIA processes for months, and then, after a requester is forced to initiate litigation with an agency well known to have deeper stores of time and resources, change positions in a manner which if accepted as true would render the suit moot.

> This is what has taken place here, and is, Plaintiff submits, the type of interaction that FOIA's section 552(a)(4)(E)(ii) is meant to discourage. The government should not avoid responsibility for expenses simply by rendering a case moot through its own actions, whether by producing documents or declaring no such documents exist. Requesters faced with incomplete responses under FOIA in the future would otherwise face even more difficult resource decisions.

Id. at 14.

The federal magistrate judge held the DOJ's reversal on the existence of responsive documents to be a substantial change in its position and awarded PRM fees. *Pub*. *Record Media*, 2013 WL 3024091, at *2–5. In awarding fees, the federal magistrate judge highlighted the benefits that PRM's litigation provided to the public, writing that:

> Despite the fact that no documents were ever produced, the Plaintiff and the public at large can still glean important information from [DOJ's change in position]. . . . Plaintiff's suit did not uncover any documents . . . [but] did nevertheless provide the public with the benefit of important information that was not available to the public prior to the suit. . . . This information, which reveals the general scope of the United State's lethal use of UAVs, is in and of itself valuable information that benefits the public.

Id. at *3.

PRM's fee award in this case utilized the 2007 FOIA amendments, and the Act's incorporation of the "catalyst theory" into FOIA's attorney fee-shifting provisions. Under that provision's plain language, a requester like the plaintiff in *Gahagan* (a self-represented attorney who has substantially prevailed in FOIA litigation) should likewise be eligible for an award of attorney fees, and consequently should be allowed to submit a fee petition in federal court.[13]

B. The plain language of FOIA allows courts the ability to award attorney fees and costs to a complainant who "substantially prevails."

FOIA's plain language—as amended by the 2007 OPEN Government Act—specifically provides "the court may assess against the United States reasonable attorneys fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E)(i).

Under FOIA, a "complainant" has standing to bring a FOIA lawsuit so long as the "complainant" is the same "person" who made the initial "request" under 5 U.S.C. § 552(a)(3)(A). FOIA's plain language is silent as to the definition of such "persons," but several

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[13] Once "eligible" for attorney fees, a requester must be evaluated by the court for "entitlement" to fees under at least four factors. *See Citizens for Responsibility*, 820 F.Supp.2d at 45 (citations omitted). No one factor is dispositive. *See id*.

decades of FOIA litigation demonstrate that the "persons" that make government record requests under FOIA are a wide and varied group. *See*, *e.g.*, Susan B. Long, Harry Hammitt, *Increased Use of the Freedom of Information Act by the Media: Exploring What Took the Media So Long*, 63 VILL. L. REV. 895, 897 (2018) (discussing increase in the number of FOIA lawsuits filed by news organizations); Christine Mehta, *Annual Report: FOIA Lawsuits Reach Record Highs in FY 2018*, THE FOIA PROJECT, Nov. 12, 2018, http://foiaproject.org/2018/11/12/annual-report-foia-lawsuits-reach-record-highs-in-fy-2018/ (providing nonprofit filers make up 50 percent of all FOIA lawsuits filed in FY 2017 and FY 2018); Complaint, *Moeller v. Equal Employment Opportunity Commission*, No. Civ. 19-02330 DLF (D.D.C. Aug. 2, 2019), ECF No. 1 (example of FOIA *pro se* lawsuit filed by a licensed attorney); Complaint, *Brennan Center for Justice at New York University School of Law et al. v. United States Department of Justice*, No. Civ. 18-01860 RDM (D.D.C. Aug. 8, 2018), ECF No. 1 (example of FOIA lawsuit filed by an academic institution).

The historically diverse nature of FOIA requesters was specifically mentioned during congressional debates over the 2007 OPEN Government Act. During the House of Representatives' floor debate over the Act, Representative Udall referenced the diverse composition of the FOIA requesters who would stand to benefit from the proposed amendments, noting that: "FOIA has been used effectively by journalists, public interest

organizations, corporations, and individuals to access Government information." 153 Cong. Rec. 6350 (2007).

During Senate debates over the Act, Senator John Cornyn noted that "[t]he act has the support of business groups, such as the U.S. Chamber of Commerce and National Association of Manufacturers, media groups and more than 100 advocacy organizations from across the political spectrum." 153 Cong. Rec. 22947 (2007). Senator Patrick Leahy further noted that additional support for the legislation came from "the American Library Association . . . OpenTheGovernment.org, Public Citizen, the Republican Liberty Caucus, the Sunshine in Government Initiative, and the Vermont Press Association." 153 Cong. Rec. 22943 (2007).

Just as the congressional record evinces an inclusive vision of the requesters who would be impacted by the 2007 FOIA amendments, the amendments themselves contain no express language barring any particular class of requesters from being able to use FOIA's fee-shifting provision. The circumstances that allowed PRM to "substantially prevail" in its litigation with DOJ are certain to be encountered by other FOIA requesters who utilize legal services (including self-represented attorneys who utilize their own services), and those requesters should likewise be eligible to make a case for fee awards to the court.

II. The Fifth Circuit's holding in "*Gahagan*" frustrates FOIA compliance by improperly barring a class of requesters from fully utilizing its fee-shifting provisions.

The Court's interpretation of FOIA starts and ends with its text. *Milner v. Dep't of Navy*, 562 U.S. 562, 569 (2011). Any casual disregard of FOIA's plain statutory language must be rejected. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (rejecting district court's addition of "substantial competitive harm" requirement into the term "confidential" in favor of the plain language of the statute).

The plain language of FOIA's fee-shifting provision does not differentiate between requesters—if a complainant requester substantially prevails in FOIA litigation, the court may award them fees. While "entitlement" to fees is variable, depending on the circumstances of the request (*see*, *e.g.*, *Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 524 (D.C. Cir. 2011) (discussing variable factors for assessing entitlement)), "eligibility" for fees flows from the sole question of whether or not a complainant has substantially prevailed under the terms of the statute.

If Congress had intended to differentiate between requesters regarding eligibility for fees, based on their status as attorneys or otherwise, it would have explicitly done so in the text of the statute. *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty., Wash.*, 554 U.S. 527, 557 (2008) (finding Congress' use of the words "just and reasonable"

were meant to give an agency wide latitude and that if Congress intended to impose constraints, it would have done so in the express language of the act). For instance, FOIA provides differentiated treatment among classes of requesters in regards to the ability of the government to assess fees for copies of records, but that differentiation is explicitly set out in the text of the statute. 5 U.S.C. § 552(a)(4)(A)(ii) (limiting copy fees government agencies can access to FOIA requests made by representatives of the news media or other individuals for non-commercial uses). FOIA's attorney fee-shifting provision, however, contains no such qualifying language.

The Fifth Circuit's holding strains to avoid FOIA's plain language in order to bar a class of requesters—self-represented attorney requesters—from fee eligibility, thus achieving a result not contemplated by the statute. Allowing courts to re-write the statute in this way negatively impacts FOIA compliance by improperly preventing a class of requesters from utilizing one of its key accountability features.

In addition, the Fifth Circuit's narrow definition of "incurred" presents a slippery slope that will likely create barriers to an entire class of litigants, beyond self-represented attorneys, by sowing confusion about whether requesters who use in-house counsel or who are clients of *pro bono* attorneys have "incurred" attorneys fees in FOIA litigation, and are thus entitled to recover them.

A robust fee provision is an important mechanism for incentivizing attorneys to represent FOIA requesters and nonprofits like PRM in a reduced fee or *pro bono* capacity. Unlike the Civil Rights Act and the Equal Access to Justice Act ("EAJA")—interpretations of which the Fifth Circuit incorporates into FOIA—the relief available under FOIA is limited. Whereas the potential for monetary relief under either the Civil Rights Act or the EAJA incentivizes attorneys to undertake representation under contingent fee arrangements, the only relief available under FOIA is the production of documents. *See, e.g.*, 28 U.S.C. § 2412(c) (explicitly providing any costs awarded under the EAJA are to be in addition to any relief provided in the judgment); *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001) (providing private individuals may sue to enforce Title VI of the Civil Rights Act to obtain both injunctive relief and damages). *Cf.* 5 U.S.C. § 552(a)(4)(E) (allowing fees and other litigation costs, but not providing for monetary damages). The Fifth Circuit's attempt to incorporate EAJA and Civil Rights Act precedent into FOIA must be rejected in favor of FOIA's unique objectives of legislative history. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 522–25 (1994) (rejecting incorporation of Civil Rights Act fee-shifting precedent into Copyright Act).

As a public interest nonprofit organization and frequent FOIA requester interested in a vibrant and functioning FOIA for all requesters, PRM asks the Court to review this matter, and to reverse the Fifth Circuit's holding.

CONCLUSION

FOIA's fee-shifting provision, as amended by the 2007 OPEN Government Act, serves a significant public accountability purpose by allowing requesters the opportunity to seek fee and cost awards if they have "substantially prevailed" during FOIA litigation with the government. Under the statute, a requester who has substantially prevailed is eligible for "reasonable attorneys fees and costs" which "may be assessed" by the courts.

The Fifth Circuit's holding in *Gahagan v. United States Citizenship & Immigration Services, et al.* ignores the plain language of the FOIA and bars self-represented attorneys from eligibility for attorney fees under FOIA's fee-shifting provision, effectively re-writing the statute to achieve a result not contemplated by Congress.

Given PRM's mission of encouraging broad public utilization of the FOIA (in addition to its own regular use of the statute), PRM has an interest in ensuring that the FOIA's accountability features are kept

vibrant and available to public requesters. The Court should grant the petition and reverse the Fifth Circuit holding.

Respectfully submitted,

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