ORAL ARGUMENT NOT YET SCHEDULED

No. 19-5310

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARGARET B. KWOKA,

Plaintiff-Appellant,

v.

INTERNAL REVENUE SERVICE,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia
No. 17-cv-01157, Hon. Dabney L. Friedrich, U.S.D.J.

BRIEF OF APPELLANT MARGARET B. KWOKA

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March 9, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Circuit Rule 28(a)(1), counsel for appellant certify as follows:

A. Parties and Amici

The parties to this proceeding and in the proceedings before the district court are as follows:

Margaret B. Kwoka, Plaintiff-Appellant

Internal Revenue Service, Defendant-Appellee

There were no intervenors or amici in the district court nor are there currently any in this Court.

B. Rulings Under Review

Appellant appeals the October 25, 2019 order entered by the Honorable Dabney L. Friedrich of the United States District Court for the District of Columbia denying appellant's motion for attorney fees and costs under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E). JA 228–29.

C. Related Cases

This case was not previously before this Court or any other appellate court. Counsel for appellant are not aware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

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GLOSSARY

FOIA: Freedom of Information Act

IRS: Internal Revenue Service

JURISDICTIONAL STATEMENT

On June 14, 2017, plaintiff-appellant filed a lawsuit in the U.S. District Court for the District of Columbia challenging defendant-appellee's withholding of records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. JA 007–11. The district court had jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B). On October 25, 2019, the district court entered a final order denying plaintiff-appellant's motion for attorney fees and costs and closing the case. JA 228–29. On November 5, 2019, plaintiff-appellant timely filed a notice of appeal. JA 230. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court erred in denying plaintiff-appellant's motion for attorney fees and costs under FOIA, 5 U.S.C. § 552(a)(4)(E).

STATUTES AND REGULATIONS

FOIA's attorney fees provisions provide as follows:

> (i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
>
> (ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—

> (I) a judicial order, or an enforceable written agreement or consent decree; or
>
> (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

5 U.S.C. § 552(a)(4)(E).

STATEMENT OF THE CASE

In this FOIA case, the district court rejected all of defendant Internal Revenue Service's (IRS) arguments for withholding records sought by plaintiff Professor Margaret Kwoka, finding that the IRS's position had "logical problems" and was "unpersuasive." The court ordered the IRS to disclose information withheld from over 12,000 records, subject to limited redactions supported by "specific detail." Nonetheless, when Professor Kwoka moved for an award of attorney fees and costs, the court denied the motion in full. Because Professor Kwoka, is a substantially prevailing plaintiff who is entitled to a fee award in this FOIA case, this Court should reverse the order denying her attorney fees and costs.

I. Margaret Kwoka is a Professor at the University of Denver Sturm College of Law whose research focuses on government secrecy and

federal agencies' administration of FOIA. JA 067, 078, 082–94. In the course of her research, Professor Kwoka routinely submits FOIA requests for agency FOIA logs, which show the identity and organizational affiliation of requesters. Professor Kwoka believes that the information in the logs is crucial to understanding agency FOIA operations. JA 061.

On January 11, 2017, Professor Kwoka submitted a FOIA request to the IRS for "records reflecting a list or log of FOIA requests received in Fiscal Year 2015." JA 067. Specifically, Professor Kwoka requested records reflecting nine categories of information for each FOIA request submitted to the IRS, including "[t]he name of the requester for any third-party request" and "[t]he organizational affiliation of the requester, if there is one." *Id.* A "third-party request" means a FOIA request where "a requester submits a request for someone else's information." JA 070.

On March 8, 2017, the IRS partially granted and partially denied Professor Kwoka's request. The IRS released some categories of information, such as the FOIA request identification number and whether a request was granted or denied, but it withheld the names of third-party requesters and the organizational affiliations of all requesters in full under FOIA exemption 3, which applies to records that

are specifically exempted from disclosure under certain other statutes, and FOIA exemption 6, which applies to certain records whose release would constitute a clearly unwarranted invasion of personal privacy. JA 068. On March 27, 2017, Professor Kwoka timely appealed the IRS's withholding of this information. *Id.* On April 11, 2017, the IRS denied Professor Kwoka's appeal, continuing to rely on exemptions 3 and 6 to withhold the names of third-party requesters and the organizational affiliations of all requesters in full. *Id.*

II. On June 14, 2017, Professor Kwoka filed this lawsuit. *See* JA 007–11. The parties subsequently filed cross-motions for summary judgment on the IRS's blanket withholdings of the names of third-party requesters and the organizational affiliations of all requesters, as well as the IRS's claims that responding to the request would require the creation of new records and would be unreasonably burdensome. *See* IRS Mot. for Summ. J. (District Ct. Docket 9); Kwoka Cross-Mot. for Summ. J. Mem. (District Ct. Docket 10).

In support of its position that the names of third-party requesters and the organizational affiliations of all requesters were exempt from disclosure under FOIA, the IRS made two related arguments. As to

exemption 3, the IRS argued that disclosure of third-party requester names and requester organizational affiliations was barred by 26 U.S.C. § 6103(a), which prohibits the disclosure of "any [tax] return or return information," because the information could be used to "reverse engineer and reveal" the identity of a taxpayer, i.e., the person whose tax records were sought by the FOIA request. IRS Mot. for Summ. J. 12 (District Ct. Docket 9). As to exemption 6, the IRS similarly argued that disclosure of third-party requester names and requester organizational affiliations could be used to "deduce any number of protected tax return details about the subject of a request," such that disclosure constituted a clearly unwarranted invasion of privacy. *Id.* at 14.

On September 28, 2018, the district court granted in part and denied in part the parties' cross-motions. JA 066. In doing so, the court rejected the IRS's blanket withholding of the names of third-party requesters and the organizational affiliations of all requesters under exemptions 3 and 6. JA 069–74.

First, the court held, contrary to the IRS's repeated assertions, that disclosing the name of a third-party requester or the organizational affiliation of any requester generally would not disclose the "*target* of a

FOIA request—i.e., the person whose tax records the requester is seeking." JA 070, 072–73. As the court explained, "the IRS's conclusion does not follow from its premises" because "[e]ven armed with the information she requests and the publicly accessible FOIA log," Professor Kwoka generally "could not know with any certainty the identity of particular taxpayers." JA 070. Turning to certain specific examples provided by the IRS, such as "when a corporate shareholder submits a FOIA request for the corporation's examination files," the court reiterated that the IRS's conclusion that the identity of a taxpayer would be revealed "does not follow"; while "the corporate shareholder *might* be requesting information about the corporation," the court noted, such requester "might also be requesting information about any number of other organizations (or individuals). And importantly, [Professor] Kwoka would have no way of knowing." JA 070–71 (quotation marks omitted). Because disclosure of the withheld information generally would not reveal the identity of a taxpayer, the court held that the IRS was "not entitled to a blanket invocation of exemption 3." JA 072. The court noted that "there may be some exceptions" to the general rule that exemption 3 did not apply but stated that, "[i]f these exceptions in fact exist," the

IRS would need to identify the specific instances and justify withholding in those instances "with reasonably specific detail." *Id.*

Second, turning to exemption 6, the court stated that because disclosure would generally not reveal the name of any taxpayer, it likewise would generally not reveal any personal information about the subject of the request. JA 072–73. Moreover, the court noted that "FOIA requesters 'freely and voluntarily address their inquiries to the IRS, without a hint of expectation that the nature and origin of their correspondence will be kept confidential.'" JA 073 (quoting *Stauss v. IRS*, 516 F. Supp. 1218, 1223 (D.D.C. 1981)) (brackets omitted). And it dismissed as "unpersuasive" the IRS's counter arguments and attempts to distinguish *Stauss*. *Id.* Again, the IRS's argument at most supported some exceptions, but "the existence of a few possible exceptions does not justify the IRS's blanket withholding here." JA 073–74.

Additionally, the court held that responding to Professor Kwoka's FOIA request would neither require the creation of new records nor be unreasonably burdensome. JA 074–77. The court explained that decades-old D.C. Circuit precedent foreclosed the IRS's argument that the redaction of information involves the creation of a new record, JA 075

(quoting *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 321 (D.C. Cir. 1982)), and that the amount of time the IRS estimated would be required to process the request fell far short of establishing an unreasonable burden, JA 076–77.

In response to the district court's opinion and order, the IRS reprocessed the requested records. The IRS produced the vast majority of third-party requester names and organizational affiliations of all requesters, withholding such information in rare instances.[1] Professor Kwoka has already begun analyzing the information produced, and she plans to include her analysis of this information as part of her forthcoming book, "Saving the Freedom of Information Act," which is under contract with Cambridge University Press. JA 080.

III. After substantially prevailing on summary judgment and obtaining disclosure of the vast majority of the withheld records, Professor Kwoka filed a motion for attorney fees and costs under FOIA, 5 U.S.C. § 552(a)(4)(E). Consistent with this Court's precedent, Professor

[1] The final redaction log produced by the IRS indicates that out of more than 12,000 FOIA requests, the IRS is withholding third-party requester names from only 147 requests and organization affiliations of requesters from only 220 requests. JA 097–98, 184–212.

Kwoka explained that she was both eligible for and entitled to an award of attorney fees and costs, while also preserving a challenge to this Court's four-factor entitlement test for an award of fees under FOIA. *See* Kwoka Atty. Fees Mem. 5–14 (District Ct. Docket 25). Professor Kwoka also argued that the amount of time and the LSI *Laffey* hourly rates sought by her attorneys were reasonable. *Id.* at 14–17.

In opposing Professor Kwoka's motion, the IRS challenged both her eligibility for and entitlement to attorney fees and costs. *See* IRS Att'y Fees Opp'n 1–12 (District Ct. Docket 27-1). As to the reasonableness of the requested fees and costs, the IRS did not challenge the amount of time sought by Professor Kwoka's attorneys and "d[id] not dispute the use of the LSI-*Laffey* Matrix in this case." *Id.* at 14. The IRS argued, however, that the requested rates should be reduced by fifteen percent based on purported differences between those rates and law firm billing practices. *Id.* at 13–14. In her reply, Professor Kwoka rebutted the IRS's contrary arguments and provided an updated accounting of her attorneys' time to include time spent on the reply and related work. *See* Kwoka Atty. Fees Reply (District Ct. Docket 28).

On October 25, 2019, the district court entered a minute order denying Professor Kwoka's motion for attorney fees and costs. JA 228–29. The district court first stated that Professor Kwoka had substantially prevailed and was eligible for a fee award because the district court's order granting her summary judgment in part changed "the legal relationship between the parties in her favor." JA 228 (citing *People for the Ethical Treatment of Animals v. NIH*, 130 F. Supp. 3d 156, 162 (D.D.C. 2015)).

Moving on to whether Professor Kwoka was entitled to fees, the district court stated that this Court's precedent required it to consider four factors: "(1) the benefit to the public, if any, derived from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding of the records had a reasonable basis in law." JA 228–29 (quoting *Cotton v. Heyman*, 63 F.3d 1115, 1117 (D.C. Cir. 1995)). The district court concluded that the first factor weighed in Professor Kwoka's favor because she had "demonstrated some 'benefit to the public' from her FOIA lawsuit." JA 228. The district court then concluded, however, that Professor Kwoka would "derive some

'commercial benefit' from the records" and that "the nature of her interest in the records is both professional and pecuniary," such that the second and third factors weighed against her. JA 228–29 (internal quotation marks and brackets omitted). The district court also stated that "the government's withholding of the records had a reasonable basis in law as an ex ante matter." JA 229 (internal quotation marks omitted). As support for its conclusion that the fourth factor weighed against Professor Kwoka, the district court stated that "[t]he IRS's principal motivation in withholding the records was to comply with its statutory obligation to avoid improper disclosure of third-party taxpayer return information," and that "the Court's authorization of redactions shows that there remains some cause for legitimate concern." *Id.* In light of its determinations of the individual factors—one weighing in Professor Kwoka's favor and three weighing against her—the district court denied in full the motion for attorney fees and costs. *Id.* Because the district court concluded Professor Kwoka was not entitled to a fee award, it did not consider the reasonableness of her requested fees and costs.

On November 5, 2019, Professor Kwoka timely filed a notice of appeal from the district court's order denying her motion for attorney fees and costs. JA 230.

STANDARD OF REVIEW

In FOIA attorney fees litigation, this Court reviews questions of fact related to eligibility for clear error and questions of law *de novo*. *Grand Canyon Trust v. Bernhardt*, 947 F.3d 94, 96–97 (D.C. Cir. 2020) (per curiam). This Court reviews the district court's entitlement determination for abuse of discretion. *Morley v. CIA* (*Morley III*), 894 F.3d 389, 391 (D.C. Cir. 2018) (per curiam). "[A] district court by definition abuses its discretion when it makes an error of law." *Smalls v. United States*, 471 F.3d 186, 191 (D.C. Cir. 2006) (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996)).

SUMMARY OF ARGUMENT

In determining whether to award attorney fees and costs under FOIA, courts in this Circuit first consider whether a plaintiff substantially prevailed, and is therefore "eligible" for fees and costs, and then, if so, whether a plaintiff is "entitled" to fees and costs. Where a

plaintiff is eligible and entitled to a fee award, the request is evaluated for reasonableness under the familiar "lodestar" framework.

The district court correctly concluded that Professor Kwoka substantially prevailed, and there can be no serious dispute that she did: The district court granted summary judgment in part to Professor Kwoka and, as a result, the IRS released the vast majority of the information previously withheld, making only limited redactions.

The district court abused its discretion, however, in holding that Professor Kwoka was not entitled to attorney fees and costs under this Court's four-factor entitlement test. First, the district court abused its discretion by failing to apply—or even consider—this Court's decision in *Davy v. CIA*, 550 F.3d 1155 (D.C. Cir. 2008), in evaluating the second and third entitlement factors. Because Professor Kwoka plainly had a scholarly interest in the records that was neither frivolous nor purely commercial, these factors should have weighed in her favor. Second, the district court abused its discretion in finding that the IRS had a reasonable basis in law for withholding the records in evaluating the fourth factor. The district court relied on the lack of agency bad faith and its authorization of redactions to the records in support of this

determination. But as the district court itself concluded at summary judgment, the agency's justification for withholding the information in full was illogical. Moreover, the sparse withholdings that followed summary judgment show that the IRS wholly disregarded its duty to segregate exempt and non-exempt information. Taken together, all four entitlement factors weigh in Professor Kwoka's favor, and she is entitled to attorney fees and costs.

Additionally, Professor Kwoka's requested attorney fees and costs were reasonable. The IRS made no challenge to the time sought by Professor Kwoka's attorneys and, thus, waived any argument that the amount of time for which compensation was requested is unreasonable. As to the hourly rates, Professor Kwoka sought rates consistent with the LSI *Laffey* matrix and provided evidentiary support for the requested rates. The IRS conceded that the LSI *Laffey* matrix applied, and although it sought a fifteen percent reduction due to purported differences between those rates and law firm billing practices, it did not submit any evidence in support of its proffered reduction. Accordingly, Professor Kwoka's attorneys should be awarded their full time and full hourly rates previously requested in the district court.

Finally, although Professor Kwoka is entitled to fees under the Court's four-part entitlement test and this panel is bound by precedent to apply it, that test is an atextual reading of FOIA's attorney fees provision. FOIA's attorney fees provision should be interpreted consistent with "similarly worded civil rights fees statute[s]" such that "prevailing plaintiffs should receive attorney's fees—with only a very narrow exception for 'special circumstances' such as bad faith by a prevailing plaintiff." *Morley v. CIA* (*Morley I*), 719 F.3d 689, 692 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (citing *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (per curiam)). Because Professor Kwoka is a substantially prevailing plaintiff and no special circumstances apply, she is entitled to attorney fees and costs under FOIA's fee-shifting provision.

ARGUMENT

I. The district court erred by not granting Professor Kwoka's motion for attorney fees and costs.

Under this Court's precedent, courts determine whether to award attorney fees and costs under FOIA in two steps: "eligibility" and "entitlement." *Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 524 (D.C. Cir. 2011). At the first step, a plaintiff is considered

"eligible" for attorney fees and costs if she has "substantially prevailed." *Id.* At the second step, courts apply a "judicially created four-factor test" to determine whether a plaintiff is "entitled" to fees and costs. *Morley III*, 894 F.3d at 391. If a plaintiff is both eligible for and entitled to fees, courts then determine the reasonableness of the requested fees by applying a "straightforward" formula: "multiply 'the number of hours reasonably expended in litigation' by 'a reasonable rate or "lodestar."'" *DL v. District of Columbia*, 924 F.3d 585, 588 (D.C. Cir. 2019) (brackets omitted) (quoting *Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1517 (D.C. Cir. 1988) (en banc)). Here, Professor Kwoka is both eligible for and entitled to an award of attorney fees.

A. Professor Kwoka substantially prevailed.

A plaintiff has "substantially prevailed" where she "has obtained relief through … a judicial order[.]" 5 U.S.C. § 552(a)(4)(E)(ii)(I). A court order satisfies this standard if it "constitutes judicial relief on the merits resulting in a 'court-ordered change in the legal relationship between the plaintiff and the defendant.'" *Campaign for Responsible Transplantation v. FDA*, 511 F.3d 187, 194 (D.C. Cir. 2007) (quoting *Buckhannon Bd. &*

Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 604 (2001)).

As the district court agreed, Professor Kwoka substantially prevailed in this case. JA 228. The order granting Professor Kwoka's motion for summary judgment in part "alter[ed] the legal relationship between the parties in her favor." *Id.* Before the order on summary judgment, the agency withheld the names of *all* third-party requesters and the organizational affiliations of *all* requesters in full. JA 068. In the summary judgment opinion, the district court ruled that the IRS's reliance on exemptions 3 and 6 to withhold this information in full was not justified and also rejected the IRS's arguments that production of the requested information would require the creation of new records and would be unduly burdensome. JA 069–77. As a result of the district court's order, the IRS reprocessed the records and produced the vast majority of the withheld information. *See* JA 097–98, 184–212 (indicating the IRS withheld third-party requester names from 147 requests and organizational affiliations from 220 requests out of 12,168 total FOIA requests).

Because Professor Kwoka was granted summary judgment in part and, as a result, the IRS produced previously withheld information, Professor Kwoka substantially prevailed and is, thus, "eligible" for attorney fees and costs under FOIA.

B. Professor Kwoka is entitled to attorney fees and costs under this Court's four-factor entitlement test.

Under this Court's entitlement test, courts consider four factors in determining whether eligible plaintiffs are entitled to fees: "(i) the public benefit from the case; (ii) the commercial benefit to the plaintiff; (iii) the nature of the plaintiff's interest in the records; and (iv) the reasonableness of the agency's withholding of the requested documents." *Morley III*, 894 F.3d at 391. Because all four factors weigh in Professor Kwoka's favor, this case is "straightforward," and she is entitled to attorney fees and costs. *Id.*

1. Professor Kwoka's FOIA request sought records that would yield public benefit.

In evaluating whether a FOIA requester has demonstrated a "public benefit" from her request, courts conduct "an *ex ante* assessment of the potential public value of the information requested, with little or no regard to whether any documents supplied prove to advance the public

interest." *Morley v. CIA* (*Morley II*), 810 F.3d 841, 844 (D.C. Cir. 2016). Where it is "plausible *ex ante* that a request has a decent chance of yielding a public benefit, the public-benefit analysis ends there." *Id.*

The district court correctly concluded that Professor Kwoka demonstrated a public benefit from her request. JA 228. Professor Kwoka is an expert in this field. *See* JA 049, 078, 082–94. And she has detailed how knowing the identities and organizational affiliations of FOIA requesters supports policy recommendations and changes that make the administration of FOIA better for the public. As Professor Kwoka explained:

> Knowing who is most often using FOIA reveals opportunities for better vehicles for agency information delivery, including proposed reforms at the congressional and executive level, such as ones that I have advanced myself. Moreover, the responsive records will inform the public as to how federal tax dollars are spent and whether such expenditures with regard to the FOIA obligations of agencies are being utilized in the best way to meet the public's needs.

JA 049–50. For example, at agencies where commercial requesters pursuing particular commercial uses are the most prevalent FOIA requesters, providing for greater proactive or affirmative disclosures of these categories of records could reduce agency expenditures responding to these FOIA requests and free up resources for other members of the

public. JA 061–62. Similarly, at agencies where first-party FOIA requests predominate because of administrative adjudications—such as the Department of Homeland Security and its subagencies—increasing the availability of administrative discovery would decrease agency FOIA expenditures. JA 062–63.

Although unnecessary to do so because only an *ex ante* showing of potential public value is required, Professor Kwoka bolstered her support for this factor by providing some of her preliminary analysis of the records at issue in this case to the district court. She explained that the records produced reveal several patterns among IRS FOIA requesters, including a high proportion of first-party requesters, tax attorney requesters, and consultant requesters. JA 079. From these trends, Professor Kwoka will be able to examine whether the IRS is administering its FOIA obligations in a manner that is efficient and effective given the nature of frequent requesters, as well as develop policy recommendations for the IRS and other agencies. JA 079–80. Professor Kwoka will share her insights with the public through her upcoming book, as well as through other scholarly presentations and publications.

JA 080. Additionally, Professor Kwoka already has made the records produced by the IRS in this case publicly available online. JA 078–79.

As the Supreme Court has repeatedly observed, FOIA was enacted to help "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). "In FOIA, after all, a new conception of Government conduct was enacted into law, a general philosophy of full agency disclosure." *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 16 (2001) (internal quotation marks omitted). Obtaining records through FOIA that shed light on how the agency is fulfilling its statutory mandate under FOIA to disclose agency records is important, given FOIA's central role in a democratic society. Accordingly, the district court correctly held that this factor weighs in Professor Kwoka's favor.

2. Professor Kwoka's scholarly interest in the records is neither frivolous nor purely commercial.

The second and third entitlement factors typically merge into the single question "whether a plaintiff has sufficient private incentive to

seek disclosure of the documents without expecting to be compensated for it." *McKinley v. Fed. Hous. Fin. Agency*, 739 F.3d 707, 711 (D.C. Cir. 2014) (internal quotation marks omitted). "[A] court [will] generally award fees if the complainant's interest in the information sought was scholarly or journalistic or public-interest oriented, unless [her] interest was of a frivolous or purely commercial nature." *Davy*, 550 F.3d at 1160–61 (internal quotation marks, brackets, and ellipsis omitted) (quoting *Fenster v. Brown*, 617 F.2d 740, 742 n.4 (D.C. Cir. 1979)).

In *Davy*, this Court expounded in detail how these factors should be applied to FOIA requesters with legitimate scholarly or journalistic interests in the records they request. *Id.* "Surely every journalist or scholar may hope to earn a living plying his or her trade, but that alone cannot be sufficient to preclude an award of attorney's fees under FOIA." *Id.* at 1160; *see also id.* at 1161 ("Congress did not intend for scholars (or journalists and public interest groups) to forego compensation when acting within the scope of their professional roles."). Concluding otherwise would mean that "very few, if any, [scholars] would ever prevail" in obtaining attorney fees and costs, "[y]et their activities often aim to ferret out and make public worthwhile, previously unknown

government information—precisely the activity that FOIA's fees provision seeks to promote." *Id.* at 1160.

Moreover, that contrary conclusion would be "inconsistent with the distinction that underlies this court's analysis of the relevant factors," which is whether a requester "seek[s] documents for public informational purposes" or "seek[s] documents for private advantage." *Id.* Requesters who seek records for public informational purposes—such as scholars, journalists, and public-interest groups—"engage in the kind of endeavor for which a public subsidy makes some sense, and they typically need the fee incentive to pursue litigation." *Id.* Those that seek records for private advantage, on the other hand, "cannot deserve a subsidy as they benefit only themselves and typically need no incentive to litigate." *Id.* Accordingly, absent special circumstances establishing that such a requester's "private commercial interest outweighs [her] scholarly interest [or] the public value in providing [her] an incentive to ferret out and publish this information," the second and third factors will weigh in favor of requesters with a scholarly interest in the requested records. *Id.*

Here, in stating that Professor Kwoka would "derive some 'commercial benefit'" from the records and that her interest is "both

professional and pecuniary," JA 228–29, the district court wholly ignored Professor Kwoka's well-established scholarly interest in the records she requested and obtained through this litigation. As illustrated by her CV, Professor Kwoka has been a professor of law since 2011, and her research focuses on government secrecy generally and agencies' administration of FOIA specifically. *See* JA 082–94. Her work been cited by federal courts, *see, e.g.*, *Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 204 n.77 (D.D.C. 2013) (quoting Margaret B. Kwoka, *The Freedom of Information Act Trial*, 61 Am. U. L. Rev. 217, 268 (2011)); *Moffat v. DOJ*, 716 F.3d 244, 254 n.10 (1st Cir. 2013) (citing Kwoka, *The Freedom of Information Act Trial*, *supra*, at 249–56); *see also NLRB v. New Vista Nursing & Rehab.*, 870 F.3d 113, 133 n.12 (3d Cir. 2017) (citing Margaret B. Kwoka, *Deference, Chenery, and FOIA*, 73 Md. L. Rev. 1060, 1109–10 (2014)), and numerous media outlets, and she has made numerous presentations to federal agencies regarding FOIA, JA 049, 085–86. Further, as explained above, Professor Kwoka has already begun utilizing her expertise to analyze the information produced by the IRS in this case, and she will include the insights gained from her analysis in her forthcoming book, "Saving the Freedom of Information Act," which is under contract with

Cambridge University Press. JA 080. Indeed, that Professor Kwoka's book will be published by an academic press underscores its scholarly nature.

Thus, as in *Davy*, Professor Kwoka's FOIA request was unquestionably not frivolous, and her "unchallenged declaration makes clear the substantive value of the released documents" as it relates to her research. 550 F.3d at 55; *see* JA 079–80 (explaining preliminary insights into IRS's FOIA processing from the records); *see also* JA 023–24 (stating that Professor Kwoka requested the records to "form the basis for a future scholarly publication"). Further, Professor Kwoka's track record of scholarly publication in her field—government secrecy and federal agencies' administration of FOIA—is more extensive than the *Davy* plaintiff, plainly establishing the scholarly interest motivating her FOIA request. *Compare* JA 078, 082–94 *with Davy*, 550 F.3d at 1161 (explaining plaintiff's publication of a book and some "magazine articles" showed that his FOIA request "reflect[ed] more of a scholarly than a disqualifying commercial interest"). Thus, Professor Kwoka's position as a law professor and her intention to publish a book based in part on these

records are insufficient bases for the second and third factors of the entitlement test to weigh against her.

In weighing these factors against her, the district court relied solely on this Court's decision in *Cotton v. Heyman*, 63 F.3d 1115 (D.C. Cir. 1995). *Cotton* is inapposite, however. There, the plaintiff FOIA requester—a former employee of the Smithsonian—sought documents from the Smithsonian that "she believed … would facilitate her preparation of an employment discrimination suit." *Id.* at 1116. The Smithsonian refused to respond to the FOIA request, primarily based on its position that it was not "an agency subject to FOIA." *Id.* at 1117. After the district court ruled that the Smithsonian was subject to FOIA, the agency produced two documents and withheld two documents, and the district court upheld those withholdings. *Id.* The district court then granted the plaintiff's motion for attorney's fees, relying primarily—if not entirely—on the public-benefit factor. *Id.* at 1117, 1120. Concluding both that the district court erred in finding any public benefit from the case and that the Smithsonian's position that it was not an agency subject to FOIA was reasonable as a matter of law, this Court reversed the award of attorney fees to the plaintiff. *Id.* at 1120–23. Of particular significance

here, the Court did not apply the second and third factors. Instead, it stated that, because of its determinations of the first and fourth factors, it had "no need to review for an abuse of discretion the district court's evaluation of the remaining factors: the 'commercial benefit' to the plaintiff and the 'plaintiff's interest.'" *Id.* at 1123. Thus, *Cotton* provides no support for the district court's holding that the second and third factors weigh against Professor Kwoka.

Given Professor Kwoka's undisputed expertise in the precise subject area her FOIA request concerned and the clear scholarly interest motivating her request, it is difficult to see how the second and third factors would weigh in favor of *any* scholar who wishes to publish a scholarly book if they do not weigh in Professor Kwoka's favor here. Accordingly, the district court abused its discretion in weighing these two factors against Professor Kwoka. Applying the proper legal standard to the record, both factors must weigh in her favor.

3. The IRS lacked a reasonable basis in law to withhold the information in full.

The fourth factor asks "why the agency initially withheld the records." *Morley III*, 894 F.3d at 392. Specifically, the Court considers "'whether the agency's opposition to disclosure had a reasonable basis in

law and whether' the agency was 'recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior.'" *Id.* (quoting *Davy*, 550 F.3d at 1162).

The unreasonableness of the IRS's legal position is starkly demonstrated by the district court's opinion granting partial summary judgment to Professor Kwoka. From its initial response to Professor Kwoka's request through summary judgment briefing, the IRS's position was that *all* third-party requester names and *all* organizational affiliations were categorically exempt under exemptions 3 and 6 because disclosure could purportedly "be used to reverse engineer and reveal information protected by 26 U.S.C. § 6103(a)," namely the identity of the taxpayer that is the subject of the FOIA request and related details about the subject taxpayer, such as his "tax liabilities" or "tax examination status." JA 035–37, 045–48; IRS Mot. for Summ. J. 11–12, 14 (District Ct. Docket 9). As the district court explained, the IRS's position suffered from basic "logical problems" because its "conclusion does not follow from its premises": "Neither the [publicly accessible FOIA] log nor the information Kwoka requests generally reveals the *target* of a FOIA request—i.e., the person whose tax records the requester is seeking."

JA 070–72. In light of this obvious fact, disclosure of the withheld information would not reveal the identity of a taxpayer and, therefore, also would not allow for the association of any of the "vaguely worded" descriptions of the FOIA requests to a particular person, rendering exemption 3 inapplicable. *Id.*

As to exemption 6, which allows for the withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6), the court explained that, for the same reasons, disclosure of the withheld information would not subject the target of the request to "harassment, stigma, retaliation, or embarrassment," as a general matter. JA 072–73. Further, the court agreed with a prior district court decision, *Stauss v. IRS*, 516 F. Supp. 1218, rejecting the application of exemption 6 to information about the IRS's FOIA requesters because "FOIA requesters 'freely and voluntarily address their inquiries to the IRS, without a hint of expectation that the nature and origin of their correspondence will be kept confidential.'" JA 073 (internal brackets omitted) (quoting *Stauss*, 516 F. Supp. at 1223). The court further explained that the IRS's attempts to distinguish *Stauss* were

"unpersuasive" as neither the "vague topic descriptions" nor the "rise of the world-wide web" "add much at all to the privacy interests at stake." *Id.*

The IRS therefore "failed to justify its blanket invocation[s]" of exemptions 3 and 6. JA 072, 074. The district court's opinion reflects that the IRS was simply wrong on the law, and that the questions were not close.

In concluding—notwithstanding its own ruling on summary judgment—that the IRS's "withholding of the records had a reasonable basis in law as an ex ante matter," the district court stated that the agency's "principal motivation in withholding the records was to comply with its statutory obligation to avoid improper disclosure of third-party taxpayer return information." JA 229. Yet, while withholding information based on a bad-faith motivation would certainly show that an agency's actions lacked a reasonable basis in law, it does not follow that the lack of bad faith shows that an agency acted reasonably. To hold otherwise would transform the entitlement test into a Rule 11 standard. *See Elec. Privacy Info. Ctr. v. DHS* (*EPIC*), 892 F. Supp. 2d 28, 52 n.15 (D.D.C. 2012) ("[A]n agency must show its withholding of requested

records had a reasonable basis in law, not merely that it did not withhold in bad faith." (citing *Davy*, 550 F.3d at 1162)).

In denying the motion for attorney fees, the court also stated that the agency's concern was legitimate, as demonstrated by "the Court's authorization of redactions" to the records. JA 229. Professor Kwoka agreed that some circumstances might permit the IRS to withhold some third-party requester names or requester organizational affiliations. JA 071–74; Kwoka Summ. J. Mem. 9 (District Ct. Docket 10). But as the district court recognized, "the existence of a few possible exceptions does not justify the IRS's blanket withholding" of this information.[2] JA 074.

FOIA provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Indeed, Congress reiterated the importance of an agency's segregability obligation when, in enacting the FOIA Improvement Act of 2016, it added an additional statutory provision requiring that an agency "consider

[2] Professor Kwoka pointed out that many of the examples provided by the IRS in its summary judgment papers concerned, at most, a few dozen requests among approximately 10,000 FOIA requests. *See* Kwoka Summ. J. Mem. 15 (District Ct. Docket 10); Kwoka Summ. J. Reply 5, 7–8 (District Ct. Docket 16).

whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible" and "take reasonable steps necessary to segregate and release nonexempt information." Pub. L. No. 114-185 § 2, 130 Stat. 538, 539 (codified at 5 U.S.C. § 552(a)(8)(A)(ii)). And this Court has repeatedly emphasized the necessity of an agency's segregability obligation, holding that district courts have "an affirmative duty to consider the segregability issue *sua sponte*," *Morley v. CIA*, 508 F.3d 1108, 1123 (D.C. Cir. 2007) (quoting *Trans-Pac. Policing Agreement v. U.S. Customs Serv.*, 177 F.3d 1022, 1028 (D.C. Cir. 1999), and that a failure to do so constitutes clear error, *id.* (quoting *PHE, Inc. v. DOJ*, 983 F.2d 248, 252 (D.C. Cir. 1993)).

The IRS ultimately produced information concerning over 12,000 FOIA requests, withholding third-party requester names from approximately 147 requests and organizational affiliations from approximately 220 requests. *See* JA 097–98, 184–212. Such sparse withholdings establish that the overwhelming majority of withheld information was, in fact, non-exempt, and the IRS failed to seriously consider the segregability of these few exceptions. *See STS Energy Partners LP v. Fed. Energy Regulatory Comm'n*, 214 F. Supp. 3d 66, 72

(D.D.C. 2016) (rejecting agency's argument that it had reasonable basis in law where district court concluded some portions of records were exempt but agency was required to produce segregable portions because agency failed to conduct the segregability "analysis that FOIA requires"); *EPIC*, 892 F. Supp. 2d at 53 (finding agency lacked reasonable basis in law where it failed to "provide an adequate segregability analysis," which "demonstrate[d] that [the agency] has not been forthcoming with the information and analysis that FOIA requires").

Here, in addition to withholding a small amount of exempt information, the IRS withheld a large amount of non-exempt information based on an illogical position, *see* JA 070–74, and, thus, without a reasonable basis for doing so. The presence of a small percentage of exempt information does not transform the unreasonable withholdings into reasonable ones. Accordingly, the district court abused its discretion in weighing this factor against Professor Kwoka.

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Because the district court abused its discretion in weighing factors two, three, and four against Professor Kwoka, its conclusion that Professor Kwoka was not entitled to attorney fees and costs was an abuse

of discretion. Moreover, because all factors weigh in Professor Kwoka's favor, she is entitled to attorney fees and costs. *Morley III*, 894 F.3d at 391. Accordingly, the Court should hold that Professor Kwoka is entitled to attorney fees and costs under § 522(a)(4)(E).

C. The requested time and rates were reasonable.

Because the district court held that Professor Kwoka was not entitled to attorney fees and costs, the district court did not decide the reasonableness of Professor Kwoka's requested attorney fees and costs. *See* JA 228–29. However, Professor Kwoka and the IRS fully briefed this issue before the district court. *See* Kwoka Atty. Fees Mem. 14–17 (District Ct. Docket 25); IRS Atty. Fees Opp'n 12–14 (District Ct. Docket 27-1); Kwoka Atty. Fees Reply 11–13 (District Ct. Docket 28). Accordingly, "it is appropriate for [this Court] to decide the matter." *Davis v. DOJ*, 968 F.2d 1276, 1280 (D.C. Cir. 1992).

1. In her initial motion for attorney fees and costs, Professor Kwoka sought 106.1 hours of total attorney time for two attorneys, broken down as follows: (1) 13.6 hours spent working on the complaint, research, conferring with opposing counsel and Professor Kwoka, and preparing joint status reports; (2) 67.5 hours for summary judgment

briefing; and (3) 25 hours on preparing the attorney fees motion and related work. Kwoka Atty. Fees Mem. at 14–15 (District Ct. Docket 25); *see* JA 096, 100–103, 214. In opposing Professor Kwoka's attorney fees motion, the IRS did not challenge *any* of this requested time. *See* IRS Atty. Fees Opp'n 12–14 (District Ct. Docket 27-1). Accordingly, the IRS has waived any argument that these hours were not reasonably expended in this litigation. *See United States v. Layeni*, 90 F.3d 514, 522 (D.C. Cir. 1996) ("Arguments not raised in the district court are generally deemed waived on appeal absent plain error.").

In her reply memorandum, Professor Kwoka sought an additional 12.2 hours for time spent preparing the reply and related work. *See* Kwoka Atty. Fees Reply at 12–13 (District Ct. Docket 28); JA 224, 226–27. The relatively small additional amount is also reasonable and compensable. *See Noxell Corp. v. Firehouse No. 1 Bar-B-Que Rest.*, 771 F.2d 521, 528 (D.C. Cir. 1985) ("Hours reasonably devoted to a request for fees are compensable."); *cf. New Jersey v. EPA*, 703 F.3d 110, 116 (D.C. Cir. 2012) (noting prior case law suggesting 69 hours for preparing an attorney fees motion of "ordinary difficulty" as "perhaps excessive" and

finding 91 hours to be reasonable amount of time devoted to attorney fees motion of greater than "ordinary difficulty").

2. With respect to requested hourly rates, Professor Kwoka relied on this Court's decision in *DL* in seeking the hourly rates set forth in the so-called "LSI *Laffey* matrix." *See* Kwoka Atty. Fees Mem. at 15–17 (District Ct. Docket 25). In *DL*, this Court held the LSI *Laffey* rates are presumptively reasonable rates for complex federal litigation and suffice to meet a plaintiff's initial burden. *Id.* at 591; *see also Salazar ex rel. Salazar v. District of Columbia*, 809 F.3d 58, 64 (D.C. Cir. 2015). Moreover, in support of the requested rates, Professor Kwoka submitted—in addition to the LSI *Laffey* matrix itself—some of the evidence relied upon by this Court about four months previously in *DL*, in particular the declarations of Michael Kavanaugh and Michael P. Downey, which set forth how the LSI *Laffey* matrix has been calculated and updated and explain why that method is a reasonable means to calculate the prevailing market rate for complex federal litigation in the District of Columbia. JA 105–182. Professor Kwoka additionally identified other district court decisions in this district that had awarded LSI *Laffey* rates in FOIA cases, Kwoka Atty. Fees Mem. at 17 (District

Ct. Docket 25) (citing *Am. Oversight v. DOJ*, 375 F. Supp. 3d 50, 69–70 (D.D.C. 2019); *Elec. Privacy Info. Ctr. v. DHS*, 218 F. Supp. 3d 27, 49 (D.D.C. 2016)), and noted that this Court in *DL* explicitly disapproved of other district court FOIA decisions that awarded less the LSI *Laffey* rates in applying, instead, the rates set forth in an alternative matrix created by the United States Attorney's Office for the District of Columbia, *id.* at 16–17 (citing *DL*, 924 F.3d at 593 (citing *Gatore v. DHS*, 286 F. Supp. 3d 25, 42–43 (D.D.C. 2017); *Elec. Privacy Info. Ctr. v. U.S. Drug Enforcement Admin.*, 266 F. Supp. 3d 162, 170–71 (D.D.C. 2017); and *Clemente v. FBI*, No. 1:08-cv-1252-BJR, 2017 WL 3669617, at *5 (D.D.C. Mar. 24, 2017))).

In its response to Professor Kwoka's attorney fees motion, the IRS "[did] not dispute the use of the LSI-*Laffey* Matrix in this case." IRS Atty. Fees Opp'n at 14 (District Ct. Docket 27-1). Nonetheless, the IRS contended that the district court should reduce the requested rates by fifteen percent on the theory that such rates do not reflect "actual billing practices of large firms, *i.e.*, that firms generally discount their standard rates, write off portions of their billed hours, and do not collect 100 percent of the fees they bill." *Id.* at 13–14. As support for its decision, the IRS relied solely on the district court decision in *Citizens for*

Responsibility & Ethics in Wash. v. DOJ (*CREW*), 80 F. Supp. 3d 1 (D.D.C. 2015).

This Court in *DL* made clear the appropriate burdens in attorney fees litigation. The initial burden is on the fee applicant to show that the requested rates sought are reasonable. *DL*, 924 F.3d at 591. Upon doing so, the burden shifts to the opponent to "offer[] 'equally specific countervailing evidence' supporting another rate." *Id.* (quoting *Covington v. District of Columbia*, 57 F.3d 1101, 1107 (D.C. Cir. 1995)).

Professor Kwoka satisfied her initial burden by relying on the recently reapproved LSI *Laffey* matrix and submitting evidence supporting the creation of, updating of, and underlying calculations subsumed within the matrix. The IRS acknowledged the LSI *Laffey* matrix sets forth reasonable rates, and, indeed, acknowledged this Court's finding in *DL* that the matrix provides a presumptively reasonable representation of the cost of legal services in the District of Columbia. *Id.* at 588, *cited in* IRS Atty. Fees Opp'n 13 (District Ct. Docket 27-1). At that point, the burden shifted to the IRS to provide "equally specific countervailing evidence" to support its proposed fifteen percent

reduction, but it did not do so. Instead, it relied solely on the application of a similar reduction in *CREW*.

The district court decision in *CREW*, which pre-dates this Court's decision in *DL*, provides an insufficient basis for reduced rates in this case. First, in *DL*, this Court reaffirmed its prior conclusion that the LSI *Laffey* matrix is "probably a *conservative* estimate of the actual cost of legal services in this area." 924 F.3d at 591 (quoting *Salazar*, 809 F.3d at 65). Second, the district court in *CREW* discounted the requested LSI *Laffey* rates by fifteen percent "to account for the differences between reported [law firm billing] rates and actual law firm billing realization," specifically to account for practices such as "writing off a portion of their billed hours to reflect attorney inefficiency and other considerations." 80 F. Supp. 3d at 5. But such concerns are not properly accounted for in determining the reasonable hourly rate. As attorney fees expert Michael Downey explained in his declaration in the *DL* case—which Professor Kwoka also submitted to the court below—law firms generally do *not* charge varying rates in complex federal litigation. JA 128. "Rather, in such litigation, firms customarily bill a client one rate for [each] particular attorney" and account for the ultimate fee charged "in two

ways other than switching rates: the reasonableness of the number of hours necessary to accomplish the task and the appropriateness of the experience level or seniority of the individual assigned to undertake the task." *Id.*

In other words, the concerns identified by *CREW* are more appropriately addressed in reviewing whether the amount of time requested is reasonable. As noted above, the IRS has not challenged the reasonableness of the hours sought by Professor Kwoka's attorneys. Because Professor Kwoka's attorneys requested the presumptively reasonable LSI *Laffey* rates and IRS failed to provide evidence rebutting the reasonableness of those rates, those rates should be applied here.

3. Multiplying Professor Kwoka's attorneys' unchallenged time by the applicable LSI *Laffey* rates yields a lodestar of $54,294.80. *See* JA 100–103, 108, 226. Professor Kwoka additionally sought only $400 in costs—the filing fee for this lawsuit—which the IRS did not challenge. Accordingly, the record clearly establishes that Professor Kwoka is

entitled to reasonable attorney fees and costs in the amount of $54,694.80 for previous work before the district court.[3]

II. Substantially prevailing FOIA plaintiffs should be presumptively entitled to attorney fees and costs.

Professor Kwoka acknowledges that the panel is bound by precedent to apply this Court's existing four-factor entitlement test. Nonetheless, Professor Kwoka believes that test is an improper interpretation of FOIA's attorney fees provision. Indeed, if despite her strong victory on the merits she is not entitled to a fee award in this case under the Court's four-part test, that test should be overturned by the Court.

This Court has interpreted FOIA's attorney fees provision as requiring consideration of four factors identified in the conference report accompanying the amendment to FOIA that inserted the attorney fees provision. *See Cuneo v. Rumsfeld*, 553 F.2d 1360, 1365 n.14 (D.C. Cir. 1977), *overruled on other grounds by Burka v. HHS*, 142 F.3d 1286 (D.C. Cir. 1998); *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d

[3] The Court should remand the case with instructions to award Professor Kwoka $54,694.80 in attorney fees and costs for work prior to this appeal and to allow Professor Kwoka to supplement her request for fees and costs related to this appeal.

704, 711–13 (D.C. Cir. 1977). This four-factor "entitlement" test is used to distinguish between substantially prevailing plaintiffs that are entitled to fees and those that, despite having substantially prevailed, are not entitled to fees.

As Judge Kavanaugh explained in his concurring opinion in *Morley I*, these four factors "have no basis in the statutory text." 719 F.3d at 690 (Kavanaugh, J., concurring). Rather than continuing with the four-factor entitlement test, FOIA's attorney fees provision should be interpreted consistently with "similarly worded civil rights fees statute[s]," such that substantially prevailing plaintiffs "should receive attorney's fees—with only a very narrow exception for 'special circumstances' such as bad faith by a prevailing plaintiff." *Id.* at 692–93 (citing *Piggie Park*, 390 U.S. at 402). Adopting the *Piggie Park* presumption for FOIA also "would be clear and predictable," as compared to the often complicated and time-consuming litigation process required by the four-factor entitlement. *Id.* at 692.[4]

[4] Judge Kavanaugh suggested as a less preferable alternative that this Court might instead adopt substantially the same standard used for attorney fee awards under the Equal Access to Justice Act (EAJA). *Morley I*, 719 F.3d at 692–93 & n.2. EAJA, however, uses entirely different statutory language, explicitly limiting fees to circumstances

No special circumstances apply in this case. *See, e.g.*, *Grano v. Berry*, 783 F.2d 1104, 1111 (D.C. Cir. 1986) (explaining special circumstances would exist where "it would be stretching the imagination to consider the result a 'victory' in the sense of vindicating the rights of the fee claimants," such that "the victory can be said to be only a pyrrhic one" (quoting *Comm'rs Court of Medina Cty., Tex. v. United States*, 683 F.2d 435, 442–43 (D.C. Cir. 1982)). Accordingly, Professor Kwoka also would be entitled to attorney fees and costs under the correct interpretation of FOIA's attorney fees provision.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order denying attorney fees and costs. The Court should hold that Professor Kwoka is eligible for and entitled to attorney fees and costs and that the amount of time and hourly rates sought by her attorneys for prior district court litigation are reasonable. The Court should remand the case with instructions to award Professor Kwoka her requested $54,694.80 in attorney fees and costs for prior district court litigation and

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where "the position of the United States was not substantially justified." 28 U.S.C. § 2412(d)(1)(B). That language is absent from FOIA.

to provide an opportunity for supplemental submissions on the amount of attorney fees to be awarded for litigation before this Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this brief complies with the typeface and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(5), (a)(6), and (a)(7)(B) as follows: The proportionally spaced typeface is 14-point Century Schoolbook and, as calculated by my word processing software (Microsoft Word for Office 365), the brief contains 8,599 words, exclusive of those parts of the brief not required to be included in the calculation by Federal Rule of Appellate Procedure 32(f) and the rules of this Court..

/s/ Patrick D. Llewellyn
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