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.

APPELLANT'S REPLY BRIEF

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Statute

GLOSSARY

FOIA: Freedom of Information Act

IRS: Internal Revenue Service

USDA: United States Department of Agriculture

INTRODUCTION AND SUMMARY OF ARGUMENT

In her opening brief, Professor Margaret Kwoka explained that she is both eligible for and entitled to attorney fees and costs under the test this Court uses to determine whether to award fees and costs to a prevailing plaintiff under the Freedom of Information Act (FOIA). In response, the Internal Revenue Service (IRS) has abandoned its argument that Professor Kwoka is not a substantially prevailing party eligible for a fee award. The IRS continues to argue, however, that Professor Kwoka is not entitled to fees under this Court's four-factor entitlement test.

As Professor Kwoka explained in her opening brief, all four entitlement factors weigh in her favor, and the district court abused its discretion in denying her fees and costs. In particular, the court abused its discretion in failing to apply *Davy v. CIA*, 550 F.3d 1155 (D.C. Cir. 2008), and ignoring her scholarly interest in the records in evaluating the second and third entitlement factors. And the court abused its discretion in evaluating the fourth entitlement factor by determining that the agency had a reasonable basis in law for withholding the records at issue,

where the court itself had recognized that the defendant's arguments for withholding the records did not logically apply to most of them.

Because Professor Kwoka substantially prevailed and all four entitlement factors weigh in her favor, this Court should reverse the decision below and hold that she is eligible for and entitled to attorney fees and costs. Moreover, the Court should hold that the fees and costs Professor Kwoka requested for the district court litigation are reasonable and remand for consideration of fees and costs on appeal.

ARGUMENT

I. Professor Kwoka Is Entitled to Attorney Fees and Costs.

The Court has directed district courts to consider four factors in determining whether a substantially prevailing FOIA plaintiff is entitled to fees: "(1) the public benefit derived 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." *Davy*, 550 F.3d at1159. All four factors weigh in Professor Kwoka's favor.

A. The first entitlement factor weighs in Professor Kwoka's favor.

As Professor Kwoka explained in her opening brief, the district court correctly concluded that she demonstrated a benefit to the public from this case, and the first entitlement factor therefore weighs in her favor. *See* Kwoka Br. 18–21. The IRS does not challenge that conclusion on appeal. *See* IRS Br. 41–47.

Nonetheless, the IRS devotes significant space to arguing that the public benefit in the released information "adds only minimal weight in her favor." *Id*. at 41. Contrary to the IRS's arguments, however, Professor Kwoka provided detailed explanations of how release of information about the identity and affiliation of FOIA requesters allows for better understanding of agency FOIA operations, including agencies' use of their resources, and how this information enables the development of recommendations for reform. *See*, *e.g.*, JA 61–64 (discussing analyses of FOIA logs from eight other agencies and the policy implications of those analyses). Although the IRS suggests that the request did not concern matters of public concern, this Court has recognized that "information that 'sheds light on an agency's performance of its statutory duties'" falls within the "'basic purpose'" of FOIA and is "in the public interest." *Multi*

Ag Media LLC v. Dep't of Agric., 515 F.3d 1224, 1231 (D.C. Cir. 2008) (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989)). Moreover, the long list of publications that have published Professor Kwoka's writing, and the long list of entities that have invited her to speak, demonstrate both the substantial public interest in her FOIA work and her ability to disseminate the information she learns from the released records. *See* JA 82–90; *see also* JA 49 (noting that Professor Kwoka has published articles, been cited in the media, made numerous presentations to federal agencies, and testified in front of Congress about FOIA). Under these circumstances, the first entitlement factor weighs strongly in Professor Kwoka's favor.

B. The second and third entitlement factors weigh in Professor Kwoka's favor.

As this Court recognized in *Davy*, scholars who "gather[] information of potential interest to a segment of the public, use[] [their] editorial skills to turn the raw materials into a distinct work, and distribute[] that work to an audience" are "among those whom Congress intended to be favorably treated under FOIA's fee provision." *Davy*, 550 F.3d at 1161–62 (internal quotation marks and citation omitted). Accordingly, a court will "generally award fees if the complainant's

interest in the information sought was scholarly or journalistic or public-interest oriented, [unless] ... his interest was of a frivolous or purely commercial nature." *Id.* at 1160–61 (quoting *Fenster v. Brown*, 617 F.2d 740, 742 n.4 (D.C. Cir. 1979) (alterations in *Davy*)).

Here, Professor Kwoka's interest in the requested records was undoubtedly scholarly. *See* Kwoka Br. 24–25. Professor Kwoka is an academic whose research focuses on government secrecy and agencies' administration of FOIA. JA 49, 82–94. She intends to share insights obtained from her analysis of the records she obtained through this case both in her upcoming academic book, "Saving the Freedom of Information Act," which is under contract with Cambridge University Press, and in other scholarly presentations and publications. JA 80.

Because her interests in the records were scholarly and not frivolous or purely commercial, the district court should have weighed the second and third entitlement factors—which consider the commercial benefit to the plaintiff and the nature of the plaintiff's interest in the records—in Professor Kwoka's favor. Rather than doing so, however, the court weighed those factors *against* her, stating that she will "derive some 'commercial benefit' from the records, and the 'nature of [her]

interest in the records' is both professional and pecuniary." JA 228–29 (quoting *Cotton v. Heyman*, 63 F.3d 1115, 1117 (D.C. Cir. 1995)). The district court did not mention Professor Kwoka's scholarly interest in the records or acknowledge this Court's decision in *Davy*.

The IRS concedes "that the nature of [Professor Kwoka's] interest stems from her work as a law professor," IRS Br. 37, and does not dispute that the district court was required to consider Professor Kwoka's scholarly interest. Nonetheless, the IRS attempts to defend the district court decision, contending that Professor Kwoka's argument "boils down to [a] disagreement with how the District Court weighed" her scholarly and commercial interests in the requested records. *Id*. at 38. The district court's order, however, did not weigh her scholarly interests *at all*. *See* JA 228–29.

The IRS half-heartedly argues that the district court *did* take Professor Kwoka's scholarly interests into account because the term "professional" in the district court's statement that the "'nature of [Professor Kwoka's] interest in the records' is both professional and pecuniary," JA 229 (citation omitted), could be read to include Professor Kwoka's "scholarly interest as well as a more general, personal interest

in fulfilling the requirements of her academic position." IRS Br. 38. The IRS seems to be suggesting that the district court silently considered Professor Kwoka's scholarly interest, silently weighed her scholarly interest against her commercial and personal interests, and silently determined that her scholarly interest was outweighed by her commercial and personal interests. Nothing in the district court's single sentence on the second and third factors, however, supports the IRS's creative reading. And even the IRS does not argue that this reading is the best interpretation of the district court's order. *See id*. at 37 (stating that Professor Kwoka's reading "is not an interpretation compelled by the minute order").

In any event, even if the IRS's interpretation were correct, the district court's determination that the second and third factors weighed against Professor Kwoka would be incompatible with *Davy*. As in *Davy*, nothing in the record here suggests that Professor Kwoka's "private commercial interest outweighs [her] scholarly interest, much less the public value in providing [her] an incentive to ferret out and publish this information." *Davy*, 550 F.3d at 1161. Although the insights Professor Kwoka gains from analyzing the records will be included in her

forthcoming book on FOIA, this Court explained in *Davy* that the fact that a scholar hopes to "earn a living" through her scholarly work "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 … to forego compensation when acting within the scope of their professional roles." (citation omitted)). The Court made clear that the "mere intention to publish a book" does not cause the second and third factors to weigh against a requester where the requester's "interest in the information sought was scholarly." 550 F.3d at 1160, 1161 (internal quotation marks and citation omitted). And the Court held that the district court had abused its discretion in weighing the second and third entitlement factors against the prevailing plaintiff where "the district court found that because the requested documents were used to research a book that was later published, … '[the plaintiff's] interest in the records was clearly commercial.'" *Id*. at 1160.

The IRS makes several attempts to distinguish *Davy*. First, the agency notes that the district court stated that Professor Kwoka would derive "some" commercial benefit from the requested records, not that she would derive a "purely" commercial benefit. IRS Br. 40. By ignoring

Professor Kwoka's scholarly interests in the records, however, the district treated her interests as purely commercial and failed to apply *Davy*. Second, the IRS criticizes Professor Kwoka for not detailing how much money she expects to make through the publication of her forthcoming book. It hardly needs to be stated, however, that a law professor is unlikely to earn large amounts of money through the publication of an academic book on FOIA. And, more importantly, any money Professor Kwoka earns from the book is simply part of how she hopes to "earn a living plying … her trade" as a scholar and therefore does not preclude a fee award. *Davy*, 550 F.3d at 1160. Third, the IRS insists that the "public interest" in the records Professor Kwoka requested is "minimal at best." IRS Br. 41. As explained above, however, "information that sheds light on an agency's performance of its statutory duties," as the records here do, "falls squarely within [FOIA's] statutory purpose." *Reporters Comm*, 489 U.S. at 773.

In short, as in *Davy*, the district court abused its discretion in weighing the second and third entitlement factors against Professor Kwoka. The court's improper analysis of these factors on its own requires vacatur of the district court's decision. *See Morley v. CIA*, 810 F.3d 841,

842 (D.C. Cir. 2016) (vacating where the district court improperly analyzed one of the entitlement factors).

C. The fourth entitlement factor weighs in Professor Kwoka's favor.

The fourth entitlement factor 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." *Davy*, 550 F.3d at 1162 (citations omitted). As Professor Kwoka explained in her opening brief, the IRS's decision to withhold all of the third party-requester names and the organizational affiliations of all requesters lacked a reasonable basis in law, and the district court abused its discretion in weighing this factor against her. *See* Kwoka Br. 27–33.

The IRS's brief makes two statements about the fourth factor that are worth addressing at the outset. First, the agency repeatedly asserts that the fourth factor is "the most important" factor in this case. IRS Br. 17, 23. However, although this Court has held that it will not assess fees where the agency's position was correct as a matter of law, the fourth factor does not have elevated importance where, as here, the agency's position was incorrect. *See Davy*, 550 F.3d at 1162 ("If the Government's

position is founded on a colorable basis in law, that will be weighed along with other relevant considerations in the entitlement calculus." (quoting *Chesapeake Bay Found., Inc. v. U.S. Dep't of Agric.*, 11 F.3d 211, 216 (D.C. Cir. 1993))).

Second, the agency contends that, because it was not "recalcitrant or obdurate," "the circumstances here are far different from those in which attorneys' fees commonly would be awarded." IRS Br. 25. But the fourth factor requires the agency to show *both* that it had a reasonable basis in law for withholding the records *and* that it was not engaged in recalcitrant or obdurate behavior. *See Davy*, 550 F.3d at 1162–63. Accordingly, where an agency lacked a reasonable basis for its withholding, courts weigh the fourth factor against the agency regardless of whether the agency was found to be recalcitrant or obdurate. *See*, *e.g.*, *Reyes v. U.S. Nat'l Archives & Records Admin.*, 356 F. Supp. 3d 155, 167–68 (D.D.C. 2018) (stating that the defendant agency "works diligently to process all FOIA requests in a timely manner," but nonetheless weighing the fourth factor against the agency because it lacked a reasonable basis in law for withholding the records).

In arguing that it acted reasonably in withholding the records at issue, the IRS focuses on its subjective motivation in withholding the records and on the district court's authorization of limited redactions, rather than on whether it had a reasonable basis in law for initially withholding the records it ultimately released. In particular, the IRS devotes a large portion of its response to discussing 26 U.S.C. § 6103, which prohibits the disclosure of tax return and return information unless otherwise authorized, and to arguing that its "primary objective" in withholding the requested records was to ensure that it did not violate that law. IRS Br. 28. But the question here is not whether the agency had a good-faith motivation for withholding the records. The question is whether the IRS's position that the third-party requester names and organizational affiliations were categorically exempt from disclosure had a reasonable basis in law.

Notably, despite the attention it gives section 6103, the agency does not even attempt to demonstrate that its position that the records were categorically exempt from disclosure had a reasonable basis in law. The IRS states that multiple people at the agency decided that disclosing the requested information could result in the disclosure of confidential return

information, *see* IRS Br. 28, that the question presented "a novel issue," *id*. at 29, and that it "takes very seriously its obligation to maintain the confidentiality of return information," *id*. at 29. But it does not explain why it was reasonable to conclude that release of the requested records would reveal return information—and the district court concluded that the IRS's argument suffered from "logical problems." JA 72.[1]

As the district court explained, the IRS's conclusion that release of the requested names and organizational affiliations would reveal

[1] That employees may face repercussions if they wrongfully release confidential return information does not reasonably justify the withholding of *non-return* information whose release would not logically reveal return information. *Chesapeake Bay Foundation*, cited by the IRS (at 30), is not to the contrary. There, the Department of Agriculture (USDA) determined that requested data submitted by state agencies was exempt under a statute barring its disclosure but offered to obtain waivers from the state agencies. 11 F.3d at 213. After the agencies provided the waivers, USDA released the information. *Id*. In reviewing the reasonableness of the agency's withholdings after the requester sought fees, the court concluded that the statute on its face supported USDA's "claim that the information could not be released without waivers," and noted that "USDA officials might have been subject to criminal penalties if they had wrongfully disclosed the documents at issue." *Id*. at 217. Moreover, because the requester "concede[d] that USDA's legal argument [was] reasonable," "the issue of the *reasonableness* of the Government's position [was] not open to question." *Id*. By contrast, here, the court determined that that the statutory provision relied upon by the IRS to blanketly withhold the information at issue did not apply to the vast majority of the withheld information.

protected information did "not follow from its premises." JA 70. "Even armed with the information she requests and the publicly accessible FOIA log, in most cases Kwoka could not know with any certainty the identity of particular taxpayers." *Id*. The district court identified similar flaws in logic with the IRS's argument that release of the names and organizational affiliations would be a clearly unwarranted invasion of personal privacy under FOIA Exemption 6. *See* JA 72–74.

The IRS contends that the fact that the district court allowed it to redact some names and organizational affiliations—and the fact that Professor Kwoka agreed that the agency could redact names and organizational affiliations in certain discrete circumstances—helps demonstrate that it had a reasonable basis for withholding the records. IRS Br. 31–32; *see also id*. at 33. Again, however, the IRS is focusing on the wrong question. The question is not whether the IRS had a reasonable basis for withholding the small subset of records as to which Professor Kwoka did not contest redaction. The question is whether the agency had a reasonable basis for initially withholding the thousands of records that it eventually released. *See*, *e.g.*, *Campaign for Responsible Transplantation v. U.S. Food & Drug Admin.*, 593 F. Supp. 2d 236, 243

(D.D.C. 2009) (rejecting an agency's claim of reasonableness where it "incorrectly focuse[d] on the contested documents that it lawfully withheld under the appropriate FOIA exemptions" instead of on the "nonexempt documents that it delayed disclosing"). That the agency may have had a reasonable basis for determining that exemptions 3 and 6 applied to a few of the requested names and organizational affiliations does not provide a reasonable basis for the blanket withholding of *all* the requested names and organizational affiliations.

The IRS's argument that segregating exempt and non-exempt records would be too burdensome also did not reasonably justify its withholding of all the third-party names and organizational affiliations, the vast majority of which were non-exempt. The district court flatly rejected the IRS's segregability argument in its summary judgment order. The court explained that the "segregability analysis focuses on whether the nonexempt portions of the document are 'inextricably intertwined with exempt portions,'" and that if the IRS meant to argue that the records were "'inextricably intertwined' in the sense that it would be impossible to produce meaningful information while redacting the exempt portions, that is simply wrong." JA 75 (quoting *Johnson v.*

Exec. Office for U.S. Attorneys, 310 F.3d 771, 776 (D.C. Cir. 2002)). The court also pointed out that the cases on which the IRS relied concerned whether a request required an "unreasonably burdensome search," yet time spent reviewing records "is not a *search* at all." JA 76. And the court determined that, even if the agency's review of the records counted as a search, the process would not be overly burdensome. As the court noted, "courts in this Circuit have required production of records much more voluminous than the records requested here." JA 76 (citing *Public Citizen v. Dep't of Educ.*, 292 F. Supp. 2d 1, 6 (D.D.C. 2003)). Thus, the IRS's claims about the burden of production did not provide a reasonable basis in law for its failure to segregate exempt and non-exempt records and for its categorial withholding of all the requested names and organizational affiliations.

Because the agency lacked a reasonable basis in law for categorically withholding all of the third-party names and the organizational affiliations of all requesters, the district court should have weighed the fourth factor in Professor Kwoka's favor.

* * *

Because all four of the entitlement factors weigh in Professor Kwoka's favor, "a balancing of the factors can only support the conclusion that [Professor Kwoka] is entitled to an award of attorney's fees." *Davy*, 550 F.3d at 1163. Accordingly, this Court should reverse the district court and hold that Professor Kwoka is entitled to an award of attorney fees and costs.[2]

II. The Fees and Costs Requested by Professor Kwoka Are Reasonable.

As Professor Kwoka explained in her opening brief, the fees and costs she requested were reasonable, and she should be awarded the full fees and costs sought for the time already spent by her attorneys in the district court. *See* Kwoka Br. 34–41.

The IRS contends that this Court should not consider the reasonableness of the fee request because the district court did not reach that issue. As the IRS concedes, however, it "did not dispute below the

[2] As Professor Kwoka explained in her opening brief, although she is entitled to fees under the four-part entitlement test, that test is not a proper interpretation of FOIA's attorney fees provision. *See* Kwoka Br. 41–43. Professor Kwoka has raised this point to preserve the issue, in case the panel does not agree that she is entitled to a fee award under the Court's existing test.

number of hours claimed by Kwoka's counsel or her reliance on the LSI *Laffey* matrix to determine the prevailing hourly rate." IRS Br. 51. The IRS's only argument below was that the hourly rates should be reduced by fifteen percent to reflect "actual billing practices." Yet under this Court's case law, once the prevailing plaintiff justifies the reasonableness of the requested rates, "those rates are 'presumed to be ... reasonable' unless and until the defendant offers 'equally specific countervailing evidence' supporting another rate." *DL v. District of Columbia*, 924 F.3d 585, 591 (D.C. Cir. 2019) (quoting *Covington v. District of Columbia*, 57 F.3d 1101, 1107 (D.C. Cir. 1995)). Here, Professor Kwoka met her initial burden of demonstrating that the rates she sought—those set forth in the "LSI *Laffey* matrix"—were presumptively reasonable. *See* JA 105–182; *DL*, 924 F.3d at 591 (recognizing the presumptive reasonability of the LSI *Laffey* rates). The burden thus shifted to the IRS to offer equally-specific evidence supporting another rate, but the IRS did not do so. Instead, the IRS relied on a pre-*DL* district court case to argue that the rates should be reduced by fifteen percent to "take into account the 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." IRS Atty. Fees Opp'n at 14 (District Ct. Docket 27-1) (citing *Citizens for Ethics and Responsibility in Washington v. U.S. Dep't of Justice*, 80 F. Supp. 3d 1, 5 (D.D.C. 2015)). The IRS offered no evidence that the LSI *Laffey* rates do not take into account "actual billing practices" or any reason why those rates would reflect prevailing market rates in other cases, but not here.

In *DL*, when the plaintiff demonstrated that that the LSI *Laffey* rates were presumptively reasonable, and the defendant did not rebut that presumption, the court awarded the full LSI *Laffey* rates, not fifteen percent below. Here, there is no need for this Court to remand to the district court to determine whether, when the plaintiff "justif[ies] the reasonableness" of the requested rates, and the defendant fails to offer "equally specific countervailing evidence," the requested rates should be awarded. *DL*, 924 F.3d at 591 (quoting *Covington*, 57 F.3d at 1107). Because Professor Kwoka requested the presumptively reasonable LSI *Laffey* rates, and the IRS provided no evidence to rebut the reasonableness of those rates, the LSI *Laffey* rates should be applied. Multiplying Professor Kwoka's attorneys' unchallenged time by the applicable LSI *Laffey* rates yields a lodestar of $54,294.80, plus $400 for

the filing fee, for a total of $54,694.80 for previous work before the district court. *See* JA 95, 100–103, 108, 213, 226.

CONCLUSION

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 for the district court to award Professor Kwoka her requested $54,694.80 in attorney fees and costs for prior district court litigation and to provide an opportunity for supplemental submissions on the amount to be awarded for subsequent time and costs incurred.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that the foregoing Appellant's Reply 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 brief is composed in a 14-point proportional typeface, Century Schoolbook. As calculated by my word processing software (Microsoft Word for Office 365), the brief contains 4,059 words, excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and this Court's rules.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

CERTIFICATE OF SERVICE

I hereby certify that, on June 12, 2020, this Appellant's Reply Brief was served through the Court's ECF system on counsel for all parties.

/s/ Adina H. Rosenbaum
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