No. 15-15117

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FIRST AMENDMENT COALITION,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California; Case No. 4:12-cv-01013-CW
The Honorable Claudia Wilken

BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PLAINTIFF-APPELLANT

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RULE 29(C)(5) CERTIFICATION

Pursuant to Fed. R. App. P. 29(c)(5), *amicus* states that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the *amicus*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Reporters Committee for Freedom of the Press certifies that it is an unincorporated nonprofit association with no parent corporation and no stock.

SOURCE OF AUTHORITY TO FILE BRIEF

Pursuant to Fed. R. App. 29(a), all parties to this appeal have given consent for *amicus* to file this brief. *See also* Ninth Circuit Advisory Committee Note to Rule 29-3.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Reporters Committee for Freedom of the Press ("Reporters Committee" or "RCFP") is an unincorporated nonprofit association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has participated as a party and as *amicus curiae* in First Amendment and freedom of information litigation since 1970. Journalists and members of the news media, including the Reporters Committee, rely on FOIA to gather information about the government and report on matters of vital public concern. The Reporters Committee thus has a strong interest in ensuring that such laws are interpreted by courts in a manner that facilitates public access to government records and assures government accountability.

INTRODUCTION AND SUMMARY OF ARGUMENT

The appeal before this Court presents a straightforward legal question: Should a plaintiff who successfully sues for access to government records under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), be eligible to recover attorney's fees when, during the pendency of the lawsuit, the government voluntarily discloses the requested records, and also discloses some of the same records to a different plaintiff in a separate FOIA case? For the reasons set forth in the opening brief of Plaintiff-Appellant First Amendment Coalition ("FAC"), the Reporters Committee agrees with FAC that this question must be answered in the affirmative, and respectfully urges this Court to reverse. *Amicus* writes separately to assist the Court by providing additional background concerning the purposes of FOIA's fee-shifting provision, its legislative history, and prior interpretations of it by courts, as well as to highlight the importance of fee shifting under FOIA to the news media, educational organizations like FAC, and, ultimately, the public at large. As set forth in more detail herein, FOIA's attorney's fees provision plays an essential role in a statutory scheme designed to discourage the improper withholding of public records by federal agencies, and ensure public access to government information, and must be interpreted and applied in a manner that serves that purpose.

FOIA is a powerful tool for ensuring government transparency and accountability, but it can only function if there are private individuals and

organizations willing to enforce its mandate of openness. FOIA's fee-shifting provision, 5 U.S.C. § 552(a)(4)(E), is thus vitally important to its operation. It encourages private "attorneys general" to take action on behalf of the public, ensures egalitarian access to government records, and rewards those who challenge government agencies' refusal to follow the law. Determinations of eligibility for attorney's fees under FOIA should be made not only in light of these goals, but also with an eye toward the decentralized nature of the federal court system, in which judges may disagree about the scope and applicability of FOIA exemptions and reach different conclusions about whether requested records must be disclosed. Without the assurance of recovering attorney's fees if successful, individual members of the press and the public will be less likely to bear the burden of vindicating the public's right of access to government records.

Since FOIA's enactment, Congress has stressed the importance of awarding attorney's fees to plaintiffs when they are successful in their litigation goals, even if there is no judicial order requiring the government to release records. As the statute stands today, a plaintiff is eligible for fees in several circumstances, including if there is "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)(ii)(II). This low threshold has been consistently reinforced by the courts, which have held that a

voluntary disclosure of information by the government agency after a lawsuit is commenced is sufficient to warrant an award of attorney's fees.

Awards of attorney's fees under FOIA are particularly important for the press, and for nonprofit educational organizations like FAC, which the public rely on to gather and disseminate information about the government. Indeed, in a time of both increased government secrecy and decreased financial resources for the news media industry, organizations like FAC should be encouraged to pursue meritorious FOIA litigation—not discouraged—confident that if their efforts to vindicate the public's right of access to records are successful, they will be awarded their costs and attorney's fees.

Because the District Court's ruling in this case fails to properly interpret and apply FOIA's fee-shifting provision, this Court should reverse.

ARGUMENT

I. FOIA's purpose is to ensure public access to government records; its success depends on the willingness of private individuals and organizations to pursue meritorious litigation.

The Freedom of Information Act, 5 U.S.C. § 552, was enacted by Congress in 1966 to cure the failure of the Administrative Procedure Act to provide the public with sufficient information about the government. *See Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). As the Supreme Court has stated, the goal of FOIA was to "pierce the veil of administrative secrecy and to open agency action to the

light of public scrutiny," *id.*, and to create an enforceable right of the citizenry to know "what their government is up to." *Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989). This phrase "should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy." *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).

FOIA mandates that all executive branch agency records, unless exempt, be disclosed upon request. 5 U.S.C. § 552(a)(3)(A). Thus, except for a few narrow categories of information that agencies must affirmatively make available, *id*. at § 552(a)(1)–(2), there must be a requester in order for the government's disclosure obligations to be triggered, *id.* at § 552(a)(3)(A). Accordingly, to encourage private individuals and organizations to both make and pursue FOIA requests, Congress authorized courts to assess costs and attorney's fees against the government whenever a plaintiff has "substantially prevailed" in litigation. *Id.* at § 552(a)(4)(E).

Congress intended the fee-shifting provision of FOIA to serve several purposes, the most fundamental of which is to ensure agency compliance with the law. Because the executive branch does not enforce FOIA, it is left up to individual members of the press and the public to serve as private "attorneys general." As the Senate Report that accompanied FOIA's 1974 amendments explained:

> Generally, if a complainant has been successful in proving that a government official has wrongfully withheld information, he has acted as a private attorney general in vindicating an important public policy. In such cases it would seem tantamount to a penalty to require the

> wronged citizen to pay his attorneys' fee to make the government comply with the law.

House Comm. On Gov't Operations & Senate Comm. On the Judiciary, 94th Cong., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents (Joint Comm. Print 1975), *available at* http://perma.cc/X2XW-9B4K (hereinafter, the "1974 Source Book"), at 171. In short, FOIA's fee-shifting provision serves to "vindicate[e] national policy." *Id.* at 170. Without it, the incentives for private individuals and entities to enforce the law are greatly diminished—a condition that still persists under many state public records laws. *See* Heath Hooper & Charles N. Davis, *A Tiger with No Teeth: The Case for Fee Shifting in State Public Records Law*, 79 Mo. L. Rev. 949.

Second, FOIA's attorney's fees provision supports egalitarian access to government records and information. According to the 1974 Senate Report, awarding fees is essential to ensuring "that the average citizen can take advantage of the law to the same extent as the giant corporations with large legal staffs." 1974 Source Book at 170. "Congress realized that too often the insurmountable barriers presented by court costs and attorney fees to the average person requesting information under the FOIA enabled the government to escape compliance with the law." *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1363–64 (D.C. Cir. 1977). Without the promise of recouping fees in successful litigation many journalists, especially freelance journalists, and news, public interest, and educational organizations would,

as a practical matter, be barred from vindicating their right to access government records. Indeed, testimony presented to Congress in connection with the 1974 amendments to FOIA noted that of the 40 lawsuits brought during the first two years of FOIA (when there was no fee-shifting provision), almost every single one was brought to vindicate a commercial or private interest; none was brought by a member of the media. 1974 Source Book at 73.

Third, requiring the government to pay reasonable costs and attorney's fees also serves "as compensation for enduring an agency's unreasonable obduracy in refusing to comply with the Freedom of Information Act's requirements." *La Salle Extension Univ. v. Fed. Trade Com.*, 627 F.2d 481, 484 (D.C. Cir. 1980). It thus "makes a litigant financially whole for a legal wrong suffered . . . ." Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L.J. 651, 653.

Finally, FOIA's fee-shifting provision must also be construed in light of the decentralized structure of the federal court system. Federal courts across the country can—and frequently do—disagree on the applicability of FOIA's various exemptions, and may reach different conclusions regarding whether certain types of records must be disclosed under FOIA. *Compare*, *e.g.*, *Detroit Free Press v. Dep't of Justice*, 73 F.3d 93 (6th Cir. 1996) (holding federal mugshots cannot be withheld under Exemptions 6 and 7) *with World Publ'g Co. v. Dep't of Justice*, 672 F.3d 825

(10th Cir. 2012) (holding that federal mugshots can be withheld under Exemption 7). Accordingly, it is important for FOIA requesters to have an incentive to pursue public access to the same or similar records under FOIA in different jurisdictions. Not only do such lawsuits assist in the development of FOIA jurisprudence, but merely because one circuit, or even multiple circuits, have held that a record is exempt from disclosure under FOIA does not mean that a requester will not ultimately be vindicated. *See, e.g., Milner v. Dep't of the Navy*, 562 U.S. 562 (2011) (striking down the so-called "High 2" exemption despite its upholding by several circuit courts of appeals).

The U.S. Supreme Court has indicated that Congress both anticipated and intended for multiple FOIA lawsuits for the same material to be pursued by members of the public. *See Taylor v. Sturgell*, 553 U.S. 880 (2008). In *Taylor*, the Court rejected application of the doctrine of claim preclusion in a FOIA case where two parties had sought access to the same documents in successive FOIA actions. *Id*. The Court noted that Congress had imposed "no statutory constraint on successive actions" under FOIA, which it found counseled against the application of the claim preclusion doctrine. *Id.* at 903. Holding otherwise, the Court said, would be contrary to the "deep-rooted historic tradition that everyone should have his own day in court." *Id.* at 893–94.

It is vital that federal courts continue to interpret § 552(a)(4)(E) in a manner that is consistent with these principles. *See Nationwide Bldg. Maint., Inc. v. Sampson*, 559 F.2d 704, 715 (D.C. Cir. 1977) (stating "courts should always keep in mind the basic policy of the FOIA to encourage the maximum feasible public access to government information and the fundamental purpose of section 552(a)(4)(E) to facilitate citizen access to the courts to vindicate their statutory rights."). FOIA's purpose and the goals served by its fee-shifting provision, as well as the nature of the federal court system, all compel an interpretation of § 552(a)(4)(E) that *encourages* multiple parties to pursue meritorious FOIA litigation in order "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

II. Both Congress and the courts have consistently made clear that FOIA requesters are entitled to attorney's fees when they succeed in their litigation goals.

As originally enacted, FOIA had no provision for awarding attorney's fees. *See* Pub. L. No. 89-487 (1966). When Congress passed its first major amendments to FOIA in 1974, it added part of the fee-shifting provision now codified at 5 U.S.C. § 552(a)(4)(E). *See* Pub. L. 93-502 (1974). That amendment was designed to remove the significant impediment to litigating denials of access under FOIA that was imposed by requiring requestors to bear the costs of such litigation, and

established a two-step process for determining when costs and fees should be awarded. First, a court must decide whether the plaintiff is "eligible" for fees, which rests on a determination of whether they have "substantially prevailed." 5 U.S.C. § 552(a)(4)(E). The second step requires the court to determine whether the plaintiff is "entitled" to fees—a discretionary decision that involves a multi-factor analysis. *See*, *e.g.*, *Nationwide Bldg.*, 559 F.2d 704, 714 (D.C. Cir. 1977). The first step is primarily at issue in this case. *See* Excerpts of Record Vol. 1, at 7.

The legislative history of § 552(a)(4)(E) makes clear that Congress did not intend to require a FOIA plaintiff to secure a judicial order compelling the disclosure of records in order to be eligible for an award of costs and fees. One of the most extensive examinations of this history is found in the Second Circuit's opinion in *Vermont Low Income Advocacy Council, Inc. v. Usery*, 546 F.2d 509, 513 (2d Cir. 1976). In that case, the Second Circuit carefully analyzed revisions to the fee-shifting language from the time it was first introduced in Congress to its final enactment, and concluded that Congress did not intend to require that plaintiffs secure judicial relief in order to recoup attorney's fees. *Id.* at 512–13. Among other things, the Second Circuit reasoned that allowing the government to escape paying attorney's fees by turning over documents once litigation had commenced would create absurd results. *Id*. (stating that if "developments made it apparent that the

judge was about to rule for the plaintiff, the Government could abort any award of attorney fees by an eleventh hour tender of the information requested").

Other federal courts that considered the issue after the 1974 amendments likewise agreed that FOIA plaintiffs may be awarded costs and fees absent a judicial determination. The D.C. Circuit, for example, offered the following rationale regarding the importance of construing § 552(a)(4)(E) liberally in favor of plaintiffs:

> If the government could avoid liability for fees merely by conceding the cases before final judgment, the impact of the fee provision would be greatly reduced. The government would remain free to assert boilerplate defenses, and private parties who served the public interest by enforcing the Act's mandates would be deprived of compensation for the undertaking.

Nationwide Bldg., 559 F.2d at 710. As a result, the D.C. Circuit, along with other Circuits adopted the so-called "catalyst theory" for determining fee eligibility. *See* David Arkush, *Preserving "Catalyst" Attorneys' Fees under the Freedom of Information Act in the Wake of Buckhannon Board and Care Home v. West Virginia Department of Heath and Human Resources*, 37 Harv. C.R.-C.L. L. Rev. 131, 140 (collecting cases from the First, Second, Fourth, Fifth, Seventh, Ninth, and Tenth Circuit Courts of Appeals). All that is required to justify a fee award under that approach is a causal link between the plaintiff's lawsuit and release of the requested records. *See*, *e.g.*, *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1496 (D.C. Cir. 1984).

Congress has not only endorsed application of the catalyst theory in FOIA cases, it has strengthened it in favor of plaintiffs. In 2001, the U.S. Supreme Court's decision in *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001) (hereinafter "*Buckhannon*") created uncertainty regarding the catalyst theory's viability. *See* Arkush, *supra.* Congress responded to that decision by amending FOIA in 2007 to expressly restore the catalyst theory, and to further expand the availability of attorney's fees under § 552(a)(4)(E). *See* OPEN Government Act of 2007, Pub. L. No. 110-175 (2007). Under those amendments, which remain in force today, a FOIA plaintiff is deemed to have "substantially prevailed" in two situations: (1) if they obtain "a judicial order, or an enforceable written agreement or consent decree" in their favor, 5 U.S.C. § 552(a)(4)(E)(ii)(I), or (2) if there is "*a voluntary or unilateral change in position by the agency*, if the complainant's claim is not insubstantial." *Id.* at § 552(a)(4)(E)(ii)(II) (emphasis added).

The Senate Report accompanying the 2007 amendments to § 552(a)(4)(E) make clear that they were designed not only to overrule *Buckhannon*, but also to ensure that a FOIA plaintiff with a legitimate claim would not be penalized if an agency handed over the requested records during the pendency of a lawsuit. Specifically, it states that the changes where designed to avoid a situation where

> [a] government agency refuses to disclose documents even though they are clearly subject to FOIA. The FOIA requestor has no choice but to undertake

> the time and expense of hiring an attorney to file suit to compel FOIA disclosure. Some time after the suit is filed, the government agency eventually decides to disclose the documents—thereby rendering the lawsuit moot. . . . [This would] effectively tax[] all potential FOIA requestors. As a result, many attorneys could stop taking on FOIA clients—and many FOIA requestors could stop making even legitimate and public-minded FOIA requests—rather than pay what one might call the "*Buckhannon* tax."

S. Rep. No. 110-59, 110th Cong., 1st Sess. (Apr. 30, 2007), *available at* http://perma.cc/EN76-NUU5, at 4.

Federal courts interpreting the 2007 amendments have concluded that the threshold for fee eligibility under FOIA can be met in a variety of ways without a court order. In *Mobley v. Deparment of Homeland Security*, for example, the district court noted that even an agency's search for records responsive to a request after litigation is initiated could lead to a determination that the plaintiff has "substantially prevailed." 908 F. Supp. 2d 42, 47–48 (D.D.C. 2012). And at least five post-OPEN Government Act cases have concluded that a purely discretionary release of requested records by the government after litigation has commenced is sufficient to find that a FOIA plaintiff has "substantially prevailed." *See Judicial Watch, Inc. v. Dep't of Justice*, 878 F. Supp. 2d 225 (D.D.C. 2012); *Yonemoto v. Dep't of Veterans Affairs*, 2012 U.S. Dist. LEXIS 76311 (D. Haw. June 1, 2012); *Waage v. IRS*, 656 F. Supp. 2d 1235 (S.D. Cal. 2009); *Dorsen v. SEC*, 15 F. Supp. 3d 112 (D.D.C. 2014); *ACLU v. DHS*, 810 F. Supp. 2d 267 (D.D.C. 2011). In *ACLU v. DHS*, for example, new guidance from then-Attorney General Eric Holder led to the

government disclosing several documents it had previously withheld. 810 F. Supp. 2d at 276. The district court concluded that because the plaintiff had commenced its lawsuit before the guidance was released, the government's decision to apply it to the requested records was sufficient to make the ACLU eligible for attorney's fees. *Id.*

The language and legislative history of § 552(a)(4)(E) confirm that it should be read broadly to ensure that plaintiffs are not prevented from recovering attorney's fees simply because the government decides to release requested records after a lawsuit is filed. It should not matter whether the government's decision to disclose records is based on the government's belief that it is bound to lose the lawsuit, a shift in policy, or a decision in another court case. Congress's intent to make FOIA plaintiffs broadly eligible for fee awards is undermined when, as is true in this case, a FOIA plaintiff has clearly obtained its litigation goals and has caused the release of requested records that the government had previously refused to disclose.

III. Fee shifting under FOIA is critically important for the press and nonprofit and educational organizations like FAC.

The news media plays a key, constitutionally-recognized role in disseminating public records and government information, and in keeping the public informed. As the Supreme Court has stated,

> in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form

> the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.

Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491–92 (1975).

The willingness of journalists—especially freelance and independent journalists—and news organizations to pursue the public's right of access to government records in court goes hand in hand with journalists' ability to recover costs and attorney's fees if they are successful. And encouraging journalists and others to pursue such litigation is especially vital now. Despite promises of increased transparency, *see Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act*, 74 Fed. Reg. 4683 (Jan. 21, 2009), the federal government has in recent years set new records for denying access to information. An analysis of 2014 FOIA data by The Associated Press, for example, found that the federal government has been "censoring government files or outright denying access to them" more frequently than ever before. Ted Bridis, *Administration sets record for withholding government files*, The Associated Press (Mar. 18, 2015), http://perma.cc/NND5-5MTB. Given this increased government secrecy, it is important that FOIA requesters not be financially penalized for pursuing meritorious litigation.

Public interest-minded nonprofit news and educational organizations like FAC also play a vital role in public records litigation, particularly given the limited financial resources of traditional news media. As one commentator has stated, "financially constrained press actors must rely increasingly heavily on pro bono or contingency fee representation, particularly the newly-formed nonprofit journalism enterprises, in order to 'fill the gap' left by the for-profit news media." Steven D. Zansberg, *A Call To Service: Pro Bono Foia litigation & Legislative Reform—Help Preserve Our Democracy*, Communications Lawyer Vol. 29, No. 4. *See also* Kevin Johnson & Kevin G. Hall, *New players join newspapers in using FOIA requests*, USA Today (Mar. 13, 2015), http://perma.cc/7UKD-47MH. The positive impact of nonprofit organizations like FAC on public access to government information could not be possible, or at least would be severely reduced, were it not for FOIA's fee-shifting provision. Neither FAC nor other public-minded nonprofit and educational organizations should be discouraged from vindicating the public's right to access government records by being barred from recovering costs and attorneys' fees.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urge this Court to reverse and remand this matter for further proceedings.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Undersigned counsel is unaware of any related cases.

Dated: October 5, 2015

s/ Bruce D. Brown
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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 15-15117

I certify that this brief complies with the length limits set forth at Ninth Circuit Rule 32-The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). Pursuant to Fed. R. App. P. 32(a)(7)(C), the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains 3,839 words.

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2015, an electronic copy of the foregoing Brief was filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit and delivered by operation of the CM/ECF system to the counsel of record.

Additionally, the following counsel was served via U.S. Mail on the same day:

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