

Preserving “Catalyst” Attorneys’ Fees Under the
Freedom of Information Act in the Wake of
*Buckhannon Board and Care Home v.
West Virginia Department of Health and
Human Resources*

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A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.¹

INTRODUCTION

The Freedom of Information Act (“the Act”),² designed to promote democracy by providing broad public access to government information, has produced important successes.³ But in its thirty-fifth year of existence, FOIA faces a serious threat. The Supreme Court’s recent ruling in *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*,⁴ if extended to FOIA, could substantially undermine the Act’s potential to enhance democratic government and the exercise of individual rights and liberties.

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This Note is intended to be a brief, pragmatic advocacy paper. It grew from a legal memorandum I wrote while employed at Public Citizen Litigation Group, which maintains a substantial Freedom of Information Act practice. Upon reading *Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources*, 121 S. Ct. 1835 (2001), attorneys at Public Citizen feared that lower courts might reflexively invalidate catalyst fees under FOIA, and they asked me to explore possible arguments to forestall such a development.

¹ James Madison, Letter to W. T. Barry (Aug. 4, 1822), reprinted in THE COMPLETE MADISON 337 (S. Padover ed., 1953).

² Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1994 & Supp. II 1996).

³ See *infra* notes 18–22.

⁴ 121 S. Ct. 1835 (2001) (5-4 decision).

In *Buckhannon*, the Supreme Court invalidated “catalyst theory” attorneys’ fees under the Fair Housing Act Amendments and the Americans with Disabilities Act.⁵ The catalyst theory allows courts to award attorneys’ fees to civil rights plaintiffs who catalyze a defendant’s change in conduct, even if litigation does not reach a final judgment.⁶ Because of the similarity between the fee provisions of civil rights statutes and FOIA,⁷ courts may be tempted to extend *Buckhannon*’s catalyst fee prohibition to FOIA.

This Note argues against such an extension because it would substantially undermine FOIA’s fee provision, severely reducing the impact of the law. Without the risk of paying catalyst fees, government defendants will be able to withhold documents unlawfully and litigate with impunity until an adverse judgment appears imminent. Then, facing likely defeat, agencies could moot actions against them by ceding the disputed documents, giving plaintiffs the relief they desire but denying them compensation for their meritorious efforts. Attorneys would be deterred from litigating FOIA claims, and individuals, researchers, and interest groups who cannot afford to risk litigating without compensation would find their right—and thus the public’s right—to government information severely diminished.⁸

I. BACKGROUND ON THE FREEDOM OF INFORMATION ACT AND *BUCKHANNON*

A. *The Freedom of Information Act*

FOIA was enacted in 1966⁹ to provide broad public access to government information.¹⁰ Early on, however, the law was criticized as impotent¹¹ and, in the immediate wake of the Watergate scandal, Congress added key reforms to make FOIA more accessible and enforceable.¹² Cur-

⁵ *Id.* at 1838 (interpreting Fair Housing Act Amendments (FHAA), 42 U.S.C. §§ 3601–3631 (1994) and Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12213 (1994)).

⁶ See *infra* note 25.

⁷ See *infra* text accompanying notes 47–49.

⁸ Courts only award FOIA fees to litigants whose claims benefit the public. See, e.g., *Burka v. United States Dep’t of Health & Human Servs.* 142 F.3d 1286, 1288 (D.C. Cir. 1998).

⁹ Act of Sept. 6, 1966, Pub. L. No. 89-554, § 552, 80 Stat. 378 (1966) (codified as amended at 5 U.S.C. § 552 (1994)).

¹⁰ PETER L. STRAUSS ET AL., *ADMINISTRATIVE LAW* 910 (9th ed. 1995). FOIA has surprised many people by proving extremely useful to businesses as well. In fact, businesses take advantage of FOIA far more than private citizens, the media, researchers, or public interest groups do. *Id.*

¹¹ See, e.g., Ralph Nader, *Freedom From Information: The Act and the Agencies*, 5 HARV. C.R.-C.L. L. REV. 1 (1970).

¹² Freedom of Information Act (FOIA), Pub. L. No. 93-502, 88 Stat. 1561–61 (1974) (codified as amended at 5 U.S.C. § 552 (1994)). For a brief, informative overview of FOIA’s history, features, uses, and contemporary problems with the statute, see AMANDA FROST, *THE*

rently, FOIA provides anyone requesting information from the federal government a presumptive right of access to all information, placing the burden on the government to prove why it need not release requested documents. In addition, the exemptions to the presumption of disclosure are drawn narrowly.¹³ Moreover, FOIA is highly accessible because any person can file a FOIA request without showing need for the documents. That person need only “reasonably describe” the records sought.¹⁴ As a final safeguard, agency denials are subject to judicial review,¹⁵ and courts may order agencies to pay plaintiffs’ litigation costs when agencies withhold documents in violation of the law.¹⁶

Information obtained through FOIA enhances democracy and the exercise of individual rights and can inform public interest research and legal advocacy in a wide range of legal areas, including voting rights, speech and association, equal protection, consumer and contractual rights, criminal and prisoners’ rights, and environmental law.¹⁷ Access to information enables more effective scrutiny of government and can reduce public ignorance regarding crucial matters such as illegal and immoral government actions,¹⁸ unsafe products or other risks to public

UNITED STATES FREEDOM OF INFORMATION ACT: LESSONS LEARNED FROM THIRTY YEARS OF EXPERIENCE WITH THE LAW (1999), at http://www.citizen.org/litigation/free_info/articles.cfm?ID=6127.

¹³ FOIA exempts from disclosure the following types of information: (1) information for which national security concerns require secrecy; (2) information solely related to an agency’s internal personnel rules and practices; (3) information specifically exempted from disclosure by other statutes; (4) privileged or confidential trade secrets and commercial or financial information; (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) under certain circumstances, records or information compiled for law enforcement purposes; (8) certain types of matters used by agencies that regulate or supervise financial institutions; or (9) geological and geophysical information and data, including maps, concerning wells. 5 U.S.C. § 552(b)(1)–(9).

¹⁴ *Id.* § 552(a)(3)(A).

¹⁵ *Id.* § 552(a)(4)(B).

¹⁶ *Id.* § 552(a)(4)(E).

¹⁷ Additionally, where FOIA potentially runs afoul of civil rights concerns such as privacy rights, the courts have typically refused to allow disclosure. *Compare* United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) (preventing the disclosure of FBI “rap sheets” to third parties because they were an “unwarranted invasion of personal privacy”) *with* United States Dep’t of Justice v. Julian, 486 U.S. 1 (1988) (upholding a disclosure of inmates’ presentence investigation reports from their own sentencing proceedings). The courts may even err on the side of excessively protecting privacy. *See, e.g.*, Church of Scientology of Cal. v. IRS, 484 U.S. 9 (1987) (construing 26 U.S.C. § 6103(b)(2) (1994) to prohibit the disclosure of redacted tax returns and requiring that the tax return information be fully reformulated before disclosure).

¹⁸ *See, e.g.*, CIA v. Sims, 471 U.S. 159 (1985) (holding that the CIA was not compelled to release the names of participants in its MKULTRA program). MKULTRA was a series of mind-control experiments that the CIA conducted illegally on unwitting human subjects. *Sims v. CIA*, 642 F.2d 562, 563–65 (D.C. Cir. 1980). To help conduct the experiments, the CIA contacted over eighty institutions and 185 researchers, many of whom also participated unwittingly. *Id.* At least two subjects died, but the fates of the overwhelming major-

health and safety,¹⁹ secret budgets,²⁰ and discrimination by government contractors.²¹ FOIA has proven so useful for public interest advocacy that one judge even called it the “Fourth Musketeer” for the “press and public interest groups.”²² Yet if courts extend *Buckhannon* to FOIA, the law could lose much of its value for such purposes.²³ In fact, the FOIA fee

ity remain unknown. *Id.*

¹⁹ See, e.g., *Columbia Packing Co. v. United States Dep’t of Agric.*, 563 F.2d 495, 499–500 (1st Cir. 1977) (affirming a district court’s compelled release of meat inspectors’ personnel files to inform the public whether the inspectors extorted money from a meat packing company or the company bribed the inspectors). See also *infra* note 22.

²⁰ Pursuant to a FOIA action, the CIA revealed its budget for the first time in 1997. Tim Weiner, *Even Spies Have Budgets*, N.Y. TIMES, Oct. 19, 1997, § 4, at 2. The following year, the agency began releasing its budget voluntarily. Tim Weiner, *Voluntarily, CIA Director Reveals Intelligence Budget*, N.Y. TIMES, Mar. 21, 1998, at A11.

²¹ See, e.g., *Nat’l Org. for Women v. Social Sec. Admin. of Dep’t of Health & Human Servs.*, 736 F.2d 727 (D.C. Cir. 1984) (plaintiff requested from a federal agency the affirmative action plans and annual reports on minority employment of four insurance companies).

²² Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 660 (1984). Judge Wald, surveying FOIA’s drawbacks and benefits, comes out strongly in favor of the Act. Judge Wald highlights the following information released because of FOIA:

Approximately one-third of all small corporations regularly underpaid federal income taxes in the late 1960s.

Tests of drinking water near uranium mines in western New Mexico disclosed high levels of radioactivity and toxic wastes.

The Consumer Product Safety Commission files contained information from a number of major manufacturers about exploding television sets.

A Department of Energy study indicated plutonium workers might suffer from increased susceptibility to cancer.

The U.S. Public Health Service disclosed that Utah residents suffered an unusually high proportion of birth defects because of atomic bomb testing from 1950 to 1964.

Id. at 660–61.

FOIA has its detractors, of course. Justice Scalia once called FOIA “the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost Benefit Analysis Ignored,” and wrote, “The defects of [FOIA] cannot be cured so long as we are dominated by the obsession . . . that the first line of defense against an arbitrary executive is do-it-yourself oversight by the public and its surrogate, the press.” Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar./Apr. 1982, at 14–15, 19. Commentators have surveyed some of the major problems that FOIA presents. See, e.g., Wald, *supra* note 22, at 664–77 (highlighting national security and business concerns); STRAUSS, *supra* note 10, at 909–15 (discussing the unforeseen high burdens and costs FOIA places on agencies and the extent to which FOIA has become a tool of businesses rather than just public interest groups).

²³ If courts decline to extend *Buckhannon* to FOIA, “substantially prevailing” claimants will not automatically receive attorneys’ fees. If a court determines that a claimant has “substantially prevailed,” she has merely become *eligible* for FOIA fees. Courts then apply a four-part test to determine whether she is *entitled* to fees. *Burka v. United States Dep’t of Health & Human Servs.* 142 F.3d 1286, 1288 (D.C. Cir. 1998) (“To be entitled to such an award, a litigant must first establish eligibility by showing that the lawsuit was reasonably necessary and the litigation substantially caused the requested records to be released. Sec-

provision would be rendered virtually meaningless because its primary beneficiary is the public interest litigant.²⁴

B. *The Catalyst Theory and Buckhannon*

In *Buckhannon*, the Supreme Court reversed the long-standing judicial practice of awarding “catalyst” attorneys fees in civil rights cases. Under the catalyst theory, a plaintiff whose lawsuit catalyzed “voluntary” remedial action by the defendant before litigation reached a final judgment could receive attorneys’ fees as a “prevailing party,” notwithstanding the absence of a judicially sanctioned change in the relationship of the parties.²⁵

The controversy that culminated in the *Buckhannon* litigation began when the West Virginia Office of Health Facility Licensure and Certification (OHFLAC) ordered an assisted living community named Buckhannon Board and Care Home to close its residential care homes within thirty days²⁶ because it housed residents who were incapable of self-help in the event of an emergency, a violation of West Virginia law.²⁷ Buckhannon filed suit in late October 1996 in the United States District Court for the Northern District of West Virginia, seeking a declaratory judgment that the state law violated the Fair Housing Amendments Act and the Americans with Disabilities Act.²⁸ Defendants consented to an interim order allowing Buckhannon to continue operating during the pendency of litigation, and the litigants proceeded through discovery and motions to dismiss.²⁹ Plaintiffs stipulated to dismissal of their damages claims, but on February 19, 1998, the trial court held that the plaintiffs were entitled to a trial on their claims for injunctive relief.³⁰ One day later, OHFLAC introduced a bill in the West Virginia Senate to repeal the self-preservation requirement,³¹ despite having defended the requirement

ond, a litigant must show that it is entitled to fees under four criteria that the court weighs in determining whether attorney’s fees are appropriate: (1) the public benefit derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff’s interest in the records; and (4) whether the Government had a reasonable basis for withholding requested information.”) (citations and internal quotations omitted).

²⁴ See *supra* note 8.

²⁵ *Buckhannon Bd. & Care Home v. W. Va. Dep’t of Health & Human Res.*, 121 S. Ct. 1835, 1838 (2001). In this context, a “voluntary” remedial action is simply one that was not required by a court. It is not voluntary in any ordinary sense. To succeed, a catalyst fee claimant must prove that her legal action coerced the defendant’s “voluntary” remedial response.

²⁶ Petitioners’ Brief at 2, *Buckhannon*, 121 S. Ct. 1835 (No. 99-1848).

²⁷ W. VA. CODE § 16-5H-2 (1998).

²⁸ *Buckhannon*, 121 S. Ct. at 1850 (Ginsburg, J., dissenting).

²⁹ *Id.*

³⁰ Petitioners’ Brief at 10, *Buckhannon*, 121 S. Ct. 1835 (No. 99-1848).

³¹ *Id.*

through fourteen months of litigation. The repeal passed less than a month later,³² and the trial court dismissed the action as moot.³³

Plaintiffs requested attorneys' fees under the catalyst theory, arguing that their lawsuit compelled the West Virginia legislature to alter its law.³⁴ The district court rejected the claim pursuant to the Fourth Circuit's 1994 ruling in *S-1 and S-2 ex rel. P-1 and P-2 v. State Board of Education of North Carolina*.³⁵ In that 7-6 en banc opinion, the Fourth Circuit abandoned the catalyst theory,³⁶ holding that "[t]he fact that a lawsuit may operate as a catalyst for post-litigation changes in a defendant's conduct cannot suffice to establish plaintiff as a prevailing party."³⁷ A person may become a "prevailing party," the Circuit stated, only by obtaining "an enforceable judgment, consent decree, or settlement."³⁸ Bound by its own precedent, a Fourth Circuit panel affirmed the district court in an unpub-

³² *Id.* at 8.

³³ *Id.* at 1850-51.

³⁴ *Id.*

³⁵ 21 F.3d 49 (4th Cir. 1994) (en banc).

³⁶ Until *S-1 & S-2*, the Fourth Circuit had long accepted the catalyst theory. In *Bonnes v. Long*, 599 F.2d 1316 (4th Cir. 1979), the Fourth Circuit held that:

[I]f . . . there is initially a genuine dispute as to whether the plaintiff . . . is a "prevailing party," inquiry on that question . . . is properly a pragmatic one of both fact and law Its initial focus might well be on establishing the precise factual/legal condition that the fee claimant has sought to change [I]nquiry may then turn to whether as a quite practical matter the outcome . . . is one to which the plaintiff fee claimant's efforts contributed in a significant way.

Id. at 1319. The Circuit then reaffirmed this framework when it reviewed the district court's decision on remand, *Bonnes v. Long*, 651 F.2d 214, 217 (4th Cir. 1981), *cert. denied*, 455 U.S. 961 (1982). Interestingly, when the Supreme Court denied certiorari to *Bonnes*, Justice Rehnquist's dissent, joined by Justice O'Connor, did not oppose the catalyst theory, but rather promoted a stricter version of it. Rehnquist, who later authored *Buckhannon*, and O'Connor, who joined the *Buckhannon* majority, would have required fee claimants to prove that their claims enforce federal civil rights statutes generally rather than merely conferring benefits upon particular plaintiffs. *Id.* at 966-67 (Rehnquist, J., dissenting).

³⁷ *S-1 & S-2*, 21 F.3d at 51. In *S-1 & S-2*, the Fourth Circuit, sitting en banc, reversed an earlier 2-1 panel decision that had upheld catalyst fees, and adopted the position of the panel's dissent. See *S-1 ex rel. P-1 v. State Bd. of Educ. of N.C.*, 6 F.3d 160, 168 (4th Cir. 1993). The panel dissent adopted by the en banc majority had relied heavily on *Farrar v. Hobby*, 506 U.S. 103 (1992), stating, "The language of *Farrar* is plain: '[T]o qualify as a prevailing party . . . [t]he plaintiff must obtain an enforceable judgment . . . or comparable relief through a consent decree or settlement.'" *S-1 & S-2*, 21 F.3d at 51 (citing *S-1*, 6 F.3d at 168 (Wilkinson, Circuit Judge, dissenting)). The panel majority, in contrast, had labeled *Farrar*'s statements on the catalyst theory "a cryptic passage of *dicta*," *S-1*, 6 F.3d at 166-67 n.2, and determined that *Farrar* only concerned (1) whether a plaintiff who recovered only nominal damages—one who, therefore, *had* obtained a legal judgment—could be considered a prevailing party, and (2) whether a "hefty" fee award in such circumstances could be upheld as "reasonable." *Id.* at 166-67. Interestingly, the *Buckhannon* majority endorsed the panel's view, stating that the portions of *Farrar* upon which the Fourth Circuit relied in prohibiting catalyst fees were indeed *dicta*. *Buckhannon*, 121 S. Ct. at 1839 n.5.

³⁸ *S-1 & S-2*, 21 F.3d at 51.

lished, per curiam opinion.³⁹ The Supreme Court granted certiorari and affirmed the Fourth Circuit, overruling eleven other circuits.⁴⁰

C. *Buckhannon and FOIA*

Buckhannon's bar on catalyst attorneys' fees threatens FOIA actions to an even greater extent than it does traditional civil rights litigation. Many civil rights claims for damages are immune from *Buckhannon's* greatest impact because defendants cannot easily moot damages claims by capitulating. Plaintiffs may reject settlement offers, increase their demands, or require attorneys' fees as part of a settlement.⁴¹ In the case of equitable relief, when defendants voluntarily remedy civil rights plaintiffs' injunctive claims, courts will not dismiss a plaintiff's action as moot if the defendant might repeat the challenged conduct.⁴² Although those

³⁹ *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 203 F.3d 819 (4th Cir. 2000).

⁴⁰ *Buckhannon*, 121 S. Ct. at 1839. Before *Buckhannon*, every other circuit had embraced the catalyst theory (except the Federal Circuit, which had not considered the issue). See *Stanton v. S. Berkshire Reg'l Sch. Dist.*, 197 F.3d 574, 577 & n.2 (1st Cir. 1999); *Marbley v. Bane*, 57 F.3d 224, 233–34 (2d Cir. 1995); *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 544–45 (3d Cir. 1994); *Robinson v. Kimbrough*, 652 F.2d 458, 465–67 (5th Cir. 1981); *Payne v. Bd. of Educ.*, 88 F.3d 392, 397 (6th Cir. 1996); *Zinn v. Shalala*, 35 F.3d 273, 276 (7th Cir. 1994); *Little Rock Sch. Dist. v. Pulaski County Spec. Dist.*, No. 1, 17 F.3d 260, 262–63 & n.2 (8th Cir. 1994); *Kilgour v. Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *Beard v. Teska*, 31 F.3d 942, 951–52 (10th Cir. 1994); *Morris v. West Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999); *Grano v. Barry*, 783 F.2d 1104, 1108 (D.C. Cir. 1986). Even the Fourth Circuit permitted catalyst fees in civil rights litigation prior to its 1994 decision in *S-1 and S-2. Bonnes v. Long*, 599 F.2d 1316 (4th Cir. 1979).

⁴¹ *But see infra* note 42.

⁴² See, e.g., *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). The Court in *W.T. Grant* stated:

[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. A controversy may remain to be settled in such circumstances, e.g., a dispute over the legality of the challenged practices. The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion.

Id. (citations omitted).

The *Buckhannon* Court noted, and seems to some extent to have relied upon, these arguments regarding civil rights plaintiffs whose claims cannot easily be mooted. *Buckhannon*, 121 S. Ct. at 1842–43. However, *Buckhannon* could easily raise problems even for those plaintiffs, in the form of conflicts of interest between civil rights attorneys and their clients. At times, plaintiffs receive settlement offers that they find agreeable, but that would inadequately compensate their attorneys. *Buckhannon* exacerbates that tension, especially in the case of injunctive claims accompanied by damages claims: Once a defendant has mooted an action for injunctive relief by complying with it, the plaintiff may lose interest in obtaining damages. Without court-awarded fees for catalyzing the defendant's change in conduct, the plaintiff's lawyer could find herself in the uncomfortable position of trying to persuade a client to continue litigation in which the client has lost interest and which may have become more trouble to the client than it is worth. Furthermore, the Supreme Court's decision in *Evans v. Jeff D.*, 475 U.S. 717 (1986), permitting defendants to

conditions will aid some civil rights plaintiffs in avoiding *Buckhannon*, they will rarely assist a FOIA fee claimant. Plaintiffs never claim damages under FOIA because the law does not provide for them,⁴³ and they rarely seek ongoing injunctive relief or declaratory judgments.⁴⁴ Nearly all FOIA actions simply demand a one-time release of documents. Therefore, if *Buckhannon* were extended to FOIA fees, government defendants could moot virtually all FOIA claims on the eve of judgment and deny compensation to successful plaintiffs' attorneys. Under such an arrangement, only parties capable of risking litigating without compensation would be able to enforce FOIA against intransigent government agencies. Furthermore, even in those cases, agencies would be able to prolong the litigation without fear of paying costs for their opponents. These bars to access, expediency, and enforceability directly contravene the purposes of amendments to FOIA⁴⁵ and, as noted above, would greatly diminish FOIA's value for public interest actions—the very claims that FOIA fees promote.⁴⁶

demand fee waivers in exchange for settlement, places the interests of the attorney and client directly in conflict. The trial attorney's experience in *Evans* provides a good example of the difficulties civil rights lawyers may face:

In other words, an attorney like myself can be put in the position of either negotiating for his client or negotiating for his attorney's fees, and I think that that is pretty much the situation that occurred in this instance.

I was forced [to agree to the fee waiver], because of what I perceived to be a result favorable to the plaintiff class, a result that I didn't want to see jeopardized by a trial or by any other possible problems that might have occurred That result I didn't want to see disturbed on the basis that my attorney's fees would cause a problem and cause that result to be jeopardized.

Id. at 724 (internal quotation marks omitted).

⁴³ Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(4)(B) (1994) (“On complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.”).

⁴⁴ In a small number of FOIA cases, plaintiffs request ongoing injunctive relief or a declaratory judgment because they allege that an agency policy, practice, or regulation violates FOIA on a continual basis. *See, e.g.,* *Payne Enters., Inc. v. United States*, 837 F.2d 486, 490–91 (D.C. Cir. 1988); *Physicians Comm. for Responsible Med. v. Glickman*, 117 F. Supp. 2d 1, 4–5 (D.D.C. 2000). In at least some cases, courts held that disclosure of requested documents did not moot the claims. *Payne Enters.*, 837 F.2d at 490–91; *Physicians Comm. for Responsible Med.*, 117 F. Supp. at 4–5. However, such cases are exceedingly rare and thus have little bearing on this Note.

⁴⁵ Congress amended FOIA in 1974 and 1986 largely to remedy problems of access and delay. *See* FROST, *supra* note 12. For example, it added (a) a progressive fee structure to guide agencies when charging requesters (with free access for the least burdensome requests by non-commercial requesters); (b) a fee waiver for public inquiries in the public interest; (c) deadlines for agency responses to requests; and (d) attorneys' fees for successful plaintiffs. *Id.*

⁴⁶ *See supra* note 24.

II. THE ARGUMENTS

Fortunately, in spite of similarities, FOIA's fee provision differs from those of the FHAA and ADA. The latter two laws allow a court to award fees and costs to "the prevailing party":

In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs.⁴⁷

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs.⁴⁸

In contrast, FOIA permits fee awards to any plaintiff who has "substantially prevailed":

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.⁴⁹

At a glance, there may seem to be little difference between "prevailing party" and "substantially prevail." But much of FOIA's future efficacy as a tool for the public interest may turn on FOIA fee claimants' ability to distinguish the two phrases.

This Note attempts that task. It explores and evaluates policy, legislative history, and textual arguments, using each to advocate against the extension of *Buckhannon* to FOIA fees. The positions presented below are far from conclusive. They are merely designed to assist practitioners seeking catalyst fees under FOIA and judges who encounter FOIA catalyst fee requests in the wake of *Buckhannon*.⁵⁰ The Note proceeds methodically through the various types of arguments practitioners may employ. Section A discusses policy, statutory purpose, and legislative history, while section B examines textual legal arguments.

⁴⁷ FHAA, 42 U.S.C. § 3613(c)(2) (1994).

⁴⁸ ADA, 42 U.S.C. § 12205 (1994).

⁴⁹ 5 U.S.C. § 552(a)(4)(E).

⁵⁰ At least two such cases are already ongoing, and the memorandum upon which this Note is based has been shared with the attorneys in both cases. *See* *Union of Needletrades, Indus., & Textile Employees v. INS*, No. 00 CIV. 2417 (S.D.N.Y. 2001); *Oil, Chem., & Atomic Workers Int'l Union v. United States Dep't of Energy*, No. 01-5163 (D.C. Cir.) (oral argument scheduled for Mar. 7, 2002).

A. *The Policies and Purposes Underlying the FOIA Fee Provision*

At the outset, it is important to note that the Fourth Circuit itself approved catalyst fees in the FOIA context in 1999. In *Reinbold v. Evers*, the Circuit adopted the catalyst theory for FOIA fees as a matter of course,⁵¹ without even commenting on its 1994 disapproval of such fees under civil rights statutes in *S-1 and S-2*.⁵² That decision makes available a few strong, related arguments. First, plaintiffs in the Fourth Circuit may argue convincingly that *Reinbold* controls FOIA catalyst fees unless the Supreme Court or the Fourth Circuit en banc overrules that case. By declining to mention *S-1 and S-2*, the Fourth Circuit implicitly determined in *Reinbold* that *S-1 and S-2* was inapplicable to FOIA fees. And since *Buckhannon* addressed the same issue as that in *S-1 and S-2*, the Fourth Circuit has, for all practical purposes, found *Buckhannon* irrelevant to FOIA fees as well. Second, in the seven other circuits that have approved of catalyst fees under FOIA,⁵³ plaintiffs can posit weaker versions of the same argument. In those circuits, plaintiffs can distinguish FOIA's language from that of the FHAA and ADA and argue that circuit precedent on FOIA remains untouched. Finally, plaintiffs everywhere can characterize the Fourth Circuit's *Reinbold* decision as evidence that FOIA fees are clearly distinct from those under civil rights statutes. Several policy and legislative history arguments support such a proposition.

1. *The Buckhannon Majority's Assumption that Its Holding Would Rarely Affect Plaintiffs' Evidences that It Failed To Consider FOIA Actions*

One crucial distinction between FOIA and civil rights statutes is the level of ease with which defendants can moot plaintiffs' claims. The *Buckhannon* majority relied on the belief that its holding would harm only the rare plaintiff:

[P]etitioners' fear of mischievous defendants only materializes in claims for equitable relief, for so long as the plaintiff has a

⁵¹ 187 F.3d 348, 363 (4th Cir. 1999) (holding that the plaintiff has "substantially prevailed" in a Privacy Act or FOIA case if the lawsuit "was reasonably necessary and substantially caused the requested records to be released").

⁵² 21 F.3d 49, 51 (4th Cir. 1994) (en banc).

⁵³ Every circuit that has considered catalyst fees under FOIA has approved of them, holding that a plaintiff substantially prevails in a FOIA action if her lawsuit was reasonably necessary and substantially causes release of the requested records. *See, e.g.*, *Maynard v. CIA*, 986 F.2d 547, 568 (1st Cir. 1993); *Vt. Low Income Advocacy Council, Inc. v. Usery*, 546 F.2d 509, 513 (2d Cir. 1976); *Reinbold*, 187 F.3d at 363 (4th Cir. 1999); *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1088 (5th Cir. 1981); *DeBold v. Stimson*, 735 F.2d 1037, 1041 (7th Cir. 1984); *Long v. IRS*, 932 F.2d 1309, 1313 (9th Cir. 1991); *Anderson v. Sec'y of Health and Human Servs.*, 80 F.3d 1500, 1504 (10th Cir. 1996); *Chesapeake Bay Found., Inc. v. United States Dep't of Agric.*, 11 F.3d 211, 216 (D.C. Cir. 1993).

cause of action for damages, a defendant's change in conduct will not moot the case. Even then, it is not clear how often courts will find a case mooted. A defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. If a case is not found to be moot, and the plaintiff later procures an enforceable judgment, the court may of course award attorney's fees. Given this possibility, a defendant has a strong incentive to enter a settlement agreement, where it can negotiate attorney's fees and costs.⁵⁴

The Court's argument is wholly inapposite to FOIA cases, in which plaintiffs only bring equitable claims and the vast majority of defendants can moot the claims against them irrevocably.⁵⁵

It is revealing that the Court contemplated typical civil rights actions (damages claims and requests to enjoin recurring practices), but ignored the paradigmatic FOIA claim (a request to compel a one-time action). Voluntary compliance with a plaintiff's demand in the former can often be rescinded and therefore may not moot a claim, but compliance with the latter can never be retracted and therefore always moots a claim. Thus, plaintiffs may argue, the Court did not have FOIA cases in mind, and its analysis has virtually no relevance to an analysis of the statutory purposes underlying FOIA. In civil rights litigation, *Buckhannon* merely limits the ability of plaintiffs to secure fee awards. But in the FOIA context, *Buckhannon* would largely emasculate the fee provision altogether. When Congress amended FOIA to provide for attorneys' fees, plaintiffs may argue, it could not possibly have intended to reject the catalyst theory. Doing so would have severely crippled plaintiffs' ability to collect fees, rendering the fee amendment virtually meaningless.

This argument finds strong support in the legislative history of the 1974 amendments to FOIA. Soon after the amendments passed, a few courts examined the legislative history carefully and found it "unusually complete"⁵⁶ and "extensive and illuminating."⁵⁷ They determined that de-

⁵⁴ *Buckhannon*, 121 S. Ct. at 1842–43 (internal quotation marks and citations omitted).

⁵⁵ The Supreme Court recognized that the release of documents moots a FOIA claim in *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989). *But see* *Payne Enters. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988) ("So long as an agency's refusal to supply information evidences a policy or practice of delayed disclosure or some other failure to abide by the terms of the FOIA, and not merely isolated mistakes by agency officials, a party's challenge to the policy or practice cannot be mooted by the release of the specific documents that prompted the suit.").

⁵⁶ *Vt. Low Income Advocacy Council v. Usery*, 546 F.2d 509, 512 (2d Cir. 1976).

⁵⁷ *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1363 (D.C. Cir. 1977).

nying catalyst fees under FOIA would be “absurd,”⁵⁸ “inconceivable,”⁵⁹ and “clearly contrary to congressional intent.”⁶⁰ A 1977 D.C. Circuit case, *Foster v. Boorstin*,⁶¹ made the point most succinctly:

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. *Thus, a general bar to awards of fees in cases resolved before final judgment cannot be accepted by the court.*⁶²

One Senate report, containing the most extensive congressional discussion on catalyst fees, described the availability of judicial review—and thus attorneys’ fees to ensure judicial review—as “crucial”:⁶³

[The availability of judicial review is] crucial to effectuating the original congressional intent that judicial review be available to reverse agency refusals to adhere strictly to the Act’s mandates. Too often the barriers presented by court costs and attorneys’ fees are insurmountable for the average person requesting information, allowing the government to escape compliance with the law We must insure [sic] that the average citizen can take advantage of the law to the same extent as the giant corpo-

⁵⁸ *Kaye v. Burns*, 411 F. Supp. 897, 902 (S.D.N.Y. 1976).

⁵⁹ *Id.*

⁶⁰ *Nationwide Bldg. Maint. v. Sampson*, 559 F.2d 704, 715 (D.C. Cir. 1977).

⁶¹ 561 F.2d 340 (D.C. Cir. 1977).

⁶² *Id.* at 343 (citing *Cuneo v. Rumsfeld*, 553 F.2d at 1364). *Kaye v. Burns* rests precisely on this logic:

It is inconceivable, however, that the recovery of attorneys’ fees could be foreclosed whenever the government chooses to moot an action under the Freedom of Information Act by supplying, during the pendency of the litigation, the material sought in the complaint. This is particularly true in light of the fact that the 1974 amendment to the Freedom of Information Act providing for the assessment of attorneys’ fees and costs was based, at least in part, on the demonstrated experience that few individuals could afford the expense of litigating a suit under the Freedom of Information Act, even though the agency’s decision to withhold information might be clearly unlawful. . . . [T]he salutary [sic] purposes of the statute to encourage voluntary compliance with the FOIA, and to encourage suit where an agency has wrongfully withheld requested material could be too easily rendered nugatory if the government could force a party into litigation and then deprive that party of the right to recover expenses incident to bringing the action.

411 F. Supp. at 902. *See also* *Nationwide Bldg. Maint. v. Sampson*, 559 F.2d at 713 (finding it “clear” that Congress intended to permit catalyst fees under FOIA).

⁶³ S. REP. NO. 93-854, at 17 (1974).

rations with large legal staffs. Often the average citizen has foregone the legal remedies supplied by the Act because he has had neither the financial nor legal resources to pursue litigation when his Administrative remedies have been exhausted.⁶⁴

Perhaps most persuasive is Judge Friendly's extensive analysis in *Vermont Low Income Advocacy Council v. Usery*,⁶⁵ the most cited case regarding FOIA fees.⁶⁶ A concise version of Judge Friendly's argument is as follows: It is clear that Congress deliberated over the threshold requirement for fees. It rejected requiring plaintiffs to win a judgment (the original committee recommendation) and rejected requiring only that the government *not* win (the House bill's language).⁶⁷ Instead it compromised, giving courts discretion to determine when a plaintiff, regardless of the stage of litigation, has "substantially prevailed":

[T]he bill specifies four criteria to be considered by the court in exercising its discretion: (1) "The benefit to the public, if any deriving 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 sought had a reasonable basis in law." The Conference Committee proposed the simpler version which was adopted. It explained in H.Rep. No. 93-1380:

The conference substitute follows the Senate amendment, except that the statutory criteria for court award of attorney fees and litigation costs were eliminated. By eliminating these criteria, the conferees do not intend to make the award of attorney fees automatic or to preclude the courts, in exercising their discretion as to awarding such fees, to take into consideration such criteria.⁶⁸

The legislative history makes clear that courts should not award fees merely because the government does not win, nor should they deny fees merely because the plaintiff did not secure a legal judgment. They should award fees whenever a plaintiff has fulfilled the purpose of the Act by compelling the disclosure of unlawfully withheld documents. Moreover,

⁶⁴ *Id.* at 17-18.

⁶⁵ 546 F.2d 509, 512-13 (2d Cir. 1976).

⁶⁶ The Westlaw Custom Digest (key number 326k68), as of December 4, 2001, indicates that *Usery* has been cited fifty-five times for the proposition that "In order to obtain an award of attorney fees in an FOIA action, a plaintiff must show at minimum that the prosecution of the action could reasonably have been regarded as necessary and that the action had substantial causative effect on the delivery of the information."

⁶⁷ *Usery*, 546 F.2d at 512-13 (citing H.R. CONF. REP. NO. 93-1380, at 9 (1974)).

⁶⁸ *Id.* (citing S. REP. NO. 93-854 at 17-18; H.R. CONF. REP. NO. 93-1380 at 9) (original paragraph structure altered).

plaintiffs may argue that congressional reliance on judicial discretion regarding attorneys' fees reflected an implicit approval of catalyst fees, which were arguably awarded in some cases before the passage of FOIA's fee provision.⁶⁹ Friendly concluded:

[W]e agree that under the bill as enacted a judgment is not an absolute prerequisite to [an award of attorneys' fees], as indeed the Government seemingly conceded at argument. To take an extreme example, *Congress clearly did not mean that where an FOIA suit had gone to trial and developments made it apparent that the judge was about to rule for the plaintiff, the Govern-*

⁶⁹ See, e.g., *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 709 n.25 (1983) (“[E]ven before the 1970 Act was passed, the ‘prevailing party’ standard had not always been construed narrowly to exclude [catalyst] plaintiffs.”) (Stevens, J., dissenting). FOIA fee claimants must bear in mind that the *Buckhannon* majority, concurrence, and dissent disputed the existence of cases approving catalyst fees prior to the 1976 enactment of 42 U.S.C. § 1988. *Buckhannon Bd. & Care Home v. W. Va. Dep’t of Health & Human Res.*, 121 S. Ct. 1835, 1842, 1844–45, 1853–54 (2001). Courts may deem the issue settled in favor of the majority and concurrence view that no such case existed.

However, *Buckhannon*'s legislative history analysis was deeply flawed. The Court engaged in a technical dissection of a single case that Congress cited in 1976 when it passed 42 U.S.C. § 1988, attempting to show that, since it was not a true catalyst case, Congress did not intend to endorse the catalyst theory by citing it. *Id.* at 1842. The concurrence similarly dissected pre-1976 cases that arguably supported the catalyst theory. *Id.* at 1843–45 (Scalia, J., concurring). Both the majority and concurrence arguably should have concentrated on what Congress thought those cases stood for when it passed the FHAA and ADA, not what the Court believes the cases mean now. Far more important, Congress passed those statutes in 1988 and 1990, respectively, long after the pre-1976 cases the Court examined. Fair Housing Act Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1633 (1989); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 371 (1991). Regardless of what Congress thought in 1976, it had become obvious by 1988 that the federal courts unanimously approved catalyst fees for “prevailing parties.” Unless one assumes that Congress was entirely ignorant of the relevant legal doctrine, its use of “prevailing party” in 1988 and 1990 strongly implies approval of the catalyst theory.

The relevance for FOIA fees is that the *Buckhannon*'s analysis of pre-1976 cases could fairly be labeled *dicta*. Unfortunately for FOIA fee claimants, however, the analysis would not have been *dicta* for FOIA fees, which passed in 1974. See *supra* note 12. Nonetheless, FOIA plaintiffs may find the following fragments of argument useful: The *Buckhannon* majority addressed only cases implementing the phrase “prevailing party,” not “substantially prevail.” (Justice Scalia labored to distinguish one “substantially prevail” case, *id.* at 1845 n.2 (Scalia, J., concurring), but this was perhaps his least convincing claim. He stated only that the appellant qualified for fees without resort to the catalyst theory because the appellees “abandoned their contention made before the lower court.” *Id.* It is far from clear—and Justice Scalia never offered explanation—why a defendant’s “abandonment of its contention” provides a plaintiff with anything other than a catalyst victory.) The majority also failed to address at least two pre-1974, “prevailing party” cases that very arguably applied the catalyst theory. See *Brown v. Gaston County Dyeing Mach. Co.*, 457 F.2d 1377, 1383 (4th Cir.) cert. denied, 409 U.S. 982, (1972); *Corcoran v. Columbia Broad. Sys., Inc.*, 121 F.2d 575, 576 (9th Cir. 1941). Rather than submitting reflexively to the Court’s analysis, which was arguably flawed *dicta*, courts should conduct their own. At the least, they should focus not on what the *Buckhannon* Court believed certain pre-1976 cases employing “prevailing party” meant, but rather what Congress in 1974 believed cases interpreting “substantially prevail” meant.

*ment could abort any award of attorney fees by an eleventh hour tender of the information requested.*⁷⁰

Thus, FOIA fee claimants benefit from strong precedent finding that barring catalyst fees under FOIA would flatly contradict congressional intent by rendering the FOIA fee provision worthless in most cases.

2. Courts Inquire into the Merits of FOIA Claims Before Awarding "Catalyst" Fees

One feature of FOIA fees that may benefit fee claimants is a judicial doctrine that compels courts adjudicating FOIA fee claims to inquire into whether the government withheld documents unreasonably.⁷¹ The doctrine is significant because FOIA fees might arguably not even be considered catalyst fees under *Buckhannon*.⁷²

The *Buckhannon* majority's discussion of *Parham v. Southwestern Bell*,⁷³ a case that arguably approved the catalyst theory in 1970, provides a useful starting point for this discussion. Congress cited *Parham* when passing 42 U.S.C. § 1988, and the *Buckhannon* petitioners argued that congressional citation to the case evidenced approval of catalyst fees.⁷⁴ Justice Rehnquist countered that *Parham* was not a catalyst case because the Eighth Circuit awarded fees "only after finding that the defendant had acted unlawfully."⁷⁵

Courts make similar findings in FOIA fee determinations. After deciding whether a claimant has "substantially prevailed," that is, whether she is *eligible* for fees, courts then weigh four equitable considerations to determine whether she is *entitled* to fees.⁷⁶ The fourth factor for consideration is "whether the Government had a reasonable basis for withholding requested information,"⁷⁷ and "the District Court must determine whether the Government's position is legally correct in assessing any claim for fees under FOIA."⁷⁸ This requirement—essentially a finding on

⁷⁰ *Usery*, 546 F.2d at 513 (emphasis added).

⁷¹ *See, e.g.*, *Burka v. United States Dep't of Health & Human Servs.* 142 F.3d 1286, 1288 (D.C. Cir. 1998).

⁷² This argument's basis is *Buckhannon*'s clear holding that fees obtained after a judgment on the merits *are not* catalyst fees. 121 S. Ct. at 1840, 1841. I am grateful to Dan Guttman for correspondence that helped develop this argument.

⁷³ *Id.* at 1842 & n.9 (citing 433 F.2d 421, 429–30 (8th Cir. 1970)).

⁷⁴ Petitioners' Brief at 21–23, *Buckhannon*, 121 S. Ct. 1835 (No. 99-1848). We will ignore momentarily that, when discussing *Parham*, the Court arguably should have addressed the legislative history of the FHAA and ADA rather than that of 42 U.S.C. § 1988. *See infra* note 69.

⁷⁵ *Buckhannon*, 121 S. Ct. 1842 n.9.

⁷⁶ *See, e.g.*, *Burka*, 142 F.3d at 1288.

⁷⁷ *E.g.*, *Chesapeake Bay Found., Inc. v. United States Dep't of Agric.*, 11 F.3d 211, 216 (D.C. Cir. 1993).

⁷⁸ *Id.*

the merits—arguably renders any FOIA fee award wholly distinct from *Buckhannon*'s definition of catalyst fees.

This argument faces at least one major problem. The merits determinations are required by judicial doctrine rather than FOIA, and *Buckhannon* arguably precludes any attorneys' fee award absent explicit statutory authority.⁷⁹ Citing legislative history, however, fee claimants can counter with the very reasonable argument that courts are actually going above and beyond what Congress required. It was Congress that first proposed the four-part balancing test, then rejected it in favor of granting courts *more* discretion over fees.⁸⁰ This constitutes fairly strong evidence that (1) Congress did not intend to require a finding on the merits, but (2) even if *Buckhannon* created such a requirement, the courts satisfy it in FOIA fee adjudications.

3. FOIA Cases Offer Greater Certainty of Causation

Even if courts reject the above arguments, plaintiffs may still benefit from another distinction between FOIA actions and civil rights litigation: the greater transparency in FOIA cases as to why a defendant might concede. By the time a FOIA plaintiff files suit, the government will have already fought the release of records through an administrative process that allowed ample time for reconsideration of the denial.⁸¹ Many agencies will have fought the release of documents for years before quickly ceding them in response to litigation.⁸² At times, the action will have moved between district and circuit courts, and the agency will yield documents after a judgment has been entered, but while an appeal is still

⁷⁹ *Buckhannon*, 121 S. Ct. at 1842.

⁸⁰ See *supra* text accompanying note 68.

⁸¹ FOIA grants agencies twenty working days to determine whether to comply with FOIA requests. 5 U.S.C. § 552 (a)(6)(A)(i). If an agency declines to release documents and the requester appeals that determination, the agency then has another twenty working days to answer the appeal. *Id.* § 552(6)(A)(ii). In "unusual circumstances" such as the need to collect records from other facilities, to consult with other agencies, or to process a voluminous amount of records, the agency may unilaterally extend the response time for another ten working days. *Id.* § 552(a)(6)(B)(i). The agency may further notify the requester of an inability to respond within those additional ten days, and it may offer the requester an opportunity to arrange an alternative time frame or modify her request. *Id.* § 552(a)(6)(B)(ii). Additionally, courts may relax FOIA's time constraints when convinced that an agency is operating under "exceptional circumstances" and moving with "due diligence." See, e.g., *Open Am. v. The Watergate Special Prosecutor*, 547 F.2d 605, 616 (D.C. Cir. 1976) ("Under the circumstances defined above, the time limits prescribed by Congress . . . become not mandatory but directory. The good faith effort and due diligence of the agency to comply with all lawful demands under the Freedom of Information Act in as short a time as is possible . . . is compliance with the Act.") Thus, FOIA does not contain, nor have courts created, any fixed deadlines for the production of documents.

⁸² For example, in *Goldstein v. Levi*, after three years of unsuccessful attempts to obtain certain government materials relating to the Rosenberg espionage prosecution, a PBS producer received the information within weeks of filing a lawsuit. 415 F. Supp. 303, 305 (D.D.C. 1976).

pending.⁸³ Years into such hard-fought disputes, there are few reasons other than the realization of likely defeat that would drive a once defiant agency suddenly to release records.⁸⁴

These features of FOIA litigation contrast with civil rights actions in which defendants may be ignorant of plaintiffs' grievances before the plaintiffs file suit or may lack resources to defend against the claims. In such cases, fee awards against defendants who yield quickly may often prove unjust. It may be unclear, for example, (1) whether the defendant would have been happy to comply with plaintiff's demands earlier if only she had heard the grievance, or (2) whether the defendant could have fought and won the lawsuit if only she possessed sufficient resources.⁸⁵ At least two important implications follow from the greater certainty of causation in FOIA actions.

First, Justice Scalia noted in *Buckhannon* that "an acknowledgement by the defendant . . . of the merits of plaintiff's case" is "equivalent" to a "judicial finding."⁸⁶ He made the statement while arguing that no state or federal case employing the catalyst theory existed at the time 42 U.S.C. § 1988 was enacted, and he equated concession with victory in court to distinguish certain cases in which courts had awarded catalyst fees.⁸⁷

⁸³ See, e.g., *Williams v. FBI*, 17 F. Supp. 2d 6, 7 (D.D.C. 1997) ("Following an initial ruling by this Court and an appeal, the government reviewed Document G and determined that a supplemental release to the plaintiff is appropriate. While the FBI ultimately released Document G on its own accord, the lawsuit did in fact cause the release of the data On March 8, 1996, after five years of litigation, the FBI was ordered to release Document B in redacted form. The FBI's argument, that this litigation did not result in the release of any information to the plaintiff, is clearly unavailing.") (citations and internal quotations omitted).

⁸⁴ See, e.g., *O'Neill, Lysaght & Sun v. Drug Enforcement Admin.*, 951 F. Supp. 1413, 1423 (C.D. Cal. 1996) ("Finally, it is important to bear in mind that the DEA had contested the disclosure of these documents up to the point where it was evident that it would be ordered to disclose. The DEA was able to reevaluate the documents and decide to release them. This situation seems comparable to the situation courts have cautioned about: voluntary government disclosure prior to a court judgment.")

Another plausible explanation for the sudden release of records could be a drastic change in agency priorities, perhaps initiated by a change in administration. When President Clinton took office, for example, he replaced a Reagan-Bush policy of defending withholdings when there was a "substantial legal basis" for doing so with a "customer-friendly" approach that adopted "a presumption of disclosure." See STRAUSS, *supra* note 10, at 915 (citing Note, *Developments Under the Freedom of Information Act—1983, 1984 Duke L.J.* 377, 386–91; Exec. Order 12,600, 52 Fed. Reg. 23781 (June 25, 1987); Letters of October 4, 1993). Any such change, however, will be fairly transparent to a court attempting to determine whether a plaintiff's lawsuit in fact catalyzed a defendant's release of documents.

⁸⁵ Justice Scalia expressed the latter concern in his *Buckhannon* concurrence. 121 S. Ct. at 1847 (Scalia, J., concurring) (decrying the prospect of fee awards when "for all one knows, the defendant only 'abandon[ed] the fray' because the cost of litigation—either financial or in terms of public relations—would be too great").

⁸⁶ *Buckhannon*, 121 S. Ct. at 1844 (2001). Scalia's actual statement was, "The other state or state-law cases . . . all involve a judicial finding—or its equivalent, an acknowledgement by the defendant—of the merits of plaintiff's case." *Id.*

⁸⁷ Notably, in one such distinguishable case, the plaintiff was held to have "substantially prevailed," not to have been a "prevailing party." *Id.* at 1845 n.2.

Those cases did not implement the catalyst theory, he wrote, because the defendants “abandoned their contention” or “acknowledged [their] liability.”⁸⁸ Such instances should be extremely rare.⁸⁹ Concession in an action for injunctive relief typically fails to qualify as an acknowledgment by the defendant of the merits of the case because uncertainty exists regarding the reasons for the concession. But in FOIA cases, where causation is often more clear, a defendant’s concession can more likely be interpreted as a grudging acknowledgement of the merit of the plaintiff’s claim. According to Justice Scalia, such an acknowledgment would be the equivalent of a judicial finding of a plaintiff’s victory.

Second, the *Buckhannon* majority disfavored the catalyst theory because uncertainty over causation could lead to increased litigation over fees.⁹⁰ In FOIA cases, those concerns are far weaker because courts can more easily determine whether a plaintiff’s legal action catalyzed the defendant’s concession of the disputed documents. There are few reasons a FOIA defendant would capitulate aside from the likelihood of defeat, and most non-litigation-based motivations to capitulate are relatively easy to prove.⁹¹ A survey of published district court decisions addressing causation for FOIA fee inquiries illustrates that courts typically resolve the question with ease.⁹² In some cases, the government has not bothered to dispute causation at all.⁹³

⁸⁸ *Id.* (quoting *Ficklen v. Danville*, 132 S.E. 705, 706 (Va. 1926)) (internal quotations omitted).

⁸⁹ *But see id.* at 1855 n.8 (Ginsburg, J., dissenting) (noting that, in at least two of the cases Justice Scalia cited, the alleged “‘acknowledgement’ consisted of nothing more than the defendant’s voluntary provision of the relief that the plaintiff sought”).

⁹⁰ *Id.* at 1843.

⁹¹ For example, agencies sometimes argue that the plaintiff did not coerce the release of documents because the agency was simply processing requests on a first in, first out basis and finally reached plaintiff’s request. Courts typically have little difficulty determining the veracity of such defenses. *See, e.g., Bricker v. FBI*, 54 F. Supp. 2d 1, 4 (D.D.C. 1999) (“While the agencies should not be allowed to hide behind the FOIA backlog, in cases such as this one where the agency is reasonably responsive to inquiries about the status of the request and processes the request fairly according to the ‘first in, first out’ protocol, the courts should require some showing of improper conduct or purpose before awarding fees and costs against the agency on the basis of delay alone. Although such allegations have been hinted at here, there has been no demonstration by the plaintiffs that the delay in disclosure was the result of anything other than ordinary administrative backlog.”)

⁹² For the sake of brevity, I cite only what appear to be the ten most recently published district court opinions on the issue. *See Dixie Fuel Co. v. Callahan*, 136 F. Supp. 2d 659, 662–64 (E.D. Ky. 2001) (“The government contends, without citing *any* authority, that plaintiff did not ‘substantially prevail.’ . . . The Court . . . finds that the existence of the lawsuit had some causative effect upon the release of that information. Many of plaintiff’s requests went completely unanswered until after plaintiff filed its complaint. Within weeks of the suit being filed, defendant released a significant amount of information in response to plaintiff’s request. In addition, the [agency] miraculously uncovered the [relevant document] a little more than one month after this Court ordered defendant to submit evidence that it did not possess the [document].”); *Weatherhead v. United States*, 112 F. Supp. 2d 1058, 1065, (E.D. Wash. 2000), *vacated without published order* (E.D. Wash. Feb. 12, 2001) (“The government strenuously argues that it was the plaintiff’s disclosure of the

4. FOIA Actions Are Distinct Because FOIA Plaintiffs Always Litigate Against the Government

Finally, plaintiffs may note that FOIA litigation is distinct from actions under civil rights statutes because FOIA claimants always litigate against the federal government. Justice Scalia's concurrence expressed concern that the catalyst theory would allow extortionist plaintiffs to bully defendants who have inferior resources.⁹⁴ That argument is irrelevant to FOIA because, with ample resources at its disposal, the United States government need not fear extortion by FOIA plaintiffs. If any-

Consul Letter, not this lawsuit, that caused the government to release the Extradition Letter The Court cannot see how that information alone compelled the government to withdraw its objection to the plaintiff's FOIA request. This Court is convinced that factored into the government's decision to release the requested document was the possibility of receiving an unfavorable decision from the Supreme Court, creating negative precedent for future disputes."); *Bricker v. FBI*, 54 F. Supp. 2d 1, 4 (D.D.C. 1999) ("[I]n cases such as this one where the agency is reasonably responsive to inquiries about the status of the request and processes the request fairly according to the 'first in, first out' protocol, the courts should require some showing of improper conduct or purpose before awarding fees and costs against the agency on the basis of delay alone. . . . [T]here has been no demonstration by the plaintiffs that the delay in disclosure was the result of anything other than ordinary administrative backlog."); *Nash v. United States Dep't of Justice*, 992 F. Supp. 447, 450 (D.D.C. 1998) ("Here, plaintiff received additional information after the filing of this lawsuit because it was only then that plaintiff submitted the privacy waiver of Daniel Nash."); *Horsehead Indus. Inc. v. United States EPA*, 999 F. Supp. 59, 64 (D.D.C. 1998) ("The only basis for EPA's argument that these documents were never withheld is its narrow construction of Horsehead's FOIA request, a construction that this Court has already rejected. The Court finds that these documents were withheld and were produced only as a result of this Court's order.") (citation omitted); *Ralph Hoar & Assocs. v. Nat'l Highway Traffic Safety Admin.*, 985 F. Supp. 1, 7-8 (D.D.C. 1997) ("Defendant argues that an intervening change in circumstances, not Plaintiffs' lawsuit, caused its change in position This contention, however, is unpersuasive Quite simply, NHTSA has not provided an adequate rationale for such a dramatic change in its safety and enforcement concerns over the course of the litigation."); *Northwest Coalition for Alternatives to Pesticides v. Browner*, 965 F. Supp. 59, 63 (D.D.C. 1997) ("EPA's argument is unpersuasive. . . . EPA refused to disclose the requested information before the suit was filed and withdrew its assertion of confidentiality as to the identities of some inert ingredients only after plaintiffs uncovered previous public disclosures of the requested information and documented those discoveries in their pleadings. As for the remaining ingredients, there can be no dispute that the October 11, 1996 order directly caused the release of the requested information.") (citations omitted); *Loglia v. IRS*, No. 96 CIV. 2654(LAK)(RLE), 1997 WL 214869, *4 (S.D.N.Y. Apr. 25, 1997) ("Plaintiff has presented no evidence that his request would not have been appropriately reviewed on [administrative] appeal Unfortunately, plaintiff filed suit before the IRS had the opportunity to decide plaintiff's appeal Plaintiff must show that his lawsuit caused the disclosure. This he has failed to do."); *Playboy Enters., Inc. v. United States Customs Serv.*, 959 F. Supp. 11, 15 (D.D.C. 1997) ("Defendant does not dispute that the lawsuit resulted in the release of the requested records to Plaintiff."); *O'Neill, Lysaght & Sun v. Drug Enforcement Admin.*, 951 F. Supp. 1413, 1423 (C.D. Cal. 1996) ("Finally, it is important to bear in mind that the DEA had contested the disclosure of these documents up to the point where it was evident that it would be ordered to disclose. The DEA was able to reevaluate the documents and decide to release them. This situation seems comparable to the situation courts have cautioned about: voluntary government disclosure prior to a court judgment.").

⁹³ See, e.g., *Playboy Enters.*, 959 F. Supp. at 15.

⁹⁴ *Buckhannon*, 121 S. Ct. at 1847 (Scalia, J., concurring); see also *supra* note 85.

thing, litigation against the government may require *more* resources than litigation against some private civil rights defendants.

More importantly, plaintiffs may argue that Congress recognized special circumstances in creating a lower bar for attorneys' fees in FOIA actions than in civil rights actions. Because FOIA applies exclusively to federal agencies, it carries a greater need for private enforcement. While the federal government can be trusted to prosecute at least some private or state violations of civil rights statutes, it can never be counted upon to prosecute its own violations of FOIA. A lower bar for the term "substantially prevail" than for "prevailing party" would reflect a congressional understanding of the greater need for private enforcement of FOIA and a recognition that without attorneys' fees, such enforcement will not occur.⁹⁵

B. Textual Arguments

In addition to arguments from policy and legislative history, plaintiffs have numerous textual arguments at their disposal to prevent the extension of *Buckhannon* to FOIA. This section first discusses arguments relying on dictionaries in an attempt to define "substantially prevail" in a manner favorable to fee claimants. It then examines issues of inter- and intra-statutory consistency, arguing that the term "prevailing party" at issue in *Buckhannon* and the "substantially prevailing" language of FOIA are distinguishable. Finally, it advocates reading *Buckhannon* narrowly.

1. Terms of Art?

Since the Supreme Court appears to have emphasized the classification in *Buckhannon*,⁹⁶ plaintiffs may find it useful or necessary to discuss whether "substantially prevail" is a legal term of art. The only clear consequence of classification as a "legal term of art" is that courts may be more likely to consult *Black's Law Dictionary* to define such words. The *Buckhannon* Court declared "prevailing party" a term of art and seems to have relied heavily on the 1997 edition of *Black's*, which defined the phrase as a "party in whose favor judgment is rendered."⁹⁷

⁹⁵ See, e.g., *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1363–64 (D.C. Cir. 1977) ("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. Recognizing that the FOIA had established a national policy of public disclosure of government information, Congress found it appropriate and desirable, in order to effectuate that policy, to provide for the assessment of attorney fees against the government where the complainant prevailed in FOIA litigation.").

⁹⁶ *Buckhannon*, 121 S. Ct. at 1839.

⁹⁷ See *id.* (citing BLACK'S LAW DICTIONARY 1145 (7th ed. 1999) [hereinafter BLACK'S 7TH]). That definition does not derive directly from prior Supreme Court cases, the *Buckhannon* majority wrote, but "can be distilled from" them. *Id.* at 1839. To the extent that the Court examined sources other than its own precedent, it clearly relied more on *Black's* than

Justice Scalia's concurrence similarly emphasized the special status of the term "prevailing party," writing, "[w]ords that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning."⁹⁸

Plaintiffs should argue that the term "substantially prevail" is not a term of art because if considered a term of art, resort to *Black's 7th* produces a definition of "prevail" that could be interpreted adversely to plaintiffs.⁹⁹ It is commonly accepted that words that are not legal terms of art should be accorded their ordinary, not their legal, meaning,¹⁰⁰ and ordinary-usage dictionaries provide FOIA fee claimants with helpful arguments. The Supreme Court has already found favorable, temporally relevant definitions of the word "substantially" in ordinary dictionaries:

"[S]ubstantially" suggests "considerable" or "specified to a large degree." See Webster's Third New International Dictionary 2280 (1976) (defining "substantially" as "in a substantial manner" and "substantial" as "considerable in amount, value, or worth" and "being that specified to a large degree or in the main"); see also 17 Oxford English Dictionary 66–67 (2d ed. 1989) ("substantial": "[r]elating to or proceeding from the essence of a thing; essential"; "of ample or considerable amount, quantity or dimensions").¹⁰¹

Furthermore, the American Heritage Dictionary of the English Language defines "prevail" favorably, in a manner typical of ordinary English dictionaries:

1. To be greater in strength or influence; to triumph or win a victory. Often used with over or against. 2. To be or become effective; succeed; win out. 3. To be most common or frequent; be predominant. 4. To be in force, use, or effect; be current. 5. To use persuasion or inducement successfully.¹⁰²

it did legislative history, which it found "ambiguous," *id.* at 1842, or decades of unanimous circuit court law, which it overruled. See *supra* note 40.

⁹⁸ *Id.* at 1846 (Scalia, J., concurring).

⁹⁹ See *infra* text accompanying notes 104–108.

¹⁰⁰ See, e.g., *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96 (1820) ("The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words . . ."); *John v. United States*, 247 F.3d 1032, 1039 (9th Cir. 2001) ("[W]e interpret . . . undefined terms not as technical terms of art but rather in accordance with their ordinary or natural meaning in the context in which they arise."); *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 90 (2d Cir. 1999) ("The phrase is not defined . . . and is not a term of art. We therefore look to the ordinary meaning of the words:").

¹⁰¹ *Sutton v. United Airlines*, 527 U.S. 471, 491 (1999).

¹⁰² AMERICAN HERITAGE DICTIONARY 1038 (1st ed. 1969).

The above definitions are helpful because they indicate that “prevail” simply means success, without the necessity of a legal judgment, in obtaining the substance of what was desired. That is precisely what a FOIA plaintiff achieves when the government cedes disputed documents before litigation has reached a judgment.

The argument against considering “substantially prevail” a term of art draws strength from the fact that *Black’s* is silent on “substantially prevail,” “substantially,” and “substantial.” The mere absence of a definition in *Black’s* may seem a weak argument for determining that a word or phrase is not a term of art, but the *Buckhannon* majority offered no explicit reason for deeming “prevailing party” such a term.¹⁰³ More importantly, in the absence of a legal dictionary definition, classification as a term of art should have little practical effect anyway because the only clear consequence of labeling a word a legal term of art is that a court may rely more heavily on legal dictionary meanings to define the word. Since *Black’s* does not offer definitions of “substantially prevail,” “substantial,” or “substantially,” courts that wish to consult the dictionary will find it useful only with respect to the word “prevail.”

2. *Black’s 7th*

If courts deem the word “prevail” a term of art, plaintiffs have some reasonable, albeit complicated, arguments. *Black’s 7th* defines “prevail” in a manner that could easily be interpreted unfavorably: “To obtain the relief sought in an action; to win a lawsuit <the plaintiff prevailed in the Supreme Court>.”¹⁰⁴ The clause before the semicolon is obviously favorable, the clause after it is unfavorable, it and the dictionary’s usage guide is silent on the meaning of the semicolon.¹⁰⁵ However, the semicolon appears to connote the existence of two similar, but non-synonymous definitions. When the dictionary introduces a wholly distinct definitional trail, it employs a new numbered entry in the definition of the term, and when it provides synonyms, it generally makes that intent clear with the use of phrases such as “also termed,” “also written,” and “often shortened

¹⁰³ See *Buckhannon*, 121 S. Ct. at 1839. There are other reasons for considering a phrase a legal term of art, but none seem helpful in this context. A phrase could be deemed a term of art because it is defined statutorily, but that circumstance does not arise here. Likewise, a phrase could be deemed a term of art because courts or practitioners commonly use it; but if courts use it in varying ways, their use offers little assistance in establishing a definition. It is odd that the Court would deem a phrase a term of art when its meaning was so disputed that it became the central issue in a Supreme Court case. It seems reasonable to assume that in order to be considered a term of art, a phrase should have a widely accepted, well-settled meaning. A majority of current Supreme Court justices apparently believe otherwise.

¹⁰⁴ BLACK’S 7TH, *supra* note 97, at 1206.

¹⁰⁵ *Id.* at xvii–xxi.

to.”¹⁰⁶ Thus, it seems likely that the semicolon signals something in between: a related, but non-synonymous definition.

Plaintiffs can therefore argue that the phrase “to obtain the relief sought in an action,” seemingly supportive of the catalyst theory,¹⁰⁷ is a valid *legal* definition of “prevail.” Moreover, that definition is useful in combating some of Justice Scalia’s major concerns: the potential difficulties of administrability and line-drawing under the catalyst theory. Scalia expressed concern, for example, that the catalyst theory offered no principled distinction between fees awarded despite failure to win a judgment in time and fees awarded despite a failure to file suit at all.¹⁰⁸ Plaintiffs can assuage such concerns by conceding that the definition of “prevail” embraces only success in obtaining relief sought *in an action*—in other words, that FOIA requires at least the filing of a lawsuit.

Clearly, *Black’s 7th* provides defendants with strong arguments as well. The fact that the definition of “prevail” contains only one usage example could suggest that the two definitions separated by a semicolon are intended to be synonymous. Furthermore, the one usage example that *Black’s* provides, “the plaintiff prevailed in the Supreme Court,” very arguably suggests that the definition requires judicial action. More important, judges are likely to be skittish about adopting a definition of the word “prevail” that differs so substantially from the Court’s definition of that term in the phrase “prevailing party.” Thus, while plaintiffs can make arguments from *Black’s 7th*, defendants can probably do so at least equally well.

3. *Black’s 4th*

Plaintiffs may be able to avoid the above morass by persuading a court to consult *Black’s 4th*, the edition in use when FOIA’s fee provision was passed,¹⁰⁹ rather than *Black’s 7th*. *Black’s 4th* provides definitions more favorable to plaintiffs than those in *Black’s 7th*, and plaintiffs can offer a persuasive argument that *Black’s 4th* is more appropriate. The *Buckhannon* Court’s use of *Black’s 7th*¹¹⁰ can easily be construed as a mistake. Typically, the Court employs interpretive resources contempora-

¹⁰⁶ *Id.* at xx.

¹⁰⁷ *Black’s 7th* fails to explain whether the phrase “in an action” modifies the relief sought or how it was obtained: “To obtain the relief sought in an action” might mean “to obtain, in an action, the relief sought.” Or it might mean “to obtain *the relief sought in an action*.” One could argue that by placing the phrase “in an action” closer to the phrase “the relief sought,” *Black’s 7th* intended it to modify that phrase. In this instance, earnest pursuit of a strictly “textualist” interpretation is admittedly inconclusive.

¹⁰⁸ *Buckhannon*, 121 S. Ct. at 1848 (Scalia, J., concurring).

¹⁰⁹ FOIA’s fee provision was passed in 1974. Pub. L. No. 93-502, 88 Stat. 1561 (1974). BLACK’S LAW DICTIONARY (5th ed. 1979) was not published until five years later.

¹¹⁰ *Buckhannon*, 121 S. Ct. at 1839.

neous with the passage of the statute at issue,¹¹¹ as is obviously appropriate. Current dictionaries simply cannot be relied upon to provide accurate insight regarding the definitions of statutory terms employed decades ago.¹¹²

Under *Black's 4th*, plaintiffs have strong arguments to support catalyst fees. The dictionary defines “substantially” as “Essentially; without material qualification; in the main; in substance; materially; in a substantial manner. About, actually, competently, and essentially.”¹¹³ And it defines “prevail” in relevant part as “To be or become effective or effectual.”¹¹⁴ Importantly, the dictionary’s definition of “prevail” is distinct from that of “prevailing party.” “Prevailing party” seems much more likely to require a judicial imprimatur: “That one of the parties to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of his original contention.”¹¹⁵ In contrast, the definition of “prevail”—listed directly above that of “prevailing party”—conspicuously omits any reference to a court, judge, judgment, lawsuit, or even *litigant*. Rather, it requires only the effectuation of a desired result. (Plaintiffs could perhaps argue that the presence of the word “party” is significant: the words “prevailing party,” not merely “prevail,” implicate judicial action.)

4. Distinguishing “Substantially Prevail” from “Become a Prevailing Party on the Major Issues”

Moving beyond dictionaries to other textual arguments, plaintiffs should argue that “prevailing party” and “substantially prevail” are distinct because when Congress uses different terms, it intends different meanings.¹¹⁶ Indeed, numerous statutes employ *both* “prevail” and “substantially prevail,”¹¹⁷ providing strong support for the proposition that

¹¹¹ See, e.g., *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267 (1994) (all nine justices examining resources contemporaneous with the passage of the Administrative Procedure Act when construing a term in the statute).

¹¹² *Black's 7th's* entry for “prevailing party” arguably defies even contemporary justification. Curiously, no editor updated the definition to reflect the advent of catalyst fees in the nearly three decades during which the federal courts of appeals grew to embrace such fees unanimously. Of course, that omission is easily excusable. It could have been mere oversight, or perhaps it reflected an editorial assumption that definitions need not be updated scrupulously. Given these considerations, however, the *Buckhannon* Court’s substantial reliance on the resource may be difficult to justify.

¹¹³ BLACK’S LAW DICTIONARY 1597 (4th ed. 1968) [hereinafter BLACK’S 4TH].

¹¹⁴ *Id.* at 1352.

¹¹⁵ *Id.*

¹¹⁶ See, e.g., [2A] NORMAN SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (6th ed. 2000) (noting that the use of different “terms within related statutes generally implies that different meanings were intended”). See also, e.g., *Legacy Emanuel Hosp. & Health Ctr. v. Shalala*, 97 F.3d 1261, 1264 (9th Cir. 1996) (“[B]y using the different terms ‘entitled’ and ‘eligible’ in adjacent provisions, Congress intended different meanings for the terms.”).

¹¹⁷ See, e.g., 25 U.S.C. § 640d-27(b) (1994) (“prevails or substantially prevails”); 29

Congress has recognized different standards for the two phrases. Furthermore, it is well settled that courts should prefer interpretations that give meaning to all words in a given statute.¹¹⁸ Finally, the Supreme Court itself has taken note of the variation in standards for fee-shifting statutes, noting that the “more than 150 existing federal fee-shifting provisions . . . contain varying standards as to the precise degree of success necessary for an award of fees.”¹¹⁹

As to the *type* of distinction between the phrases, plaintiffs should argue that “substantially” does not merely connote the amount of relief required. First, the requirement that a plaintiff “substantially prevail” does not require that the plaintiff become a “prevailing party” on some significant portion of the claim. At the time FOIA’s fee provision was enacted, “prevailing party” was already considered to embrace such partial victories,¹²⁰ so to interpret “substantially prevail” in the same manner would be redundant.

Second, “substantially prevail” is not a heightened requirement that a plaintiff become a prevailing party *and* win more than a nominal amount of relief. *Black’s 4th* unfortunately defines “substantial” as “[o]f real worth and importance; of considerable value[;] valuable . . . *Something worthwhile as distinguished from something without value or merely nominal.*”¹²¹ The italicized phrase could be used to support a theory that “substantially prevail” is actually a *higher* bar than “prevailing party.” Under that view, a party must not only be the prevailing party, but also must receive more than nominal relief.¹²²

U.S.C. § 1303(f)(3) (1994) (same); 18 U.S.C. § 1864(e) (Supp. II 1996) (“prevailing or substantially prevailing party”); 33 U.S.C. § 1365(d) (1994) (same).

¹¹⁸ *E.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) (“[T]he Court will avoid a reading which renders some words altogether redundant.”); *cf.* *Marek v. Chesny*, 473 U.S. 1, 9 (1985) (interpreting the interplay between 42 U.S.C. § 1983 (1994) and Rule 68 of the Federal Rules of Civil Procedure in a manner that would give meaning to all the words in each).

¹¹⁹ *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983) (emphasis added).

¹²⁰ *See, e.g.*, *BLACK’S 4TH*, *supra* note 113, at 1352 (defining “prevailing party” as one that “successfully prosecutes an action or successfully defends against it, *prevailing on the main issue, even though not to the extent of his original contention*”) (emphasis added); *Hensley v. Eckerhart*, 461 U.S. 424, 434–35 (1983) (finding that the phrase “prevailing party” in the Civil Rights Attorneys’ Fee Awards Act of 1976, 42 U.S.C. § 1988 (1994), embraced partial victories). The *Buckhannon* Court itself arguably endorsed this interpretation: “[R]espect for ordinary language requires that a plaintiff receive at least some relief . . . before he can be said to prevail.” *Buckhannon Bd. & Care Home v. W. Va. Dep’t of Health & Human Res.*, 121 S. Ct. 1835, 1839–40 (2001) (citing *Hewitt v. Helms*, 482 U.S. 755, 760 (1987)).

¹²¹ *BLACK’S 4TH*, *supra* note 113, at 1597 (emphasis added).

¹²² Such a reading would be consonant with, but is by no means compelled by, the Supreme Court’s 1992 ruling that a party receiving merely nominal damages is a “prevailing party” within the meaning of 42 U.S.C. § 1988 (1994), but that courts have discretion to determine whether fees are reasonable in such circumstances. *Farrar v. Hobby*, 506 U.S. 103 (1992). In light of *Farrar*, a plausible argument could be made that Congress wished in some instances to limit judicial discretion to grant fees by requiring that plaintiffs not merely achieve “prevailing party” status, but also receive more than nominal relief.

The most persuasive counters to this argument are that it flatly contradicts FOIA's legislative history, which expresses a preference for broad judicial discretion in fee awards,¹²³ and that courts will often face difficulty determining the nominality or substantiality of relief in FOIA actions. Unlike partial monetary relief, it is often hard to judge the value of a portion of information released by a defendant. A requirement that the documents revealed be "substantial" could sometimes force courts into making difficult judgments about factors such as the comparative values of different pieces of information. Such severe difficulties in administrability render it unlikely that Congress intended such a statutory framework.

5. *Construing the Buckhannon Opinion Narrowly*

A final textual argument against extending *Buckhannon* is that the Supreme Court's language shows that it simply did not rule on the term "substantially prevail." Numerous statements by the Court suggest it only addressed fee provisions that invoke the phrase "prevailing party." The opening sentences of Justice Renquist's majority opinion read,

Numerous federal statutes allow courts to award attorney's fees and costs to the "prevailing party." The question presented here is whether *this term* includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct.¹²⁴

Justice Renquist's conclusion provides further support by emphasizing the "clear meaning of '*prevailing party*,'"¹²⁵ as does Scalia's concurrence:

The Court today concludes that a party cannot be deemed to have prevailed, for purposes of fee-shifting statutes such as 42 U.S.C. §§ 1988, 3613(c)(2), unless there has been an enforceable "alteration of the legal relationship of the parties." That is the normal meaning of "prevailing party" in litigation, and there is no proper basis for departing from that normal meaning.¹²⁶

In fact, the *Buckhannon* majority never even mentions the phrase "substantially prevail."¹²⁷ When coupled with its focus on precision in inter-

¹²³ See *supra* discussion accompanying notes 63–64.

¹²⁴ *Buckhannon*, 121 S. Ct. at 1838 (emphasis added).

¹²⁵ *Id.* at 1843 (emphasis added).

¹²⁶ *Id.* at 1849 (Scalia, J., concurring).

¹²⁷ In his concurrence, Justice Scalia mentions the phrase only in a footnote while arguing that a defendant's abandonment of its argument gave the plaintiff an ordinary, not a

pretation and its humble apologies for producing misleading *dicta* in the past,¹²⁸ the *Buckhannon* Court's silence on "substantially prevail" casts serious doubt on the wisdom of construing *Buckhannon* to control that phrase.

CONCLUSION

This Note has urged against judicial extension of *Buckhannon*'s catalyst attorneys' fee prohibition into the FOIA context. Plaintiffs have numerous arguments at their disposal to oppose such an extension, but their most forceful claim is the extent to which a prohibition on catalyst fees would undermine FOIA. Without catalyst fees, FOIA plaintiffs will have no assurance of compensation for even the most meritorious cases, and FOIA will likely suffer from serious under-enforcement. It is senseless to imagine that Congress, in an effort to remedy weaknesses in FOIA, would have amended the law to provide for attorneys fees but did not approve of catalyst fees.

FOIA has at times presented difficult questions for courts and created high costs for administrative agencies. But the statute's purposes are far too important to allow it to be dramatically weakened as a result of hasty or careless application of a related but distinct Supreme Court ruling. In the wake of *Buckhannon*, we must argue vigorously in the courtroom to preserve catalyst attorneys' fees under FOIA. Without such fees, we risk losing a vital tool for enhancing democratic government and safeguarding individual rights and liberties.

catalyst, victory. *Id.* at 1845 n.2. *See supra* note 69.

¹²⁸ *See id.* at 1840–41. ("[S]everal Courts of Appeals have relied upon dicta in our prior cases in approving the catalyst theory. Now that the issue is squarely presented, it behooves us to reconcile the plain language of the statutes with our prior *holdings*." (citations and internal quotations omitted); *Id.* at 1849 ("The dissent's insistence that we defer to the 'clear majority' of Circuit opinion is particularly peculiar in the present case, since that majority has been nurtured and preserved by our own misleading dicta (to which I, unfortunately, contributed) Deferring to our colleagues' own error is bad enough; but enshrining the error that we ourselves have improvidently suggested and blaming it on the near-unanimous judgment of our colleagues would surely be unworthy. Informing the Courts of Appeals that our ill-considered dicta have misled them displays, it seems to me, not 'disrespect,' but a most becoming (and well-deserved) humility.") (Scalia, J., concurring) (citations and footnotes omitted).