No. 23-1286

IN THE

Supreme Court of the United States

BOWERS + KUBOTA CONSULTING, INC., *et al.*,

Petitioners,

v.

JULIE A. SU, ACTING SECRETARY OF LABOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE ESOP ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

STATUTUES, RULES AND REGULATIONS

Cited Authorities

OTHER AUTHORITIES

Page

Page

INTERESTS OF *AMICUS CURIAE*

The ESOP Association ("TEA") is a national nonprofit organization that supports the creation and maintenance of employee stock ownership plans ("ESOPs"), which are regulated by the Employee Retirement Income Security Act of 1974 ("ERISA").[1] Since its inception in 1978, TEA has served companies with ESOPs, professionals with a commitment to ESOPs, and companies considering an ESOP. TEA works to promote and enhance laws and regulations that govern ESOPs and provide its membership with expert educational programming and information.

TEA's members include sponsors of ESOPs, ESOP trustees, appraisers of ESOP companies, retirement plan administrators, and other professionals who work with ESOPs. Particularly given the Department of Labor's ("DOL's") record of suing ESOP stakeholders based on the DOL's questionable opinions on valuation concepts, TEA's members have an interest in the ability of defendants in such suits to recover attorneys' fees and costs in instances where the DOL advocates a position that was not substantially justified. To that end, TEA supports a writ of certiorari in this case, because the core legal question at issue here—whether the DOL can escape fee and cost liability under the Equal

1. No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than amicus curiae or his counsel, has made a monetary contribution to this brief 's preparation or submission. The parties were given timely notice of the intent to file.

Access to Justice Act ("EAJA") if the DOL may have *subjectively* believed its positions were reasonable—is of fundamental importance to ESOPs nationwide.

SUMMARY OF THE ARGUMENT

One of Congress's overarching goals when it enacted the Equal Access to Justice Act ("EAJA") was curbing—and, where necessary, compensating regulated parties for—acts of governmental overreach. The EAJA's "substantially justified" standard was supposed to incentivize the government to exercise greater care and deliberation when assessing the merits of potential litigation. It was supposed to discourage the government from bringing cases with marginal merit or easily discoverable Achilles heels. Because it was cheaper to just give in to the government than it was to seek vindication in court, Congress was concerned that private citizens were being coerced into compliance with even unreasonable government positions.[2]

In the proceedings below, the DOL subjected Petitioners to costly and protracted litigation to vindicate their rights in the face of patently unreasonable DOL conduct. The DOL ignored serious—and outcome-determinative—errors in the valuation opinion of the DOL's retained valuation expert, and the majority panel of the Ninth Circuit acknowledged that the DOL was informed about significant errors in the expert's

2. The DOL has an incentive to employ its expansive resources in cases against citizens. ERISA authorizes the DOL to assess civil penalties against various parties. 29 U.S.C. § 1132(i), (l).

opinions well before proceeding to trial. Citizens should not be forced to bear the cost of vindicating their rights in court when the government's position rests on errors that the government knew about or should have known about well before trial.

The DOL's actions in the proceedings below were bad enough. But they are part of a much larger problem with DOL overreach in the ESOP[3] space. The DOL's case hinged on the application of a particular statutory provision that permits trustees to cause ESOPs to purchase employer stock if the purchase is for "adequate consideration" (the "Adequate Consideration Exemption"). 29 U.S.C. § 1108(e). By Congress's design, the statutory Adequate Consideration Exemption is purposefully vague because Congress intended for the DOL to promulgate regulations on the determination of adequate consideration. Despite Congress' imploration to the DOL, for nearly 50 years the DOL has failed to promulgate a regulation, and instead has launched an aggressive enforcement campaign designed to compel compliance with the DOL's idiosyncratic—and often unreasonable—opinions on nuanced valuation concepts.

The DOL's tactics are precisely what the EAJA was meant to restrain. The Ninth Circuit majority's interpretation of the EAJA's "substantial justification" standard would encourage the DOL to continue to sue

3. This case deals with a private-company ESOP. Public companies also can have ESOPs in the form of company stock offered to participants in a 401(k) plan (commonly referred to as "KSOPs"). KSOPs differ in many ways from private-company ESOPs, and KSOPs are not the focus of TEA's positions in this brief.

and litigate through trial against ESOP stakeholders in an effort to coerce compliance with its non-binding and unreasonable opinions on valuation issues. This Court should grant certiorari in order to decide whether the EAJA permits such governmental overreach.

ARGUMENT

I. The Ninth Circuit's Approach to the EAJA Conflicts with the EAJA's Purpose.

The EAJA was enacted in 1980[4] after several years of comprehensive[5] Congressional study of attorneys' fees. At that time, the "American Rule," which requires litigants to pay their own attorneys' fees, win or lose, shielded the government from having to pay private litigants' attorneys' fees, even if the government acted unreasonably. The American Rule was viewed as a means to foster fairness among litigants; by not penalizing those who exercise their right to litigate, the American Rule was meant to preserve access to the courts.[6] *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685, 103 S. Ct. 3274, 3277, 77 L. Ed. 2d 938 (1983) (as a matter of "intuitive notions of fairness to litigants,"

4. The EAJA had a three-year sunset provision. *See* Small Business Act, Pub. L. No. 96-481, § 201, 94 Stat. 2321, 2325 (1980). It was enacted again in 1985, and the legislative history regarding the 1985 legislation reflects the same considerations as the legislative history regarding the 1980 EAJA. *See* Equal Access to Justice Act, Pub. L. No. 99-80, 99 Stat. 186 (1985).

5. *See* H.R. Rep No. 96-1418, at 1 (1980).

6. *See*, *gen.*, Court Awarded Attorney's Fees and Equal Access to the Courts, 122 U. Pa. L. Rev. 636 (1974).

losing parties should not be saddled with the burden of paying the winning party's fees); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 74, 111 S. Ct. 2123, 2148, 115 L. Ed. 2d 27 (1991) (J. Kennedy, Rehnquist, Souter dissenting) (American Rule meant to "preserv[e] equitable access to courts and penalize[e] the willful abuse of it.")[7]; *see also Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 126, 135 S. Ct. 2158, 2164, 192 L. Ed. 2d 208 (2015); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 271, 95 S. Ct. 1612, 1628, 44 L. Ed. 2d 141 (1975) (American Rule seeks "encouragement of private action to implement public policy").

Congress realized that when one of the litigants was the government, however, the American Rule was having "the opposite effect"[8] from what was intended. Private citizens were being dissuaded from seeking court review of their disputes with the government because the government has nearly unlimited litigation resources. Against such a foe, private litigants could not afford to challenge the government in court, even in instances involving governmental overreach,[9] "excessive regulation," or "the unreasonable exercise of government authority."[10] It was "cheaper for the

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7. H.R. Rep. 96-1418, at 9, 1980 U.S.C.C.A.N. 4984, 4988 (observing that the American Rule is "grounded in belief that losing party should not be penalized for merely exercising the right to prosecute or defend a lawsuit.").

8. H.R. Rep. 96-1418, at 9, 1980 U.S.C.C.A.N. 4984, 4988.

9. *See.* Sen. Rept. 96-253, at 2, 551 (1979); *see also* H. R. Rep. No. 96-1005, Part 1, pp. 6-7, 355-356 (1980).

10. H.R. Rep No. 96-1418, at 12, 1980 U.S.C.C.A.N. 4984, at 4991, 98.

businessman to give in than it is to fight the Federal agency."[11]

One particular concern of Congress was the phenomenon of citizens basing their litigation decisions "solely on the cost of fighting back" against the government.[12] When the cost to fight back becomes prohibitive, citizens "routinely pay fines and/or sign consent orders, however unjustified or unreasonable."[13] To Congress, such "coerced" compliance risked that "precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views."[14] Indeed, the imperative for courts to consider an agency's position as part of an adversarial crucible with both parties on equal footing has long been recognized in this Court's jurisprudence—and nowhere more strongly than in its recent decisions in *Loper/Relentless*. *See Loper Bright Enterprises, et al. v. Raimondo, et al.*, 603 U.S. ___ (2024).

Coerced compliance "seriously undercuts our system of justice,"[15] and "[a] party [should] not have to choose between acquiescing to an unreasonable government

11. H. R. Rep. No. 96-1005, Part 1, at 7, 356 (1980).

12. H. R. Rep. No. 96-1005, Part 1, at 7, 356 (1980).

13. H. R. Rep. No. 96-1005, Part 1, at 7, 356 (1980).

14. H. R. Rep. 96-1418, at 9-10, 1980 U.S.C.C.A.N. 4984, 4988.

15. H. R. Rep. No. 96-1005, Part 1, at 7, 356 (1980).

order or prevailing to his financial detriment."[16] To combat unreasonable governmental action and coerced compliance, the EAJA requires an award of attorneys' fees to a prevailing party (other than the government) in litigation with the government *unless* the government's position was "substantially justified" or special circumstances would make an award unjust. 28 U.S.C. § 2412(d)(1)(A). In other words, Congress instructed courts to presume that if the government loses, it was because of a weakness in its position. The presumption is rebuttable, but here, the Ninth Circuit resolved what it deemed a "close call" by referencing the "deferential" standard of review in EAJA cases. Pet. App. 15a. Applying such a deferential standard of review is inconsistent with the agency's burden to overcome a rebuttable presumption.

Importantly, the "substantially justified" standard was not the only standard Congress considered for shifting attorney's fees to the government. In April of 1978, after bills had been introduced to provide for an award of attorney's fees against the government, the Department of Justice submitted a proposal that would have allowed for (but not mandated) an award of attorneys' fees against the government only if the government's action was "arbitrary, frivolous, unreasonable, or groundless, or [where] the United States continued to litigate after it clearly became so."[17] Congress rejected that standard, primarily because

16. H.R. Rep No. 96-1418, at 12, 1980 U.S.C.C.A.N. 4984, 4991.

17. *See.* Sen. Rept. 96-253, at 2, 551 (1979).

it "would not deter government overreach."[18] In fact, Congress made clear that it would not accept "[a] ny attempt to add restrictive tests" to the process of evaluating whether the government's conduct was "considered acceptable."[19]

Congress expected that the threat of having to pay a private litigant's attorneys' fees would "cause agencies to be more deliberative in their regulatory activity"[20] and "force the Federal departments and agencies to substantially improve the quality of their enforcement and other proceedings."[21] The EAJA was supposed to "assure that administrative decisions reflect informed deliberation"[22] and the government initiated and pursued "only sound, well-prepared cases."[23] Congress cautioned agencies "to carefully evaluate their case and not [ ] pursue those which are weak or tenuous."[24]

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18. *See.* Sen. Rept. 96-253, at 2, 551 (1979).; *see also* H. R. Rep. No. 96-1005, Part 1, at 6-7, 355-356 (1980); H.R. Rep. 96-1418, 14, 1980 U.S.C.C.A.N. 4984, 4993 ("Under the Department [of Justice]'s proposal, fees would be awarded only where the government action was 'arbitrary, frivolous, unreasonable, or groundless, or the United States continued to litigate after it clearly became so.'").

19. H. R. Rep. No. 96-1005, Part 1, at 10, 359 (1980).

20. H. R. Rep. No. 96-1005, Part 1, at 5, 354 (1980).

21. H. R. Rep. No. 96-1005, Part 1, at 8, 357 (1980)

22. H.R. Rep. No. 96-1418, 12, 1980 U.S.C.C.A.N. 4984, at 4991.

23. S. Rep. No. 586, 98th Cong., 2d Sess. (1984), at 11.

24. H.R. Rep No. 96-1418, at 14, 1980 U.S.C.C.A.N. 4984, at 4993.

To the majority below, however the EAJA's "substantially justified" standard meant that governmental agencies may bring and litigate to conclusion a case premised on expert opinions that the governmental agency knows, or should know, long before trial are fundamentally and materially erroneous.

In the proceedings below, the DOL brought an ERISA action against Petitioners,[25] alleging that they sold their privately held company to an ESOP for an inflated value. The government primarily presented a "valuation" case, meaning the government tried to prove that the company was worth less than the ESOP paid Petitioners. To try and make this showing, the DOL hired a supposed valuation expert who rendered an opinion on the "fair market value" ("FMV") of the company at the time of the ESOP's purchase. The majority below acknowledged that the government's case (which the majority below described as "shoddy" and significantly flawed) rested on an expert who committed several material errors that the government "knew or should have known" about. The majority below recognized that correcting for just two of the obvious errors, which were raised to the government well before trial, resulted in the expert's opinion of value exceeding the transaction price.

But the majority below held that the district court did not abuse its discretion in determining that the government's case was substantially justified. The

25. The Adequate Consideration Regulation governs the conduct of the trustee who causes an ESOP to purchase stock. Petitioners, who were shareholders that sold their stock to the ESOP, were named in various claims that were derivative of the principal claim against the trustee.

majority below focused on the fact that the government's expert apparently "stood firm" in his argument that Petitioners were paid too much for their company, which meant that the government "could have rationally believed" that the transaction was overpriced.

The EAJA was not meant to subject citizens to unreasonable governmental actions simply because the government "could have rationally believed" that its position had merit. Such a standard dilutes the EAJA to the point of irrelevance, because it requires an assessment of the knowledge and beliefs of the relevant governmental actors, rather than a purely objective assessment of the facts and law as they existed at particular points in time. The EAJA was meant to cause the government to be more deliberative in its pursuit of claims, and to drop claims that were weak or tenuous—not merely to insist on a trial solely on the government's belief—however tenuous—in the erroneous analysis of a paid expert, as the DOL did here. Moreover, the judicial system itself will suffer from this ruling, because the government, like any litigant, can "stand firm" as a posture and not as a reflection of an objectively reasonable litigation position, and the panel majority's decision does nothing to enforce the need for government accountability. Instead, the weak subjective standard endorsed by the majority below will foster hasty, uncritical governmental actions that will force citizens to make the difficult choice between the cost of litigating and vindicating their rights in court, even when the government's predicate is in error.

Certiorari should be granted to restore the standard Congress chose as necessary to effectuate the EAJA's purpose.

II. The Department of Labor's Position was the Type of Governmental Overreach the EAJA was Meant to Prevent.

In the ESOP space, governmental overreach and coerced compliance are pervasive. Understanding why requires some discussion of the Adequate Consideration Exemption and positions the DOL has taken on its meaning and application.

The proceedings below involved claims by the DOL that a trustee caused an ESOP to "pay"[26] too much for stock of the employer. Under ERISA, a fiduciary can cause an ESOP to purchase private-company employer stock if that purchase is made in exchange for "adequate consideration," which ERISA defines as the "***fair market value*** as ***determined in good faith*** by the trustee pursuant to the terms of the plan ***and in accordance with regulations promulgated by the Secretary***." 29 U.S.C. § 1002(18)(B) (emphasis added); *id.* § 1108(e). As the Fifth Circuit explained in 1983, in a case brought by the DOL, ERISA provides little statutory guidance on a determination of adequate consideration because Congress "wanted the Secretary

26. In a private-company ESOP, participants pay nothing for stock that they receive. The ESOP "pays" for the stock by means of contributions that the employer is obligated to make to the ESOP annually. The ESOP does not use its own money. There is, however, a fiction employed in ESOP cases that if the transaction price exceeds FMV as determined in good faith, the ESOP is entitled to a cash payment in the amount of the "overpayment." Such an approach awards a windfall to ESOP participants and ignores the reality of the economics of an ESOP.

[of Labor] to flesh out the standards for fiduciaries to follow" when an ESOP purchases stock. *Donovan v. Cunningham*, 716 F.2d 1455, 1466 (5th Cir. 1983).

After ERISA's passage in 1974, the DOL did not promulgate regulations on adequate consideration. Instead, the DOL began aggressively investigating and suing ESOP stakeholders to try and force compliance with the DOL's idiosyncratic opinions on nuanced valuation concepts, which had been the gist of the DOL's case in *Cunningham*. The Fifth Circuit rejected the DOL's position that the Adequate Consideration Exemption requires adherence to specific valuation approaches, in large part because the DOL failed to promulgate regulations. "Judicial adoption" of highly specific estate and gift tax valuation regulations, the court explained, "is no substitute for the regulations the Secretary has never promulgated. . . ." *Id.* If the DOL believed that "more specific rules are needed" beyond what is stated in ERISA, then "the better—and fairer—approach is to inform fiduciaries of them beforehand by regulation." *Id.* at 1473.

In response to *Cunningham*, the DOL in 1988 issued a proposed regulation on adequate consideration that set forth requirements for a good-faith determination of FMV. *See* 53 Fed. Reg. 17632-01 (May 17, 1988). Importantly, the proposed regulation states that "the Department [of Labor] recognizes that plan fiduciaries have a need for guidance in valuing assets, and that standards to guide fiduciaries in this area may be particularly elusive with respect to assets other than securities for which there is a generally recognized market." *Id.* The proposed regulation also states that

guidance on a good-faith determination of FMV is particularly "important" to fiduciaries of ESOPs. *Id.*

Yet the 1988 proposed regulation was never finalized, thus depriving ESOP stakeholders of the important and elusive guidance the DOL knew they needed. In the absence of much-needed guidance, the standard for the determination of adequate consideration is what ERISA's text prescribes: a determination of FMV[27] in "good faith." 29 U.S.C. § 1108(e); *id.* at § 1002(18). This standard is "one of prudence," meaning the Adequate Consideration Exemption does not place the primary focus on valuation concepts. It focuses on the ESOP trustee's *process* and *conduct* in relying on an independent valuation opinion. *Cunningham*, 716 F.2d 1455 at 1473. A trustee who relies in good faith on an independent assessment of FMV satisfies ERISA's requirements for causing an ESOP to purchase employer stock. But that is not how the DOL has interpreted ERISA in actions it has brought against ESOP stakeholders.

The above discussion of the Adequate Consideration Exemption and the DOL's attempts to litigate in lieu of

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27. FMV is known as a "standard of value" or "basis of value." As a leading treatise on valuation explains, a standard of value "describe[s] the fundamental premises on which the reported values will be based" and is "critical," because it "may influence or dictate a valuer's selection of methods, inputs and assumptions, and the ultimate opinion of value." INTERNATIONAL VALUATION STANDARDS (2017), at IVS 104, § 10.1. There are other standards of value, such as fair value, intrinsic or fundamental value, going-concern value, liquidation value, book value, and (most relevant in this appeal) investment value. Shannon P. Pratt, THE OPINION OF THE COLLEGE ON DEFINING STANDARDS OF VALUE, 34 Valuation 2, at 6-11 (1989).

regulations is important to understanding the extent of the DOL's overreach in the ESOP space. In 2005, EBSA initiated an Employee Stock Ownership Plan National Enforcement Project.[28] A National Enforcement Project focuses EBSA "enforcement resources" and requires regional offices to "place particular investigative emphasis"[29] on issues. One of that Project's central issues was whether an ESOP pays "more than . . . the fair market value of the plan sponsor stock" (there is no mention of the "good faith" prong of the Adequate Consideration Exemption, and no mention of forthcoming regulations).[30] The Deputy Assistant Secretary of the Employee Benefits Security Administration emphasized the DOL's focus on valuation concepts, stating that "[v]aluation is the first, second, third, and fourth problem" from the DOL's perspective.[31] The same official likewise confirmed the DOL's "increased the level of scrutiny of ESOP appraisals,"[32] and he revealed that when the DOL "open[s] an ESOP case," he asks his "field people to take a close look at the appraisal."[33]

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28. *See* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement (last accessed June 20, 2024).

29. *See* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement (last accessed June 20, 2024).

30. *See* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement (last accessed June 20, 2024).

31. https://www.inc.com/graham-winfrey/us-cracking-down-on-esop-plans.html (last accessed July 5, 2024).

32. https://www.plansponsor.com/reducing-risk-esop-investigations-litigation/?layout=print (last accessed July 5, 2024).

33. *Id.*

True to those words, the DOL uses enforcement proceedings to try and compel compliance with its perspective on valuation issues—even in the absence of regulations that the DOL should have issued decades ago. Beginning in 2014, the DOL began pressuring private-party ESOP trustees to sign settlement agreements with the DOL setting forth a process these trustees must follow when evaluating the FMV of private-company stock. The DOL touts these "Process Agreements"[34] on its website, and apparently believes they are a substitute for properly promulgated regulations. In fact, after the first Process Agreement in 2014, Phyllis Borzi, the Assistant Secretary of Labor for EBSA, warned that "[o]thers in the industry would do well to take notice of the protections put in place by this agreement . . . "[35] In enacting the EAJA, Congress warned that "precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views." H.R. Rep. 96-1418, 9-10, 1980 U.S.C.C.A.N.

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34. *See* https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/enforcement/esop-agreement-appraisal-guidelines.pdf; https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/enforcement/esop-agreement-appraisal-guidelines-first-bankers.pdf; https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/enforcement/esop-agreement-appraisal-guidelines-joyner.pdf; https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/enforcement/esop-agreement-appraisal-guidelines-lubbock.pdf; https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/enforcement/esop-agreement-appraisal-guidelines-alpha.pdf.

35. *See* https://www.dol.gov/newsroom/releases/ebsa/ebsa20141043 (last accessed June 20, 2024).

4984, 4988. That is precisely what has been happening in the ESOP space.

Making matters worse, for many years TEA and others implored the DOL to issue final regulations on the determination of adequate consideration. In 2022, Congress finally took notice: the bipartisan Secure 2.0 Act, which passed on 12/29/22, *requires* the DOL to promulgate regulations on the determination of FMV for purposes of an ESOP stock purchase. 29 U.S.C.A. § 3228(c)(4)(B). There is no deadline, however, and there is no telling how long it might take the DOL to comply.

Against this backdrop, consider again the DOL's position in the proceedings below. The DOL's theory was that the ESOP's trustee relied on a flawed valuation of the company's stock. From the start, the DOL sought to impose upon Petitioners the DOL's opinion on valuation issues, despite the fact that the DOL has failed to promulgate a regulation. To try and prove its claims, the DOL relied on a valuation expert who violated accepted, industry-standard practices for estimating the FMV of a company. The DOL knew or should have known that its expert made significant errors in the determination of FMV, yet the DOL continued to rely on that expert in its case against Petitioners. Armed only with the flawed opinion of its retained expert, the DOL continued to litigate its claim that the ESOP paid Petitioners too much for their stock because the trustee's valuation differed from the flawed valuation upon which the government relied.[36]

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36. In the ESOP space, it is concerningly common for the DOL to rely on valuation experts who assert FMV positions

TEA urges this Court to consider the hypocrisy in the DOL's positions. In the proceedings below, the DOL sought to hold the ESOP trustee liable for allegedly failing to rely reasonably on valuation advice that the ESOP trustee received from an expert, third-party valuation advisor. The DOL's position was that if the valuation did not comply with the DOL's opinions on valuation approaches, then the ESOP trustee should be liable for relying on an unreasonable valuation. After its loss at trial, the DOL sought to avoid responsibility for Petitioners' fees and costs under the EAJA on the grounds that the DOL should not be liable for relying on an unreasonable valuation.

The DOL should never have sought to force Petitioners to adhere to the DOL's own idiosyncratic, *ad hoc* opinions on valuation issues. It should have issued regulations, just as Congress wanted (and still wants) and as the Fifth Circuit faulted the absence of decades ago. And when the DOL's case was grounded on the argument that the ESOP trustee did not rely reasonably on valuation advice, the DOL itself cannot be absolved for relying on its own valuation advice that contained obvious errors—errors that were identified for the DOL during discovery, well before trial.

The DOL's conduct is precisely the unreasonable conduct the EAJA was designed to prevent. This Court should grant certiorari in order to say so.

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that are contrary to established standards for estimating FMV. 29 U.S.C. § 1002(18); *id.*, § 1108(e). Private litigants should not have to bear the cost of litigating the question of whether the DOL's retained experts are violating fundamental requirements for a FMV assessment.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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