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 FOR THE AMERICAN SOCIETY OF APPRAISERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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I. INTEREST OF *AMICUS CURIAE*[1]

The American Society of Appraisers ("ASA") is one of the largest multi-disciplinary organizations devoted to the appraisal and valuation profession. ASA is a nonprofit, professional organization that teaches, tests, and credentials highly qualified appraisers of businesses and other assets. ASA's mission is to foster public trust of its members and the appraisal profession through the highest levels of ethical and professional standards. ASA advances professional excellence through education, accreditation, publication, and other services with an emphasis on professional ethics to protect the public. ASA is a founding member of The Appraisal Foundation, authorized by Congress as the organization responsible for setting The Uniform Standards of Professional Appraisal Practice ("USPAP") for the valuation profession.

Valuation professionals commonly obtain their advanced education and training in business valuation from valuation professional organizations. There are only three such organizations in the United States, one in Canada, and one internationally that offer recognized professional accreditations in business valuation. ASA is among the most established and prominent of the North American organizations. In fact, ASA members are

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1. ASA has provided counsel of record with proper notice of its intent to file this *amicus* brief in support of the Petition in compliance with Supreme Court of the United States Rule 37.2. In addition, no counsel for a party authored this brief or any portion of it, and no party or its counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than ASA made any monetary contribution to the preparation and submission of this brief.

perhaps the most prolific contributors to the business appraisal community's "body of knowledge."

Because of its esteemed position in the business valuation community, ASA has a strong interest in ensuring that generally accepted valuation standards and principles are followed, including in modern litigation where judgment in any given case frequently turns on expert testimony like that of valuation professionals. Accordingly, ASA has a strong interest in correct and uniform application of the Equal Access to Justice Act ("EAJA"), 28 U.S.C. Section 2412, by the federal judiciary to deter the improper use of expert valuation evidence, such as the misapplication of generally accepted valuation standards and principles, by litigants including the government. This case is therefore of paramount importance to ASA.

II. SUMMARY OF ARGUMENT

This case presents the Court with a concise and stark illustration of just how far the United States Court of Appeals for the Ninth Circuit has drifted from Congress's intent (and other circuits), expressed through EAJA, to protect private parties from governmental abuse through the government's vast litigation resources and the need for this Court's intervention.

After a multi-year Department of Labor ("DOL") investigation into B+K Consulting Inc.'s ("B+K") Employee Stock Ownership Plan ("ESOP") transaction, DOL filed suit against B+K and its owners alleging that defendants violated several provisions of the Employee Retirement Security Act of 1974 ("ERISA"). Pet. App. 27a.

DOL's claims boiled down to a single question—whether the sale price of the stock exceeded fair market value. *Id*. at 29a. DOL's sole evidence that defendants sold their stock to the ESOP for greater than fair market value was a valuation expert's unreliable valuation opinion roundly condemned by both the district court and the Ninth Circuit as falling below generally accepted valuation standards and principles, and thereby lacking any credibility, as discussed *infra* at Section B. *Id.* at 9a-12a, 53a-56a. There is no dispute about that finding.

Additionally, the courts below found that DOL "either knew or should have known ***before trial***" that its expert's analysis contained material errors. *See* Pet. App. 9a (emphasis added); *see also* Pet. App. 9a-10a, 23a-24a, 52a-56a. Yet under the Ninth Circuit's singular interpretation of EAJA, the district court denied defendants' motion for attorney's fees and expenses under EAJA, and the Ninth Circuit affirmed. *Id.* at 13a-14a, 117a.

Congress enacted EAJA in 1985 as a statutory protection against the precise governmental misconduct presented in this matter. More specifically, to ensure that when the government uses its vast litigation resources against private citizens and non-governmental entities in a proceeding found not to be "substantially justified," federal district courts "***shall*** award to the prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . ." 28 U.S.C. § 2412(d)(1)(A) (emphasis added). Through its provision waiving sovereign immunity of the United States, 28 U.S.C. Section 2412(b), EAJA is a remedial statute designed to put the government and private parties on "equal footing" in federal litigation by shifting

attorney's fees where the district court determines that the government's position was not substantially justified. 28 U.S.C. § 2412(d)(1)(A).

The Ninth Circuit's decision below applying the EAJA's "substantially justified" standard for shifting fees conflicts with other circuits. The inappropriately exacting EAJA standard applied in the Ninth Circuit demands the Court's attention to put Ninth Circuit EAJA precedent back in line with other circuits, and just as importantly, congressional intent underlying EAJA, as this case so starkly illustrates.

In the Ninth Circuit—the largest regional circuit in geography, population, volume of litigation, and number of federal judges—the government now faces no disincentive or penalty for bringing a crippling lawsuit against private litigants based on nothing but expert evidence that fails to meet the generally accepted standards and principles applicable to an expert witness's area of expertise. This materially infringes upon the integrity and reputation of the federal judiciary where complex litigation requires an expert witness to assist the trier of fact in understanding technical issues central to core litigation issues—such as the fair market valuation of a private business involved here. To promote the statute's deterrent and remedial purposes, it is important for the Court to assure that the government faces consequences when it knows or should have easily known that the expert evidence underpinning the government's entire position does not meet generally accepted valuation standards and principles.

III. ARGUMENT

A. It is Important to the Integrity of the Judicial Process that Expert Evidence is Based on Generally Accepted Standards and Principles.

Expert evidence is "widely used" and considered "a critical component of federal litigation[.]" 2 Federal Litigation Guide § 23.01[2]. This was particularly true here, where the government's entire case hinged on the testimony of its hired valuation expert. The expert appraisal at issue in this case was prepared to assess the fair market value of B+K at the time of its ESOP transaction.

In the valuation context, fair market value is a standard of value established by the United States Department of Treasury's Revenue Ruling 59-60. That Revenue Ruling defines "fair market value" as "the price at which property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of the relevant facts." Treas. Rev. Rul. 59-60 § 2.02.

In the 65 years since the publication of Revenue Ruling 59-60, fair market value has been the governing standard in transactional and private business valuations, contracts, federal statutes, and judicial decisions. And while a valuation is an opinion that may vary, such opinions must be based on "generally accepted valuation standards and principles," meaning the collective theory and guidance expressed in authoritative valuation texts, peer-reviewed articles, and the educational materials of leading valuation

professional organizations such as ASA. Dr. Shannon Pratt, the most well-known and respected authority in the field of business valuation, often referred to this concept as the "body of knowledge" relevant to the valuation of closely held businesses, such as the valuation addressed in the Petition. Dr. Pratt's business valuation treatise, co-authored (since Dr. Pratt's death) with ASA, has been the leading source for the "body of knowledge" of business valuation for over four decades. *See* Shannon Pratt & ASA Educational Foundation, *Valuing a Business: The Analysis and Appraisal of Closely Held Companies* (6th ed. 2022) (the "Pratt/ASA Treatise").

As the Pratt/ASA Treatise persuasively states, a business valuation that does not comply with generally accepted valuation standards and principles will not result in a credible value determination. Specifically,

> [i]t is important that all those either providing or using business valuation services be aware of these standards. The days when there was virtually no generally accepted guidance and almost anything could pass as a credible business valuation are gone forever. Owners, investors, attorneys, government agencies, ***and the courts*** all demand that business valuation work live up to these higher standards.

Id. at p. 4 (emphasis added).

Dr. Pratt's "body of knowledge" and the concept of generally accepted valuation standards and principles is so widely accepted that it has been codified into federal regulations. For example, the Internal Revenue

Service has embedded these concepts into its regulations pertaining to the valuation of nontraded assets for charitable contribution purposes. *See, e.g.,* 26 C.F.R. § 1.170A-17(a); *see also* 26 C.F.R. § 1.170A-17(b); 26 C.F.R. § 1.170A-17(a)(2) (generally accepted valuation standards and principles include "the substance and principles of USPAP . . . .").[2]

With the prominence of these standards and principles in mind, consider some of the basic requirements that applied to the work of the government's hired expert in this case, Steven J. Sherman ("Sherman"). First, USPAP's Competency Rule mandates that "an appraiser must not render appraisal services in a careless or negligent

2. The generally accepted valuation standards and principles are also collected in numerous literatures, including ASA's *Business Valuation Standards* (2022) and *Principles of Appraisal Practice and Code of Ethics* (2020). Other significant sources outlining the generally accepted valuation standards and principles, each of which is either authored or co-authored by an ASA member, include: Travis Harms & Christopher Mercer, *Business Valuation: An Integrated Theory* (3rd ed. 2021); Roger Grabowski & Shannon Pratt, *Cost of Capital: Applications and Examples* (5th ed. 2014); Neal Beaton, *Valuing Early Stage and Venture-Backed Companies* (2010); James Hitchner, *Financial Valuation: Application and Models* (4th ed. 2017); David Laro & Shannon Pratt, *Business Valuation and Federal Taxes: Procedure, Law, and Perspective* (2015); Christopher Mercer, *Buy-Sell Agreements: Ticking Time Bombs or Reasonable Resolutions?* (2007); Jay Fishman, William Morrison, & Shannon Pratt, *Standards of Value* (2nd ed. 2013); Jay Fishman, J. Clifford Griffith, & Shannon Pratt, *Guide to Business Valuations* (16th ed. 2006); Gary Trugman, *Understanding Business Valuation: A Practical Guide to Valuing Small to Medium-Sized Businesses* (6th ed. 2022); Paul Hood & Timothy Lee, *A Reviewer's Handbook to Business Valuation: Practical Guidance to the Use and Abuse of a Business Appraisal* (2011).

manner" and must "use due diligence and due care." 2020-21 USPAP, Competency Rule, p. 11. USPAP's Scope of Work Rule adds that an appraiser must conduct sufficient research and analysis to produce "credible assignment results" given the intended use of his valuation—here, a determination of B+K's fair market value as of December 14, 2012. *Id.* at Scope of Work Rule, p. 14. It further goes on to incorporate the appraisal community's recognized "body of knowledge", stating that whether research and analysis meets this requirement can be measured in part by what the appraiser's peers, like other ASA members, would do in the same or a similar assignment. *Id.*

USPAP's Standard Rule 9-1 likewise requires an appraiser to "be aware of, understand, and correctly employ those recognized approaches, methods and procedures that are necessary to produce a credible appraisal" and to "not commit a substantial error of omission or commission", which requires "[d]iligence . . . to identify and analyze the factors, conditions, data, and other information that would have a significant effect on the credibility of the assignment results." 2020-21 USPAP, Standard Rule 9-1, General Development Requirements, p. 51. An appraiser shall "not render appraisal services in a careless or negligent manner, such as by making a series of errors that . . . affect the credibility" of the report. *Id.*

As it specifically relates to a retrospective appraisal like Sherman's report, USPAP cautions that such an assignment "is complicated by the fact that the appraiser already knows what occurred in the market after the effective date of the appraisal." 2020-21 USPAP, Advisory Opinion 34, p. 156. Accordingly, unless there is "evidence that data subsequent to the effective date was inconsistent

with market expectations as of the effective date . . . the effective date should be used as the cut-off date for data considered by the appraiser." *Id.*[3]

Unfortunately, as addressed below, Sherman unquestionably failed to apply these basic standards and principles, which further underscores the need for this Court to standardize the application of EAJA and bring the Ninth Circuit's outlier position in line with its sister circuits.

B. The Government's Sole Relevant Evidence Drastically Departed from Generally Accepted Valuation Standards and Principles.

In this case "the only question that mattered was whether B+K was sold for more than its fair market value" when the ESOP purchased it for $40 million. Pet. App. 4a. At the time of the formative transaction, the ESOP's independent trustee had hired a third-party valuation firm, Libra Valuation Advisors ("LVA"), who contemporaneously concluded that $40 million was less than fair market value using three different generally accepted valuation methodologies. *Id.* at 48a-50a. The only evidence DOL offered to contradict this contemporaneous third-party appraisal was Sherman's retrospective appraisal, performed some eight years after the transaction, which valued B+K at $26.9 million. *Id.* at 9a, 59a.

3. *See also* American Institute of Certified Public Accountants, Statement on Standards for Valuation Services No. 1, Consulting Services Executive Committee, ¶ 100.43 (June 2007) ("the valuation analyst should consider only circumstances existing at the valuation date and events occurring up to the valuation date.").

Like any valuation professional attempting to reach a credible determination of fair market value, Sherman was required to follow the generally accepted valuation standards and principles discussed above. These are not nuanced matters of valuation theory about which various qualified appraisers might reasonably differ. Far from it. These are basic requirements that any competent appraiser purporting to perform a business valuation must follow and apply to reach a credible conclusion of fair market value. Unfortunately, Sherman's report fell materially short of these requirements, making his work—and DOL's only evidence on the sole dispositive issue—unreliable and useless, as all four judges below agreed. Put simply, Sherman "significantly and unreasonably undervalued the Company" because he disregarded these basic standards and principles. Pet. App. 53a.

This was not a close call. Consider two of Sherman's obvious and objective errors that the district court found.

First, Sherman improperly deducted more than $10 million in "subconsultant fees" from the value of B+K. Pet. App. 53a-54a. There were two main problems with this deduction. To begin with, there was no evidence to support how Sherman reached this figure. *See id.* at 54a (citing evidence of only some $2.9 million in subconsultant fees). Worse still, what Sherman labeled as "expenses" of B+K were not. B+K passed those subconsultant fees to clients for payment, they were not a B+K expense deductible from value. *Id.* at 53a-54a. Sherman and DOL would have learned this with a modicum of diligence, such as asking company management about B+K's expenses, but instead learned it during discovery when it was pointed out by Petitioner's experts. *Id.* at 9a, 54a. Every judge below

thus had no difficulty concluding this conduct ignored the generally accepted valuation standards and principles outlined above. *Id.* at 9a-10a, 20a-21a, 53a. Indeed, it is hard to imagine a starker example of "careless or negligent" conduct by an appraiser that lacks necessary "due diligence and due care" than deducting a made-up number of expenses that the subject company did not even pay. *See* 2020-21 USPAP, Competency Rule, Scope of Work Rule, and Standard Rule 9-1, p. 11, 14, 51.

Second, Sherman erroneously decreased his valuation of B+K by an additional $3 million for a "limited control discount" he calculated based on events that occurred ***after the sale***. Pet. App. 55a-56a. Given the clear prohibition against using subsequent events for a retrospective appraisal, the district court concluded this deduction also "contravened the appraisal standards limiting the facts to be considered." *Id.* at 55a; *see also* 2020-21 USPAP, Advisory Opinion 34, p. 156.

Together, the district court found that fixing these two blatant errors alone led to a fair market value of more than $40 million, just as LVA correctly concluded at the time of the transaction. That is, if the artificial and combined $13.5 million deduction from these two errors is rightly "added to [Sherman's] value of $26,900,000, the total is $40,415,000." Pet. App. 59a. Considering this with LVA's contemporaneous valuation, along with the other evidence at trial, conclusively established that "the Company was not sold for more than fair market value." *Id.*

Additional errors further illustrate just how "significantly and unreasonably" Sherman's work departed from generally accepted valuation standards and

principles. Sherman erroneously relied on a non-binding and "low-ball" preliminary offer from URS Corporation, although no evidence suggested it "was the price that a willing buyer was willing to pay and that a willing seller was willing to accept." Pet. App. 36a (citing Treas. Rev. Rul. 59-60 § 2.02). In other words, Sherman relied on a data point that was outside the very definition of "fair market value," the determination of which was presumably the entire purpose of his engagement. As the district court observed, this plainly was "not relevant to (and certainly does not establish) the fair market value of the Company." *Id.* at 58a.

To make matters worse, Sherman alarmingly did not even get the amount of the irrelevant low-ball offer correct. Sherman alleges the offer was $15 million because he disregarded URS's explicit statement that the dollar amount was to be adjusted to reflect "cash and debt on the company's balance sheet", which brought the total to approximately $29 million. Pet. App. 27a.

In addition, Sherman wrongly asserted that the company's projected 2012 Earnings Before Interest, Taxes, Depreciation, and Amortization ('EBITDA") should have been reduced to approximately $4.8 million for use in market-based approaches to determining value. Pet. App. 50a. In doing so, Sherman ignored the fact that "the actual EBITA as of December 31, 2012, was $7.1 million. Although Sherman was supposed to base his appraisal only on circumstances on or before December 14, 2012, the actual EBITDA as of December 31, 2012, should have at least caused him to reexamine the historical results that he claimed required him to 'correct' the EBITDA to only $4,849,000." *Id.* at 50a-51a. In the same way,

Sherman ignored recent "relevant circumstances" such as a "backlog of contracts" that further demonstrated "the unreliability of [his] 'corrected' EBITDA." *Id.* at 51a.

All told, Sherman's obvious and objective errors left DOL with no credible evidence contrary to the contemporaneous LVA valuation, which the district court found was reasonable evidence of fair market value. Pet. App. 48a-50a, 58a-59a. Indeed, the district court ironically found that after correcting just two of Sherman's errors, the evidence from ***both*** Petitioners and DOL demonstrated that the ESOP did not pay more than fair market value. In other words, it is incontestable that DOL had no reasonable, substantial, or probative evidence on the sole issue dispositive to their claims in this case. And DOL "knew or should have known" of Sherman's failures and thus its lack of reliable evidence prior to trial. *Id.* at 9a; *see also id.* at 9a-10a, 23a-24a, 52a-56a

C. The Court Should Grant the Petition to Bring the Ninth Circuit's Inappropriately Exacting EAJA Analysis in Line with Other Circuits and Congressional Intent.

EAJA, 28 U.S.C. Section 2412, is an important statute that has its roots in one of the most basic principles that underlies our Republic—"the 'King' can do and indeed does do, on occasion at least, wrong." *Weber v. Weinberger*, 651 F. Supp. 1379, 1384-85 (W.D. Mich. 1987). When "the King" does get it wrong, it can impose undue burden on citizens. Understanding the importance of protecting non-governmental private parties against heavy-handed government action, Congress enacted EAJA to protect the general public in one such situation—litigation with the

federal government. *See Pierce v. Underwood*, 487 U.S. 552, 575 (1988) ("Concerned that the Government, with its vast resources, could force citizens into acquiescing to adverse Government action, rather than vindicating their rights, simply by threatening them with costly litigation, Congress enacted EAJA . . .").

EAJA effectuates such congressional intent by providing federal district courts with authority to award attorney's fees and related costs to a party when the government's position in a civil case is not "substantially justified." 28 U.S.C. § 2412(d)(1)(A). More specifically, EAJA provides that a court "***shall*** award to the prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . unless the court finds that the position of the United States was substantially justified . . ." *Id.* (emphasis added).

Congress permanently enacted EAJA in 1985 with the intent "to ensure that certain individuals, partnerships, corporations . . . or other organizations will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved." *Scarborough v. Principi*, 541 U.S. 401, 407 (2004) (quoting H.R. Rep. No. 99-120, 4). In a way, Congress enacted EAJA "to discourage the federal government from using its superior resources unreasonably – it is in this respect an 'anti-bully' law." *Battles Farm Co. v. Pierce,* 806 F.2d 1098, 1101 (D.C. Cir. 1986), *vacated on other grounds,* 487 U.S. 1229 (1988).

In applying EAJA, the Ninth Circuit is out of step with other circuits. As the dissent in this case accurately explained, the Ninth Circuit's "rationale effectively

replaces the statutory standard for denying attorney's fees—*viz.*, whether the Government's position was 'substantially justified,' 28 U.S.C. § 2412(d)(1)(A)—with a much looser standard of whether the Government 'rationally believed' that its position was substantially justified." Pet. App. 24a-25a. Thus, the Ninth Circuit's decision in this case limits the deterrence effect of EAJA by showing deference to the government and opens the floodgates for the government to pursue substantially ***unjustified*** claims against private parties without consequence in "the largest of the twelve regional circuits in geography, population, volume of litigation, and number of federal judges." *See A Short History of the Ninth Circuit Court of Appeals*, https://www.ca9.uscourts.gov/information/ninth-circuit-history/ (last visited July 9, 2024).

This case presents a plain illustration of the need for this Court's intervention. To briefly recap—in this case, DOL's claims boiled down to a single question, whether the sale price of B+K stock to the ESOP exceeded fair market value. Pet. App. 29a. DOL's sole evidence on that dispositive question was Sherman's unreliable valuation opinion unanimously condemned by every judge below for having disregarded generally accepted valuation standards and principles, and thereby lacking any credibility, as discussed *supra* at Section B. *Id.* at 9a-12a, 20a-22a, 53a-56a. And DOL either knew or should have known before trial that its expert's analysis contained critical errors. *See id.* at 9a-10a, 23a-24a, 52a-56a.

Given that was the ***only*** evidence DOL had to support its case, Pet. App. at 9a, if there ever was a government action that was ***not*** substantially justified meriting EAJA

fee shifting, it is this one. But not under the excessively exacting standard established by the Ninth Circuit to measure the government's actions.

Despite DOL's actual and/or constructive knowledge of its evidentiary failings, this did not meet the high bar set in the Ninth Circuit to prove government action was not "substantially justified" and therefore shift attorney's fees and costs under EAJA. Pet. App. 13a-14a, 115a. The Ninth Circuit's extraordinarily high bar and statutory rewrite of EAJA undermines the integrity of the federal judiciary and flouts Congress's intent in enacting EAJA because it creates precedent that the government may solely rely on expert evidence that it actually or constructively knows does not apply generally accepted standards and principles within the expert's field of expertise without repercussions. Allowing such precedent to stand without the Court's clarification of the "substantially justified" statutory standard will result in the continued misapplication of EAJA within the country's largest regional and populous appellate circuit, dilute both the deterrence and remedial purposes of EAJA fee shifting, and reduce the likelihood that private parties seek review of, or defend against, unjustified governmental action because of the expense involved. *Scarborough*, 541 U.S. at 407. If the Court fails to clarify the "substantially justified" requirement, private parties will be pushed to acquiesce to adverse, unjustified government action. *Underwood*, 487 U.S. at 575.

In the Ninth Circuit, the government can solely rely upon expert evidence, like its valuation evidence in this case, that so clearly falls below generally accepted standards and principles without fear of consequences.

In addition, the Ninth Circuit's approach impugns the integrity, reputation and impartiality of the federal judiciary due to its deferential propensity towards government action. Congress established EAJA to deter this precise conduct and "level the playing field" between citizens and the sovereign. This case provides the Court with an opportunity to put the Ninth Circuit's application of EAJA in line with both congressional intent and other federal courts, and clarify the definition of "substantially justified" in cases where the government actually or constructively knows that the expert evidence it relies upon fails to apply generally accepted standards and principles.

IV. CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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