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

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed, under abuse-of-discretion review, an order denying a request for attorney's fees and nontaxable costs under the Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 89 F.4th 1169. A prior opinion of the district court rendering judgment on the merits (Pet. App. 26a-87a) is reported at 561 F. Supp. 3d 973. The opinion of the district court denying attorney's fees and nontaxable costs (Pet. App. 88a-117a) is not published in the Federal Supplement but is available at 2022 WL 355126.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 2023. A petition for rehearing was denied on January 8, 2024 (Pet. App. 1a-2a). On March 28, 2024, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including June 6, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, Tit. II, 94 Stat. 2325, as amended, authorizes the district court in a civil action brought by or against the United States to award to a "prevailing party" (other than the United States) fees and other expenses if the "'position of the United States'" was not "substantially justified" and no special circumstances would make an award unjust. 28 U.S.C. 2412(d)(1)(A); see *Commissioner, INS* v. *Jean*, 496 U.S. 154, 158 (1990). The "position of the United States" includes both "the position taken by the United States in the civil action" and "the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. 2412(d)(2)(D). To be eligible for a fee award under Section 2412(d), the requesting party must not exceed a certain net worth at the time the civil action was filed. 28 U.S.C. 2412(d)(2)(B) (establishing a cap of $2 million for an individual and $7 million for an entity).

b. The dispute underlying this litigation concerns a type of retirement plan known as an employee stock ownership plan, or ESOP. An ESOP is "a type of pension plan that invests primarily in the stock of the company that employs the plan participants." *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 412 (2014); see 26 U.S.C. 4975(e)(7). Like many employee benefit plans, ESOPs are subject to the requirements of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* See *Dudenhoeffer*, 573 U.S. at 412-413.

Congress enacted ERISA "to protect," among other things, "the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. 1001(b). To that end, ERISA imposes "strict standards of trustee

conduct * * * derived from the common law of trusts—most prominently, a standard of loyalty and a standard of care." *Central States, Se. & Sw. Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 570 (1985); see 29 U.S.C. 1104(a)(1). Those standards require fiduciaries who appoint other fiduciaries to monitor their appointees. 29 C.F.R. 2509.75-8. ERISA also forbids a fiduciary to cause plans to engage in certain transactions with a "party in interest," 29 U.S.C. 1106(a)(1)(A), a term that includes the owners of the company sponsoring the retirement plan, see 29 U.S.C. 1002(14). A plan may, however (subject to other limitations not pertinent here), buy or sell the stock of the company that sponsors the plan as long as the transaction is for "adequate consideration." 29 U.S.C. 1108(e)(1). As relevant here, "adequate consideration" means "the fair market value of the asset as determined in good faith by the trustee or named fiduciary." 29 U.S.C. 1002(18).

The Secretary of Labor has primary authority for administering ERISA. 29 U.S.C. 1002(13), 1132-1135. Section 502(a)(2) of ERISA authorizes a "civil action" by "the Secretary" for "appropriate relief under section [409]" of the Act. 29 U.S.C. 1132(a)(2). Section 409 in turn provides that a plan fiduciary that breaches its duties "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits" from the breach. 29 U.S.C. 1109(a). It also provides for other appropriate "equitable or remedial relief," including "removal of such fiduciary." *Ibid.*

2. Petitioners are Bowers + Kubota Consulting, Inc., a privately held company based in Hawaii, and its former owners, Brian Bowers and Dexter Kubota.

In December 2012, petitioners Bowers and Kubota sold all their stock in the company to the entity's ESOP for $40 million. Pet. App. 4a. The Department of Labor investigated whether that transaction between the company's owners and its retirement plan had complied with ERISA. For example, the government investigated whether the ESOP paid petitioners Bowers and Kubota more than fair market value for their shares, and whether Bowers and Kubota had properly monitored the trustee they had appointed to represent the ESOP in the transaction. See 29 U.S.C. 1104(a)(1)(B); 29 C.F.R. 2509.75-8.

Through its investigation, the government discovered that the buyer (the ESOP, represented by its trustee) retained as its valuation advisor the same valuation firm that the sellers (petitioners Bowers and Kubota) had previously retained to establish the price of their offer. Pet. App. 45a. The firm provided nearly identical valuations to both sides of the transaction, having assigned Bowers's and Kubota's stock a value ranging from about $37 to $41 million. *Id.* at 42a, 45a. That valuation relied on a projection provided by petitioners that the company would generate pretax profits exceeding $9 million in 2012, even though the company's annual pretax profits in the prior four years had ranged from $1.67 million to $3.05 million, and had actually declined from 2010 to 2011. *Id.* at 33a.

The government also discovered that, months before deciding to pursue an ESOP transaction, petitioners Bowers and Kubota had engaged a different valuation firm to provide an internal-use valuation of their company in connection with a possible sale to a third-party buyer. Pet. App. 36a. That earlier valuation also relied on the company's projection of $9 million in pre-tax

profits for 2012, but the individual who performed the valuation "expressed concern about the reasonableness of this projection because it represented a 'significant jump' from the Company's past performance." *Id.* at 37a (citation omitted). After Bowers and Kubota failed to reach agreement with that prospective buyer—which had provided an indication of interest to purchase the company for $15 million, plus or minus the company's cash and debt—they turned their focus to selling the company to an ESOP. *Id.* at 34a-38a.

In addition, the government discovered that petitioners Bowers and Kubota had appointed the ESOP's trustee to represent the retirement plan just weeks before petitioners' transaction closed. Pet. App. 43a. Bowers and Kubota, the government uncovered, had also disclosed their requested sales price to the ESOP trustee before appointing him, and the trustee reported spending fewer than 30 hours to perform due diligence on the ESOP's behalf. *Id.* at 75a.

3. a. In 2018, the Secretary of Labor filed suit in the United States District Court for the District of Hawaii against petitioners Bowers and Kubota, as well as the ESOP's trustee, alleging that they had violated ERISA's fiduciary standards and prohibitions on certain transactions.[1] C.A. App. 1851 (complaint). The complaint asserted that petitioners had caused the ESOP to pay above fair market value for Bowers's and Kubota's shares in the company, *id.* at 1865-1867, 1869-1870, and that Bowers and Kubota had violated their fiduciary duty to monitor the ESOP's trustee, *id.* at 1866.

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[1] The Department also joined Bowers + Kubota Consulting, Inc. and the ESOP as necessary parties under Federal Rule of Civil Procedure 19(a). Pet. App. 89a. Although the company is a petitioner in this Court, the retirement plan is not.

Regarding the failure-to-monitor claim, the government alleged that petitioners Bowers and Kubota had failed to ensure that the trustee was acting solely in the interests of the retirement-plan participants, and that they had instead pressured the trustee to buy their stock at a predetermined price, without sufficient diligence or independence. *Id.* at 1867-1868; see Pet. App. 73a-76a. For relief, the government sought restitution and restoration of any losses to the retirement plan, as well as an injunction prohibiting Bowers, Kubota, and the trustee from either acting as fiduciaries to the ESOP or breaching their obligations under ERISA in the future. C.A. App. 1872-1873.

Petitioners unsuccessfully moved to dismiss, see D. Ct. Doc. 47 (Jan. 18, 2019), for summary judgment, see C.A. App. 1702-1725, and to exclude the government's expert opinion, see D. Ct. Doc. 564 (May 31, 2021). The ESOP's trustee reached a settlement agreement with the government. Pet. App. 29a. The case proceeded to a bench trial on the remaining claims for monetary and injunctive relief against petitioners. *Id.* at 4a.

b. In its posttrial decision, the district court found in petitioners' favor on each claim. Pet. App. 86a-87a. On the claims concerning the ESOP's alleged overpayment, the court concluded that the trial evidence had not established that the transaction exceeded fair market value. *Id.* at 58a. The court disagreed with the government's expert witness, who had testified that the valuation relied on by the ESOP trustee significantly overvalued the company. *Id.* at 50a. Although the court acknowledged the government's evidence that the appraisal had projected that the company's pre-tax profits

would increase from $2.614 million in 2011 to $9.235 million in 2012, *id.* at 33a, it credited the testimony of petitioners' expert witness, who had opined that those projections were justified based on an "upward trend the Company experienced in 2012 and the Company's backlog of contracts," *id.* at 51a. The court also disagreed with the testimony of the government's expert regarding how certain fees and costs should have been allocated in the company's valuation. *Id.* at 53a-54a. Nevertheless, the court observed that the government had not been "acting on a mere whim in questioning [the ESOP trustee's] reliance on a valuation provided by the very appraiser who had previously provided a preliminary fair market value" to the other side of the same transaction. *Id.* at 48a.

The district court also found that the government had not shown by a preponderance of the evidence that petitioners had breached their fiduciary duty to monitor the retirement plan's trustee. Pet. App. 73a-76a. The court "acknowledged," however, that "the Government's concerns are understandable." *Id.* at 76a. In particular, the court observed that (1) petitioners had shared their preferred "high sale price" with the trustee upon appointing him to represent the ESOP in that same transaction; (2) the same appraiser represented the buyer and seller; (3) the appraiser "provid[ed] an appraisal in a fairly short time" that resembled the valuation that petitioners' prior valuation firm had come to doubt, and (4) the trustee "documented only about 30 hours of work" in conducting due diligence. *Ibid.* The court also recognized that petitioners had told the trustee that "the sale would have to close" within a month's time, which, while not a formal "requirement" to close the deal on that timeline, nevertheless "did not give [the

trustee] a lot of time to conduct due diligence." *Id.* at 75a. The court drew inferences, however, that the trustee "may have decided" that the valuation company "was well-respected" and that potential tax benefits could have made it "better" to hire the seller's appraiser than to "delay the sale." *Ibid.* In weighing the evidence, the court concluded that it did not suffice to show that "Bowers and Kubota should have better monitored" the trustee. *Id.* at 76a.

The district court accordingly declined to award any financial or equitable relief and entered judgment for petitioners. Pet. App. 86a.

4. Petitioners moved for attorney's fees and nontaxable costs under EAJA. Pet. App. 89a-90a; see 28 U.S.C. 2412(d)(1)(A). The district court denied petitioners' request. Although the government did not "meet its burden" of persuasion at trial, the court reasoned, it was "nevertheless substantially justified in bringing those claims" "based on the evidence submitted at trial." Pet. App. 115a. Citing its posttrial findings, the court emphasized that the government "had every right to be suspicious of the circumstances surrounding the sale of [the petitioner] Company to the ESOP." *Ibid.*

In concluding that the government's position was substantially justified, the district court adopted a magistrate judge's findings and recommendation. Pet. App. 117a; see C.A. App. 35-49. Like the district judge, the magistrate judge had found that the government's position "had a reasonable basis in fact and law," C.A. App. 45, because, among other things, the government had introduced at trial "circumstantial evidence" that petitioners had overvalued their company for purposes of the ESOP transaction, *id.* at 46, the government had defeated "motions to dismiss and [for] summary

judgment," *id.* at 47, and petitioners had improperly staked their fee request on "hindsight," *ibid.*[2]

Although the government had also contested (*e.g.*, C.A. App. 153) petitioners' eligibility for attorney's fees and nontaxable costs because their net worth exceeded the statutory caps set by Section 2412(d)(2)(B), the district court did not reach that alternative basis for denying petitioners' fee request.

5. The court of appeals affirmed in relevant part. Pet. App. 1a-25a. Citing *Pierce* v. *Underwood*, 487 U.S. 552 (1988), the court explained that, "[f]or the government's position to be substantially justified," it "'must have a "reasonable basis both in law and fact,"'" Pet. App. 7a (citations omitted), a determination that the court reviewed "for an abuse of discretion," *id.* at 8a. The court of appeals then concluded that the district court had not abused its discretion "in finding that the government's litigation position at the time of trial had a reasonable basis." *Id.* at 11a. Although the court of appeals identified a "plain" error in the government expert's opinion regarding the valuation of the petitioner company, the court observed that the expert's mistake "did not necessarily undermine [his] big-picture" analysis or "the government's position[] as the parties headed to trial." *Id.* at 10a. Rather, the court found that the government's expert "had plausible responses

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[2] The district court also denied petitioners' motion for a discretionary award of attorney's fees under 28 U.S.C. 2412(b) and 29 U.S.C. 1132(g)(1) based on alleged misconduct. Pet. App. 116a-117a. The court rejected petitioners' argument that the government had "acted in bad faith." *Id.* at 116a (citation omitted). Petitioners do not challenge that finding. The court separately granted in part petitioners' request for taxable costs (*e.g.*, printing expenses) under 28 U.S.C. 2412(a). Pet. App. 117a. That award is not at issue here either.

to the district court's critiques of his opinion," *id.* at 11a n.2, and that "[a]t the time of trial, the government appeared to have substantial evidence for its case," *id.* at 12a n.3. The court observed that the government had not only defeated summary judgment, *id.* at 4a, but it had also defeated petitioners' pretrial motion to exclude its expert's testimony, *id.* at 11a; see D. Ct. Doc. 463 (Apr. 27, 2021).

In upholding the district court's decision, the court of appeals emphasized the "deferential standard of review," Pet. App. 12a, and "the unique facts of the case," *id.* at 12a n.3. The court did not reach the government's independent argument that petitioners exceeded EAJA's net-worth limits and therefore were ineligible for such an award. See Gov't C.A. Br. 30-33.[3]

Judge Collins dissented in pertinent part. Pet. App. 14a-25a. The dissent characterized the majority's decision as having turned on whether the government "subjectively appreciate[d] that its case was not supported by substantial evidence," as opposed to whether it was objectively supported by such evidence. *Id.* at 25a. Judge Collins would have vacated and remanded for the district court to decide whether petitioners were ineligible for a fee award based on their net worth. *Ibid.*

Petitioners sought rehearing en banc. Pet. App. 1a. No judge requested a vote, and the full court denied the petition. *Id.* at 1a-2a.

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[3] On the parties' agreement, the court of appeals unanimously vacated a portion of the district court's order that had reduced the award of petitioners' taxable costs and remanded on that basis. Pet. App. 13a.

ARGUMENT

Petitioners renew (Pet. 22-24) their contention that the district court abused its discretion in declining to award attorney's fees under EAJA. That factbound determination does not warrant this Court's review. The court of appeals' decision, which found no abuse of discretion in the district court's denial of fees, is correct and does not conflict with any decision of this Court or of any other court of appeals. This Court has repeatedly denied petitions seeking review of substantial-justification decisions under EAJA. See, *e.g.*, *Pecore* v. *United States*, 568 U.S. 1143 (2013); *Gatimi* v. *Holder*, 562 U.S. 1256 (2011); *White* v. *Nicholson*, 547 U.S. 1018 (2006); *Dunn* v. *Commodity Futures Trading Comm'n*, 528 U.S. 825 (1999). The same result is warranted here.

In all events, this case would be a poor vehicle for considering petitioners' arguments because they would not be entitled to relief even if this Court agreed with them, because petitioners failed to establish that they fall within EAJA's eligibility limits. See 28 U.S.C. 2412(d)(2)(B). Petitioners Bowers and Kubota have conceded that they each surpass the statutory cap of $2 million on individuals. And the petitioner company failed to prove that its net worth is less than $7 million (the statutory cap for entities) with financial statements that meet generally accepted accounting standards.

1. The court of appeals correctly concluded that the district court did not abuse its discretion in declining to award attorney's fees and nontaxable costs under EAJA.

a. EAJA authorizes the payment of attorney's fees and certain expenses to a "prevailing party" "other than the United States," unless the government's position

before and during litigation was "substantially justified." 28 U.S.C. 2412(d)(1)(A). In *Pierce* v. *Underwood*, 487 U.S. 552 (1988), this Court held that the government's position is "substantially justified" under EAJA if it has a "reasonable basis both in law and fact." *Id.* at 565 (citation omitted). The Court made clear that "a position can be justified even though it is not correct," and it explained that, for purposes of EAJA, a position is "substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct." *Id.* at 566 n.2.

The court of appeals properly employed that standard here. It recognized that the government's position must have a "'reasonable basis both in law and fact'" and be "justified to a degree that could satisfy a reasonable person." Pet. App. 7a (quoting *Underwood*, 487 U.S. at 565-566 & n.2); see *id.* at 13a ("To be 'substantially justified' means, of course, more than merely undeserving of sanctions for frivolousness.") (quoting *Underwood*, 487 U.S. at 566). And it correctly identified the standard of review as "abuse of discretion." *Id.* at 8a (citing *Underwood*, 487 U.S. at 559-560). Viewing the record through that lens, the court of appeals then found no reversible error in the district court's conclusion that the government's position was substantially justified as a whole. *Id.* at 8a-13a. That factbound application of settled law does not warrant this Court's review.

b. Echoing the dissenting opinion, petitioners (and their amici) contend (Pet. 16) that the court of appeals "did not require the government to come forward with competent evidence that supported its theory at the time it made the decision to go to trial," and that the court imposed a "looser standard" that would "allow the Government to defeat a fee request based on its failure

to subjectively appreciate that its case was not supported by substantial evidence," Pet. 24 (citations omitted); see ESOP Amicus Br. 9-11; American Soc'y of Appraisers Amicus Br. 14-17. Those contentions lack merit.

As an initial matter, the court of appeals explicitly disclaimed the position that petitioners ascribe to it. The court rejected the suggestion that it was "establishing a laxer standard for the government to prevail in an EAJA case." Pet. App. 12a n.3. Rather, the court explained that its decision turned on the "deferential standard of review and the unique facts of the case." *Ibid.* And contrary to petitioners' suggestion, the court determined that, given the standard of review and the record before it, "the government appeared to have substantial evidence for its case" at "the time of trial." *Ibid.*

Petitioners also mischaracterize the decision below as having found *all* of the government's expert testimony "plainly unreliable." Pet. 23. Instead, the court of appeals focused on a particular mistake and emphasized that "this error, as plain as it was, did not necessarily undermine" the expert's "big-picture [pretax profits] analysis" or "the government's position[] as the parties headed to trial." Pet. App. 10a; see *id.* at 10a n.1 (explaining that a related error "constituted only a small part of [the expert's] overall analysis").

Rather than end its inquiry after diagnosing an error in the expert report, compare Pet. 23-24, the court of appeals properly assessed whether the government's position was substantially justified as a whole, Pet. App. 7a-13a. The court reviewed the entire record and identified substantial evidence showing that the government's reliance on its expert—and its litigation position—were "ration[al]" and "reasonable." *Id.* at 11a. It

found that the government's expert "had plausible responses to the district court's critiques of his opinion" at trial. *Id.* at 11a n.2. It explained that it was reasonable to view petitioners' $40 million valuation as "faulty" because petitioners had "predicted that profitability would balloon in a matter of a few months with no compelling explanation why." *Id.* at 11a. And it noted that petitioners' prediction that their profits would "double in a short period of time" was not only "dubious," but was later disproven by the company's "actual" financial results. *Id.* at 11a, 12a n.3. The court also pointed to other objective markers that the government's position was reasonable: For example, the government had defeated petitioners' motion to exclude its expert's opinions, which "would suggest to a reasonable person" that the expert's testimony would be found reliable. *Id.* at 11a; see D. Ct. Doc. 463.

By engaging in that holistic review, the decision below faithfully applied EAJA's text and this Court's precedent. EAJA requires courts to assess the government's overall "position," a term that the Act repeatedly employs in the singular. 28 U.S.C. 2412(d)(1)(A). This Court has also made clear that, although a litigant's positions "on individual matters may be more or less justified," EAJA's substantial-justification test "favors treating a case as an inclusive whole, rather than as atomized line-items." *Commissioner, INS* v. *Jean*, 496 U.S. 154, 161-162 (1990).

The court of appeals likewise was correct to give weight to the fact that the government had defeated petitioners' motion to exclude its expert witness's testimony. See Pet. App. 11a. In the EAJA context, this Court has endorsed reliance on similar "'objective indicia,'" including "the stage in the proceedings at which

the merits were decided." *Underwood*, 487 U.S. at 568. Further bolstering the lower courts' determinations is that the government defeated petitioners' motion for summary judgment. See Pet. App. 4a. As this Court has explained, "summary judgment will not lie * * * if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An interlocutory determination to that effect tends to establish substantial justification under EAJA because a position is "substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct." *Underwood*, 487 U.S. at 566 n.2.

In addition, the government's position was substantially justified because it did not rely exclusively on the expert testimony on which petitioners have largely rested their petition. As the district court recognized, the government also presented "circumstantial evidence" that petitioners had overvalued their company for purposes of the ESOP transaction. C.A. App. 45-46 (report and recommendation); see Pet. App. 90a (adopting that finding). The government's failure-to-monitor claim likewise did not depend exclusively on expert testimony: It turned in part on petitioners' failure to provide the trustee sufficient time to conduct due diligence, and on the trustee's use of the same valuation advisor that petitioners themselves used. Although it drew inferences in petitioners' favor at trial, Pet. App. 73a-76a, the district court recognized that "the Government's concerns are understandable," *id.* 76a. And any errors in the expert testimony supporting the government's claims for *monetary* remedies would not have undermined the government's claim for *injunctive* relief. Petitioners do not address the failure-to-monitor claim

or that independent ground supporting the court's sound decision to deny their fee request.

In short, the district court did not abuse its discretion in denying petitioners' request for fees, and the court of appeals did not err in affirming that factbound conclusion.

2. Petitioners also argue (Pet. 16-20) that the court of appeals' application of *Underwood*, *supra*, in this case conflicts with decisions of the Third, Fifth, Seventh, and Eighth Circuits. But petitioners' assertion of circuit division relies on their misreading of the decisions below and thus fails for that reason. In any event, petitioners invoke factbound cases decided more than 20 years ago. None of those decades-old decisions shows a conflict warranting this Court's review or a need to "clarify" the standard articulated in *Underwood*. Pet. 16. In fact, nearly half of petitioners' citations predate *Underwood* itself.

a. Courts of appeals have consistently applied the definition of "substantially justified" announced in *Underwood*. See, *e.g.*, *Michel* v. *Mayorkas*, 68 F.4th 74, 78-79 (1st Cir. 2023); *Ericksson* v. *Commissioner of Social Sec.*, 557 F.3d 79, 81-82 (2d Cir. 2009); *Williams* v. *Astrue*, 600 F.3d 299, 301-302 (3d Cir. 2009); *Perez* v. *Jaddou*, 31 F.4th 267, 270-271 (4th Cir. 2022); *Davidson* v. *Veneman*, 317 F.3d 503, 506 (5th Cir. 2003); *Griffith* v. *Commissioner of Social Sec.*, 987 F.3d 556, 563-564 (6th Cir. 2021); *United States* v. *Pecore*, 664 F.3d 1125, 1130-1133 (7th Cir. 2011), cert. denied, 568 U.S. 1143 (2013); *Garcia* v. *Barr*, 971 F.3d 794, 796 (8th Cir. 2020) (per curiam); *Medina Tovar* v. *Zuchowski*, 41 F.4th 1085, 1089-1090 (9th Cir. 2022); *Madron* v. *Astrue*, 646 F.3d 1255, 1257-1258 (10th Cir. 2011) (Gorsuch, J.);

United States v. *Douglas*, 55 F.3d 584, 588 (11th Cir. 1995); *Hill* v. *Gould*, 555 F.3d 1003, 1007-1008 (D.C. Cir. 2009); *Norris* v. *SEC*, 695 F.3d 1261, 1265-1266 (Fed. Cir. 2012) (per curiam). Of course, courts applying that test have reached different outcomes when considering different sets of facts and circumstances. But that is neither unexpected nor concerning, and it does not indicate the existence of a conflict warranting this Court's intervention.

b. In positing division among the courts of appeals, petitioners principally rely (Pet. 17-18) on the Seventh Circuit's decision in *Phil Smidt & Son, Inc.* v. *NLRB*, 810 F.2d 638 (1987). But that decision preceded *Underwood* and is therefore inapposite. Petitioners do not explain how a pre-*Underwood* decision supports their claim (Pet. 16) that this Court should "clarify" a standard articulated more than a year later. And even on its own terms, *Phil Smidt* is not instructive. As the Seventh Circuit has explained, that decision reversed the denial of an EAJA fee award where, unlike here, the court of appeals had determined that the government had "not ma[de] '*any* attempt to independently corroborate its allegation'" against the defendant. *Pecore*, 664 F.3d at 1136 (brackets and citation omitted).

Petitioners' remaining assertions (Pet. 18-20) of a circuit conflict are equally unavailing. Like the Seventh Circuit's decision in *Phil Smidt*, the Third Circuit's decisions in *Taylor* v. *Heckler*, 835 F.2d 1037 (1987), and *Edge* v. *Schweiker*, 814 F.2d 125 (1987), predate *Underwood* and shed no light on a supposed inconsistency in *Underwood*'s application. In fact, *Taylor* and *Edge* are no longer good law insofar as they applied a "plenary" standard of review, *Taylor*, 835 F.2d at 1039; *Edge*, 814 F.2d at 128, instead of the abuse-of-discretion standard

that this Court subsequently prescribed, *Underwood*, 487 U.S. at 559. And *Hanover Potato Products, Inc.* v. *Shalala*, 989 F.2d 123 (3d Cir. 1993), is a case-specific application of *Underwood* with facts bearing no resemblance to this case. *Hanover Potato* involved a dispute over an agency's handling of an administrative record in response to a request for public inspection. *Id.* at 128-129. And the Third Circuit itself has cited *Hanover Potato* in affirming the denial of EAJA fees under distinct factual circumstances. See, *e.g.*, *Williams*, 600 F.3d at 301-302.

Similarly misplaced is petitioners' reliance on *Estate of Baird* v. *Commissioner*, 416 F.3d 442 (5th Cir. 2005), and *Lauer* v. *Barnhart*, 321 F.3d 762 (8th Cir. 2003). Those cases, like petitioners' other citations, did not resemble the factual circumstances present here. In *Baird*, a tax dispute, the Fifth Circuit found that a fee award (under a prior version of 26 U.S.C. 7430) was warranted because, in the court's view, the government had not called any qualified expert to the stand, had not proffered any evidence to support its position at trial, and had not understood governing law. 416 F.3d at 446, 453-454. In this case, by contrast, the district court had denied petitioners' pretrial motion to exclude the government's expert opinions, disagreed with the government's expert testimony only in a posttrial ruling (despite the expert's "plausible responses to the district court's critiques"), and found no misunderstanding of controlling law. Pet. App. 11a & n.2. And in *Lauer*, the Eighth Circuit took the view that the government had lacked "any evidence" to support its decision to deny social-security benefits to the claimant. 321 F.3d at 765. Here, however, the courts below found "substantial evidence" supporting the government's case, Pet. App.

10a-12a & n.3, including not only expert testimony, but also "circumstantial evidence," C.A. App. 45-46; see Pet. App. 90a.

Finally, petitioners misapprehend the disposition and reasoning in *Nalle* v. *Commissioner*, 55 F.3d 189 (5th Cir. 1995). Petitioners contend (Pet. 18) that "the Fifth Circuit reversed the denial of EAJA fees in * * * *Nalle*." But *Nalle* was a tax case in which the court of appeals "affirm[ed]," not reversed, the denial of fees. 55 F.3d at 190 (addressing prior version of 26 U.S.C. 7430); accord *id.* at 194-195. In doing so, the court "consider[ed] all the facts and circumstances surrounding the dispute," *id.* at 191, and cautioned against efforts—not unlike petitioners'—to "collapse Congress' explicit distinction between the legal standard applicable in fee petition evaluations and the standard applicable to the underlying merits," *id.* at 194.[4]

c. At bottom, petitioners' challenge distills to a disagreement with the district court's determination that the government had presented sufficient evidence to establish substantial justification, and with the court of appeals' finding of no abuse of discretion in that determination and its affirmance of the denial of fees. If this

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[4] Petitioners also quote decades-old dictum that "[d]etermining whether the government's position is substantially justified for the resolution of an EAJA claim has proved to be an issue of considerable conceptual and practical difficulty." *Morgan* v. *Perry*, 142 F.3d 670, 685 (3d Cir. 1998) (quoting *Roanoke River Basin Ass'n* v. *Hudson*, 991 F.2d 132, 138 (4th Cir.), cert. denied, 510 U.S. 864 (1993)), cert. denied, 525 U.S. 1070 (1999). But that statement was describing both the importance of distinguishing the standard for fee applications from the underlying merits, and the factbound nature of the proper inquiry. See *ibid.* If anything, that observation undermines petitioners' request for this Court's intervention.

Court did grant review here to apply the substantial-justification standard to the facts and circumstances of this case, then the Court's only task would be to determine whether the district court abused its discretion in finding substantial justification. Such a case-specific and fact-specific contention does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). This Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); see *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). And the Court has repeatedly explained that "'a request for attorney's fees should not result in a second major litigation.'" *Jean*, 496 U.S. at 163 (citation omitted).

3. Finally, this case is not a suitable vehicle for reviewing the question presented because resolving it in petitioners' favor would not affect the outcome of their fee request. Quite aside from the lower courts' conclusions that the government's position was substantially justified, petitioners are not entitled to a fee award because they failed to establish their status as "prevailing parties."

Only a "prevailing party" may recover attorney's fees and nontaxable costs under EAJA. 28 U.S.C. 2412(d)(1)(A) and (B). For "purposes of" such awards, the statute defines a "'party'" as "an individual whose net worth did not exceed $2,000,000," or an entity "the net worth of which did not exceed $7,000,000," as calculated "at the time the civil action was filed." 28 U.S.C. 2412(d)(2)(B). The applicant seeking to recover fees has

the burden to establish its net worth. See, *e.g.*, *Love* v. *Reilly*, 924 F.2d 1492, 1494 (9th Cir. 1991).

Petitioners did not prove that they satisfy EAJA's net-worth requirements. They conceded (C.A. App. 433) that "neither Mr. Bowers nor Mr. Kubota qualify as individuals with an EAJA 'net worth' less than the $2,000,000 cap imposed under 28 U.S.C. 2412(d)(2)(B)." And as the government detailed in its brief to the court of appeals, see Gov't C.A. Br. 30-33, the petitioner company likewise did not show a qualifying net worth below $7 million during the relevant period. Petitioners did not provide financial statements for the company that complied with generally accepted accounting principles, C.A. App. 168-170, as would be required under circuit precedent to establish the company's eligibility for an award, see *American Pacific Concrete Pipe Co.* v. *NLRB*, 788 F.2d 586, 591 (9th Cir. 1986); see also *Broaddus* v. *United States Army Corps of Eng'rs*, 380 F.3d 162, 166 (4th Cir. 2004) (collecting cases).

Although the courts below found it unnecessary to address petitioners' eligibility under EAJA, the government may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Granfinanciera, S. A.* v. *Nordberg*, 492 U.S. 33, 38 (1989) (citation omitted). That alternative ground for affirming the court of appeals' judgment underscores the unsuitability of this case for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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