No. 23-1286

In the Supreme Court of the United States

BOWERS + KUBOTA CONSULTING, INC., BRIAN J. BOWERS, *and* DEXTER C. KUBOTA,

Petitioners,

v.

JULIE A. SU,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY

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In deciding to take this regulatory enforcement action to trial, "the government relied only on its expert's valuation opinion." Pet. App. 9a. But as we now know, the expert's opinion was objectively unreliable—as the government would have known if it had conducted even the most basic corroborative investigation.

That should have entitled petitioners, once they prevailed on the merits, to recover their fees under the Equal Access to Justice Act (EAJA). As the Fifth Circuit has held, the government's decision to proceed to trial "cannot merely rely on an expert's opinion * * * when that expert's opinion is unfounded and speculative," or else EAJA fees will be due. *Estate of Baird* v. *Commissioner*, 416 F.3d 442, 452 (5th Cir. 2005).

But the Ninth Circuit reached the opposite conclusion, and in doing so, it raised the bar for holding the government liable under EAJA in cases involving expert testimony. According to the decision below, a federal agency coming to court with a meritless enforcement action supported by no more than circumstantial suspicion and an objectively unreliable expert opinion may evade liability for EAJA fees as long as it believed, subjectively, that the district court might not exclude the expert's opinion at trial.

The government resists that characterization—but when stripped of its naked rhetoric, the brief in opposition actually reflects the same understanding of the holding below. And while the government denies the disagreement among the circuits, its arguments are not persuasive—there is no doubting that this case would have been resolved differently in the Fifth and Seventh Circuits, as well as the Third and Eighth.

Nor is the government's vehicle argument persuasive. On that front, it says that EAJA fees must be denied regardless of the standard applied, because none of the defendants qualified as a "prevailing party" according to the statute's net worth limit. But that was a hotly contested issue before the district court, which declined to resolve it. Because the government relied on the supposed sufficiency of its expert's flawed valuation analysis, and that was the sole basis on which the Ninth Circuit affirmed the denial of EAJA fees, this case presents a clean opportunity for the Court to resolve the question presented. Whether the government might prevail on an alternative ground is a question properly reserved for remand.

Beyond that, the government does not deny that the question presented is frequently recurring or that it implicates an important check on government overreach, points confirmed by the two supporting amicus briefs. Because this is an appropriate vehicle for resolving the question, the petition should be granted.

A. The decision below breaks from the standards adopted by other circuits

We showed in the petition (at 15-20) that this case would have come out differently if it had arisen in the Third, Fifth, Seventh, or Eighth Circuits. The government offers two responses. First, it asserts (at 13) that the Ninth Circuit "explicitly disclaimed" that it was adopting "a laxer standard for the government to prevail in an EAJA case." Second, it says (at 16-17) that all EAJA cases are fact-bound and that any differences in outcomes are attributable to "differences in facts and circumstances." Neither contention has any merit.

1. The Ninth Circuit adopted an incorrect standard for EAJA fees that is extraordinarily forgiving of the government

a. The government commenced an investigation of petitioners' 2012 ESOP transaction based solely on what it took to be "suspicious circumstances." Pet. App. 8a. That may be enough to commence an investigation, but it is not sufficient to go to trial. *Ibid.*

Yet over four years of investigation, the "only" evidence that the government developed to support its otherwise purely circumstantial case was "its expert's valuation opinion." See Pet. App. 9a. And as everyone now recognizes, Sherman's analysis was total bunk—he "overlooked" certain essential factors and focused instead on other assertions that "could not have affected" the company's valuation, producing a report so "unreliable" as to be "unreasonabl[e]." See Pet. App. 5a-6a, 9a-11a.

The court of appeals openly acknowledged all of this. Yet it held that the district court did not abuse its discretion in holding that the government "was substantially justified in relying on Sherman's opinion at trial" because "Sherman stood firm in his conviction that [the company] was not as profitable as [its appraiser had] predicted" (even though he "should have known" otherwise), and "the government did not know heading to trial that the district court would reject Sherman's entire opinion." Pet. App. 10a-11a. In other words, Sherman remained confident despite that his opinion was indefensibly wrong, and the government blindly believed him.

As Judge Collins explained in dissent, that holding rewrites the standard for EAJA fees: It "allow[s] the Government to defeat a fee request based on its failure to

subjectively appreciate that its case was not supported by substantial evidence." Pet. App. 25a.

That is manifestly a laxer standard for EAJA fees than the standard applied by other courts and called for by *Pierce* v. *Underwood*, 487 U.S. 552 (1988). Those cases require the government to come forward with evidence that a "a reasonable mind might accept as adequate to support a conclusion." *Id.* at 565 (quoting *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938)). The Ninth Circuit has relieved the government of any such burden, replacing the objective standard with a subjective-belief standard that will incentivize the retention of hired-gun experts doing shoddy, ends-oriented work.

b. Any doubt about that is dispelled by the opposition brief itself, which lays bare the government's intention to leverage the decision below to escape EAJA liability in the exact circumstances where Congress intended fees to be available.

As the government sees it (at 13), the court of appeals "reviewed the entire record and identified substantial evidence showing that the government's reliance on its expert" was "rational and reasonable." Yet all the government cites as "substantial evidence" corroborating Sherman's analysis is the "circumstantial evidence" that supported its initial suspicions. BIO 14-15. As the Ninth Circuit rightly explained, those circumstantial red flags were sufficient to "justify the *investigation*" but not "proceeding to trial." Pet. App. 8a. The government's argument is thus circular: Sherman's report was sufficient to confirm the government's circumstantial suspicions because the government's circumstantial suspicions were sufficient to confirm Sherman's report. But, of course, the circumstantial suspicions were *wrong*

and Sherman's opinion was *unreliable*. And the government knew or should have known this—indeed, it *would* have known if it had conducted a competent investigation, like following up on observations made in Sherman's deposition or petitioners' *in limine* motion.

The government's opposition thus makes clear how it reads the Ninth Circuit's decision: A government agency coming to court with a meritless regulatory enforcement action—one supported by bare circumstantial suspicions and an objectively unreliable, unreasonable "expert" report—may evade liability for EAJA fees as long as, "heading into trial," it *subjectively* believed the district court might fall for it. Pet. App. 11a.

c. The government resists (at 14) that characterization for a final reason. It says that there were "other objective markers that the government's position was reasonable," namely the denials of the motion for summary judgment and the motion *in limine* to exclude Sherman's report. That is quite misleading.

First, petitioners did not seek summary judgment on the over-valuation claim, and the expert valuation reports therefore were not submitted to the district court as part of the summary judgment briefing. See Dist. Ct. Dkt. 412, at 35-43. The Ninth Circuit thus did not base its holding on the denial of summary judgment, which is not a basis on which courts in later cases might attempt to cabin the standard adopted below.

Second, the denial of petitioners' motion to exclude Sherman's testimony indicated nothing about the reliability of his analysis. The point of excluding unreliable expert witness testimony is "to protect *juries* from being swayed by dubious scientific testimony." *United States* v. *Flores*, 901 F.3d 1150, 1165 (9th Cir. 2018). But this case

was tried to the bench, and there is no need "for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself." *Ibid.* The district court thus denied the motion to exclude Sherman in an unreasoned, one-line minute order, simply reserving the question of Sherman's reliability for trial. See Dist. Ct. Dkt. 555. Reserving a question for later resolution suggests nothing whatever about the strength of the government's case pre-trial.

To give the government a pass under EAJA on the basis of a summary order reserving the question of reliability for a bench trial would be to relieve the government of almost any burden at all. And rest well assured that, without this Court's intervention, the government will point future courts to the decision here, making that exact argument and seeking that exact outcome.

2. Other circuits apply a standard that demands more of the government and would have resulted in a reversal here

The legal standard adopted and applied below clashes with the prevailing standard from a number of other circuits. See Pet. 16-20.

a. Take first *Baird*. There, the Fifth Circuit held that an agency cannot be substantially justified within the meaning of EAJA if it "did not present any credible evidence or call any competent witnesses to support the reasonableness of its position during the course of the litigation." 416 F.3d at 454. That is the exact standard that the Ninth Circuit rejected below: The government called only Sherman, whose expert analysis was plainly and unreasonably wrong. Pet. App. 9a-11a. The government thus failed to present credible evidence or call a competent witnesses. And the apparent possibility that Sherman might

not be excluded was no excuse. As the Fifth Circuit held in *Baird*, the government "cannot merely rely on an expert's opinion * * * when that expert's opinion is unfounded." 416 F.3d at 452. In the Fifth Circuit, fees would have been granted.

The government attempts (at 18) to distinguish *Baird* on the ground that "the Tax Court ruled that [the government's expert witness] was incompetent to testify as an expert" (*Baird*, 416 F.3d at 446), whereas in this case the district court denied petitioners' motion to exclude Sherman's testimony. That is no distinction at all. Again, the district court denied petitioners' *in limine* motion without any reasoning, indicating that only that it would resolve the question of Sherman's reliability at trial. The government could not rationally have read anything into that order. And at the trial, "[t]he district court rejected Sherman's expert report as unreliable" because of the pervasive, objective errors in his analysis. Pet. App. 5a. Those are analytically the same facts as were present in *Baird*. The outcome should have been the same in both cases, but it was not.

The petition also cited and discussed *Nalle* v. *Commissioner*, 55 F.3d 189 (5th Cir. 1995), where the Fifth Circuit explained that when the agency has "failed to conduct a reasonable investigation that would have revealed the flaw in its position," the agency cannot rely on the flawed evidence to establish substantial justification. *Id.* at 192. That holding formed the basis for *Baird* and likewise conflicts with the decision in this case. The government is correct to note (at 19) that *Nalle* ultimately affirmed the denial of EAJA fees for case-specific reasons. But that does not diminish the conflict between the legal standard applied by the Fifth Circuit there and the laxer standard applied by the Ninth Circuit here.

b. Take next *Phil Smidt & Son, Inc.* v. *NLRB*, 810 F.2d 638 (7th Cir. 1987), where the Seventh Circuit held that the government falls short of EAJA's substantial-justification standard when "there [is] conflicting evidence" weighing against the government's theory and it "fail[s] to take adequate measures to assess that evidence" and more generally "fail[s] to exercise the proper care in the formulation of its [own] factual submission[s]." *Id.* at 642. That is this case to a tee, and the Seventh Circuit therefore would have reversed with instructions to award EAJA fees.

The government gives two rejoinders. First, it notes (at 17) that *Phil Smidt* predates *Underwood*, asserting that it is "therefore inapposite." That is undeniably wrong. The Seventh Circuit has held expressly that, although "*Phil Smidt* was decided one year before" *Underwood*, its "formulation" of the EAJA standard remains "an acceptable interpretation of 'substantial justification'" after it. *United States* v. *Hallmark Construction Co.*, 200 F.3d 1076, 1080 n.1 (7th Cir. 2000).

Thus, the Seventh Circuit and its district courts have continued to apply the *Phil Smidt* standard, citing and applying it in hundreds of post-*Underwood* cases. The cases are too many to cite exhaustively, but for just a few examples from different districts within the Seventh Circuit, see *Purnell* v. *Colvin*, 2014 WL 51392 (N.D. Ill.); *Tarpoff* v. *United States*, 2012 WL 2344164 (S.D. Ill.); and *Chorak* v. *Astrue*, 2012 WL 1577448 (N.D. Ind.). The court in each of those cases cited *Phil Smidt* and *Hallmark Construction* for the governing standard and subsequently granted EAJA fees.

Second, the government says (at 17) that *Phil Smidt* does not conflict with the decision below "even on its own

terms." Under the Seventh Circuit's standard as the government sees it, EAJA fees are warranted only when the agency "ha[s] not made *any* attempt to independently corroborate its allegation against the defendant." BIO 17 (cleaned up) (quoting *United States* v. *Pecore*, 664 F.3d 1125, 1130-1133 (7th Cir. 2011)). But the government cannot seriously mean that EAJA fees are foreclosed as long as the agency makes *any* attempt, no matter how limp or ham-handed, to corroborate otherwise baseless allegations. The availability of EAJA fees turns on the government's *evidence*, not on whether or not it has "attempt[ed]" an investigation.

In all events, the language quoted from *Pecore* did not purport to revise the EAJA standard in the Seventh Circuit; the court there simply described an example of what would be sufficient for an award of EAJA fees, not what it believed in all cases is necessary.

c. The conflict with the Fifth and Seventh Circuits is thus clear, and that alone is enough to warrant the Court's attention. But there is more.

The Third Circuit has held that, when "the government's strongest arrow in its [evidentiary] quiver [is] faulty" and it should have known of the errors, its case is not substantially justified. *Edge* v. *Schweiker*, 814 F.2d 125, 129 (3d Cir. 1987). About *Edge*, the government notes (at 17) that the court applied a less deferential standard of review than *Underwood* later dictated. That is a red herring—the relevant holding from *Edge* addressed the decisional standard (substantial justification), not the standard of appellate review (abuse of discretion).

The Eighth Circuit, too, has held that "the government's position must be well founded in fact to be substantially justified" and that "[a] position which lacks

any evidence in its support" does not suffice. *Lauer* v. *Barnhart*, 321 F.3d 762, 763-764 (8th Cir. 2003). In response, the government offers (at 18-19) only the naked conclusion that it produced "substantial * * * circumstantial evidence" of wrongdoing in this case. But, again, that is not how the Ninth Circuit saw it; it held that the government's circumstantial suspicion was *not* enough, and that "the government relied only on its expert's valuation opinion" in deciding to go to trial (Pet. App. 9a).

At bottom, there is no denying that petitioners EAJA claim would not have been rejected in these other circuits. The availability of EAJA relief should not turn on the fortuity of the defendant's location like this.

B. This is a clean vehicle, and the question is important

The government does not deny that the question presented recurs frequently. Nor could it. The government is the most frequent federal litigant, and it often loses cases in which it relies on expert testimony. In countless such cases, the question presented will arise. And in the ERISA context, where enforcement actions often depend on experts, discouraging meritless enforcement actions is especially important to achieving Congress's aim of encouraging ESOP formations.

This case is also an ideal vehicle for review. The question presented was preserved at every stage of litigation and was the sole determinant of the outcome below. The government nevertheless asserts (at 20) that "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." That is so, it says (at 21), because "[p]etitioners did not prove that they satisfy EAJA's net-worth requirements."

That is a logically independent question that no lower court has yet resolved. Petitioners strenuously disagreed with the government and presented extensive evidence showing that petitioner Bowers + Kubota Consulting had a qualifying net worth in 2018, when the government made the decision to proceed to trial. See Dist. Ct. Dkt. 669, at 27-29 (citing Dkts. 670-672). But the district court declined to resolve it. See Dist. Ct. Dkt. 684, at 3 (report and recommendation "assuming" without deciding that petitioners did not exceed the net worth limit). The question whether the government might prevail for an independent reason—one not previously addressed by any lower court—is therefore, at most, an issue for remand. See, *e.g.*, *Kisor* v. *Wilkie*, 588 U.S. 558, 563 (2019) (reserving subsequent issues for the lower courts to address on remand in the first instance).

Even on its own terms, the government's alternative basis for affirmance is wrong. The evidence was clear that petitioner Bowers + Kubota Consulting was carrying a large debt load in the wake of the transaction and thus was an eligible "prevailing party" entitled to EAJA fees. See Dist. Ct. Dks. 670-672.

As we noted in the in the petition (at 21), "EAJA's admirable purpose will be undercut if lawyers fear that they will never actually receive attorney's fees" when the statute's standard is met. *Astrue* v. *Ratliff*, 560 U.S. 586, 600 (2010) (Sotomayor, J., concurring). That is a very real risk here, if the Ninth Circuit's decision is left to stand. The Court should grant the petition and reverse.

Respectfully submitted.

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