No. 24-1142

In the Supreme Court of the United States

ROBERT HOLMAN,

Petitioner,

v.

BROOKE ROLLINS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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Petitioner appreciates the Respondents' recommendation that the Court grant this petition, vacate the decision of the Sixth Circuit Court of Appeals, and remand the case for reconsideration of Mr. Holman's attorney's fees request. *See* Resp. Br., at 6 ("This Court should therefore grant certiorari, vacate the court of appeals' judgment, and remand for further consideration in light of *Lackey*."); *id.* at 14 ("The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of *Lackey v. Stinnie*, 604 U.S. 192 (2025) (No. 23-621)."). The process is commonly called a "GVR."

However, Respondents confusingly offer the Court a few reasons why it could, if it wanted to, deny the Petition, notwithstanding their position that a GVR is appropriate. But they are mistaken to contend that there is not a three-way circuit split over whether objectively unreasonable pre-litigation conduct is dispositive when evaluating the question of "substantial justification." *See* Resp. Br. at 11–12. For this reason, Petitioner contends that if this Court will not GVR this matter, then this Court should instead grant certiorari, and set the case for argument.

Separately, Petitioner agrees with a GVR because it was error for the Sixth Circuit to not address the prevailing party issue, regardless of whether the

government's argument was substantially justified, because prevailing-party status is dispositive as to whether Mr. Holman is entitled to litigation *costs*, a separate assessment from attorney's fees, which can be decided on the substantial justification factor alone. The Sixth Circuit, by limiting its ruling to the "substantial justification" inquiry, overlooked the cost-entitlement issue.[1]

In summary, Petitioner agrees that the Court should GVR for further consideration in light of *Lackey*. Alternatively, this Court can take up the issue of whether attorney's fees are available under EAJA to a party who prevails in the face of unjustifiable government pre-litigation conduct.

A. Respondents are correct that this Court should GVR the petition.

Petitioner concurs that a GVR is appropriate to determine if he is the "prevailing party" under EAJA, in light of *Lackey*. As evidenced by the strong dissents on the substantial justification holding at both the panel stage and the rehearing en banc petition stage, the Sixth Circuit's substantial justification holding is

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[1] Respondents' fallback argument that attorney's fees would be denied because of "special circumstances" that make an award unjust—which neither the District Court nor the Sixth Circuit relied upon—only underscores why a GVR is appropriate. Resp. Br. at 5, 8–11. Courts are divided on whether the government's duty to defend laws invariably defeats a Plaintiff's right to fees under the Equal Access to Justice Act.

legally dubious. Now, not even the Respondents care to defend it. *See* Resp. Br. at 13. And because the outstanding issue of costs remains even if the government is relieved from paying attorneys' fees to Mr. Holman, the Sixth Circuit should determine if *Lackey* controls the "prevailing party" standard under EAJA.

A GVR is appropriate when "intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). A GVR may also be appropriate in the "rare occasions" where "after the Government prevails in a case in a court of appeals, the Solicitor General asks this Court to GVR in light of an error." *Grzegorczyk v. United States*, 142 S. Ct. 2580, 2581 (2022) (Sotomayor, J., dissenting from denial of a grant, vacate, and remand order); *see also id.* at 2583 ("The Court has entered GVR orders on the Government's motion, without undertaking any express analysis of the merits, for well over a century." (citing *De Baca v. United States*, 189 U.S. 505 (1903) (per curiam); *Ballin v. Magone*, 140 U.S. 670 (1891) (per curiam)).

As recognized by the government's new policy of not defending the very type of program that Petitioner challenged, such an error exists here. *See* Resp. Br. at 12–13. Both parties seemingly agree that

the government's position was not substantially justified below, and that, therefore, the lower court must decide who the prevailing party was. *See, e.g.*, *id.* (acknowledging "some tension" between the government's non-defense of such programs and the Sixth Circuit's substantial justification holding). Respondents' recognition of the Sixth Circuit's error is unsurprising for three reasons.

First, the racial preferences challenged by Holman were explicit, yet not supported by factual evidence of prior discrimination. *See* App. 115a–117a; *see also* App. 65a–66a, 107a–108a. Thus, USDA's implementation of Section 1005 did not conform to this Court's well-established strict scrutiny requirements for race-based preferential programs. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498, 503 (1989). This placed the government in the untenable position of defending a law that was doomed to fall. They recognize this—that is why they no longer defend such programs. Resp. Br. at 12–13.

Second, the body of circuit court case law on the substantially justified exception to the recovery of attorneys' fees is light, because most fee requests turn on prevailing party status. Thus, the panel had a limited body of case law to guide its decision.[2]

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[2] The Sixth Circuit's erroneous decision on substantial justification may receive overweighted recognition moving forward considering the light body of caselaw.

Third, and enhancing this problem, the overwhelmingly dominant focus of briefing below was on the prevailing party issue, leaving much of the argumentation on the substantial justification issue to the members of the panel and the en banc court.

One explanation for why the Sixth Circuit foisted the substantial justification analysis into the forefront was uncertainty over how this Court would resolve *Lackey*. *See, e.g.*, App. 6a n.2 (Thapar, J.) ("*Lackey*'s impact remains unclear."). A GVR for consideration of *Lackey* would permit the Sixth Circuit to reconsider its opinion and potentially allow it to resolve the case on more traditional prevailing party grounds. And *Lackey*'s holding in the context of 42 U.S.C. § 1988 that a prevailing party must prevail on the merits does not automatically mean the same for EAJA. *See* Pet. 31–32. In fact, Congress meant for EAJA that "[t]he phrase 'prevailing party' should *not* be limited to a victor only after entry of a final judgment following a full trial on the merits." Pet. 32–33 (quoting App. 133a-134a, H.R. Rep. No. 96-1418 (1980)) (emphasis added); 28 U.S.C. § 2412(d)(2)(H) ("[I]n the case of *eminent domain proceedings*, [prevailing party] means a party who obtains a final judgment.") (emphasis added). *Lackey* therefore qualifies as an "intervening development" regarding the attorneys' fees analysis. A "reasonable probability" exists that the Sixth Circuit would have resolved the case differently if it had the benefit of more clarity surrounding the contours of *Lackey* at the time of its decision.

Another reason exists to remand for further consideration in light of *Lackey*. Specifically, the prevailing party issue is dispositive on the issue of *costs*, even if it is not for *fees*.

EAJA provides that a prevailing party may recover fees in a separate provision from an award of costs.[3] Fees are provided for in 28 U.S.C. § 2412(d)(1)(A). Section 2412(d)(1)(A) mandates fees and other expenses to a prevailing party unless the court finds that the position of the United States was "substantially justified or that special circumstances make an award unjust." *Id.* Costs, however, are authorized in 28 U.S.C. § 2412(a)(1). Unlike fees, a prevailing party is entitled to costs *regardless* of whether the government's position was justified, or it can make a showing of special circumstances. *Id.* The Sixth Circuit panel opinion never addressed this, evidently thinking that the substantial justification ruling meant it could sidestep the thorny issue of whether Petitioner was legally a "prevailing party." But Petitioner's claim for costs, separate from his claim for fees, required the Sixth Circuit to make this determination.

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[3] Respondents are incorrect when they assert that Section 2412(d)(1)(A) "authorizes an award of attorney's fees and costs . . . ." (Resp. Br. at 3). That section only authorizes "fees and other expenses, *in addition to any costs awarded pursuant to subsection (a)* . . . ." Litigation costs are separately authorized. *See* 28 U.S.C. § 2412(a)(1) (authorizing costs to a prevailing party against the United States "but not including the fees and expenses of attorneys").

The District Court ruled that Petitioner was not the prevailing party, and so it did not need to reach the question of "whether the Government's position was substantially justified *or* whether Plaintiff should receive an award of costs. (Pet. App. 51a n.2) (emphasis added) (citing 28 U.S.C. § 2412(a)(1)). The Sixth Circuit, however, ruled based on substantial justification. It neglected to rule on costs at all even though a prevailing party is entitled to costs regardless. (App. 15a–45a). The lower courts' failure to grapple with the cost-award issue is another reason for the Court to GVR to determine under *Lackey* whether Petitioner is a prevailing party or not.

For these reasons, a GVR to determine prevailing party status is appropriate.

B. Respondents understate the circuit split regarding the "substantial justification" question under EAJA.

EAJA provides that a fee award will generally be available to a prevailing party against the federal government, "unless the court finds that the position of the United States was substantially justified…" 28 U.S.C. § 2412(d)(1)(A). But what makes up "the position"?

EAJA itself offers one clue—it at least includes the consideration of what the government did to wind up in court. *See* 28 U.S.C. 2412(d)(1)(B) ("Whether or not the position of the United States was

substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based)…"); *cf. Comm'r, I.N.S. v. Jean*, 496 U.S. 154, 165 (1990) (Inquiry into substantial justification is "one that properly focuses on the governmental misconduct giving rise to the litigation.").

But how much weight should courts give to the policy actions of the government, and how much weight should be given to the professionalism, argumentation, and conduct of the attorneys who later represent the government in court? That question divides the circuit courts.

Respondents say that, actually, since the Court's 1990 decision in *Jean*, there is uniformity in courts below. Resp. Br. at 11 ("All circuits apply the same framework to determine whether the government's position is substantially justified under EAJA, and any variance in outcome is simply the result of varying facts.").

But that argument is belied by the Sixth Circuit's opinion in this very case, which held that "what matters most" under the substantial justification inquiry is "the actual merits of the Government's litigating position." Pet. App. 23a. In other words, a plaintiff challenging a brazenly unconstitutional action must wait until the government presents its defense in court, to know whether fees might be available down the road. *See contra*, Administrative

Conference of the United States, *About the Equal Access to Justice Act (EAJA)* (Undated) ("The stated purpose of EAJA, among other things, is to 'diminish the deterrent effect of *seeking review* of, or defending against, governmental action by providing' for the award of certain costs and fees against the United States.") (emphasis added).[4]

And as Petitioner discussed in the Opening Brief, Circuit Courts of Appeal articulate the test for substantial justification in very different terms from the Sixth Circuit. *See, e.g.*, *Healy v. Leavitt*, 485 F.3d 63, 68 (2d Cir. 2007) ("'[I]f the Government's prelitigation position could not render the entire Government position 'not substantially justified,' … such a result would discourage an aggrieved party from seeking full 'vindication of his rights' under the EAJA.") (internal quotation marks omitted); *Morgan v. Perry*, 142 F.3d 670 (3d Cir. 1998) ("Thus, unless the government's pre-litigation *and* litigation positions have a reasonable basis in both law and fact, the government's position is not substantially justified.") (emphasis added); *Hackett v. Barnhart*, 475 F.3d 1166, 1175 (10th Cir. 2007) (collecting cases with multiple different approaches, and holding that "fees generally should be awarded where the government's underlying action was unreasonable even if the government advanced a reasonable litigation position.") (internal quotation marks

[4] https://www.acus.gov/eaja/background (last visited November 18, 2025).

omitted). These cases post-date *Jean*.

The Court thus may consider granting certiorari to provide direction to lower courts on how, under EAJA's substantial justification inquiry, the federal government's pre-litigation misconduct may be weighed against its litigation behavior.

C. Respondents' assertion that "special circumstances" preclude fees only further supports a GVR.

Respondents argue an alternative basis for affirmance. They say that attorney's fees are unwarranted because special circumstances would make an award unjust. Resp. Br. at 5, 8–10. EAJA does limit fees (but not costs) to a prevailing party when the court finds that special circumstances make an award unjust. 28 U.S.C. § 2412(d)(1)(A). This factor tends to consider "equitable considerations" not at issue here, like unclean hands. *Sakhawati v. Lynch*, 839 F.3d 476, 478 (6th Cir. 2016) (quoting H.R. Rep. No. 96-1418, at 11 (1980)) (alteration in original). A special consideration might be a "close or novel questions of law." *Nat'l Truck Equip. Ass'n v. Nat'l Highway Traffic Safety Admin.*, 972 F.2d 669, 672 (6th Cir. 1992) (citing *Grason Electric Co. v. NLRB*, 951 F.2d 1100, 1103-05 (9th Cir. 1991)). But this issue was not close or novel. Indeed, Respondents find themselves unable to claim any substantial justification for their pre-litigation actions or even their legal arguments below.

Respondents argue that their duty to defend the

constitutionality of an act is a "special circumstance." Resp. Br. at 5. Yet Respondents admit that the bulk of the courts that accept this rationale have relied on the "substantial justification" prong that they have now abandoned. *Id*. at 9. It would be odd if it were otherwise. If merely defending a statute exempted an official-capacity government defendant from paying a prevailing party its fees, this exception would swallow the rule in constitutional challenges to statutes. EAJA instead expressly provides that fees against the "United States" includes "any official of the United States acting in his or her official capacity," as they are when defending a statute's constitutionality. 28 U.S.C. § 2412(d)(2)(C).

In fact, the circuits vary on this very question. According to the Ninth Circuit, EAJA's "purpose would be frustrated by a ruling that the Justice Department's decision to defend the constitutionality of a statute is reasonable regardless of whether the statute itself might reasonably be thought to be constitutional." *League of Women Voters* v. *FCC*, 798 F.2d 1255, 1259 (9th Cir. 1986). While the Third Circuit thinks it "implausible" that Congress intended to penalize the government for defending the constitutionality of its own enactments. *Kiareldeen* v. *Ashcroft*, 273 F.3d 542, 550 (3d Cir. 2001). And in *Grace* v. *Burger*, 763 F.2d 457, 458 (D.C. Cir. 1985), the D.C. Circuit rejected the idea that the duty to defend "forever and always" justified the government's defense. The Sixth Circuit does not appear to have definitively weighed in on the

question, but it has "never (to our knowledge) found a 'special circumstance' justifying the denial of fees." *McQueary* v. *Conway*, 614 F.3d 591, 604 (6th Cir. 2010). To the extent that the Court is interested in resolving two circuit splits instead of one, the Respondents' arguments suggest that Petitioner's case is the perfect vehicle.

Moreover, any "presumption of constitutionality" is no help to Respondents here. Respondents' claim to this doctrine—that "courts must apply a 'presumption of constitutionality' to duly enacted statutes"—is irrelevant here. Resp. Br. at 9. Racially discriminatory statutes are "immediately suspect," *Shaw* v. *Reno*, 509 U.S. 630, 642 (1994), and general presumptions of regularity have "no place in equal protection analysis," *City of Richmond,* v. *J.A. Croson*, 488 U.S. at 501.

Respondents' argument that the preliminary injunction entered against them below did not "benefit" Petitioner is no "special circumstance" here. Resp. Br. at 9–10. In fact, the District Court entered the preliminary injunction because Petitioner was *not* protected by the other preliminary injunctions. *Id.*; *see* App. 90a. That is a "benefit" to Petitioner in any reasonable sense of the word.

Given that the courts of the Sixth Circuit have "never" found a special circumstance before, *McQueary,* 614 F.3d at 604, the court seems unlikely to do so, especially in a case like this one. Respondents' position was egregiously

unconstitutional before the litigation, and it defended a plainly unconstitutional statute. Regardless, the Sixth Circuit should be given the chance to evaluate the "special circumstances" factor because whether they exist turns on "the court" so finding. *See* 28 U.S.C. § 2412(d)(1)(A). If "special circumstances" exist for the first time in the Sixth Circuit to justify defending a plainly unconstitutional law, the Sixth Circuit should be the court to make that determination.

Conclusion

For the foregoing reasons, the petition should be granted, with vacatur of the Sixth Circuit decision, and remanded for reconsideration. In the alternative, the petition should be granted, and the case set for oral argument.

Respectfully submitted,

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