No. 17-618

In the Supreme Court of the United States

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS, PETITIONER

v.

DEPARTMENT OF HOMELAND SECURITY

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion by denying attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), for work performed on petitioner's merits appeal that the court of appeals had previously dismissed as moot over petitioner's objection.

2. Whether the district court abused its discretion by reducing the EAJA award for interrelated claims based on petitioner's limited success in this action.

3. Whether the district court abused its discretion by reducing the EAJA award on grounds that petitioner later asserted, for the first time in a petition for rehearing, had been raised by the district court *sua sponte*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 857 F.3d 907. The opinions of the district court (Pet. App. 15-33, 37-85) are reported at 202 F. Supp. 3d 20 and 156 F. Supp. 3d 123.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13-14) was entered on May 26, 2017. A petition for rehearing was denied on July 26, 2017 (Pet. App. 88-90). The petition for a writ of certiorari was filed on October 24, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns an award of attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). The award arose from petitioner's challenge to

a 2008 regulation, known as the 17-month STEM extension rule, that was codified at 8 C.F.R. 214.2(f)(10)(ii)(C) (2009) (superseded May 10, 2016). The district court awarded fees to petitioner as a "prevailing party," but it significantly reduced the award from the amount requested in light of petitioner's limited success on its claims. Pet. App. 19-22, 26-31; see *id.* at 15-33. The court of appeals affirmed. See *id.* at 1-11.

1. The regulations in question address the period of time that certain aliens in F-1 nonimmigrant student status may lawfully remain in the United States after graduation in order to participate in the workforce as part of an Optional Practical Training (OPT) program. Pet. App. 2-3. Between 1992 and April 2008, regulations authorized such graduates from a college, university, conservatory, or seminary to work temporarily in the United States for 12 months of OPT directly related to the student's major area of study when certain requirements were satisfied. 8 C.F.R. 214.2(f)(10)(ii) and (11) (2008); see Pet. App. 3.

In April 2008, the Department of Homeland Security (DHS) issued an interim final rule that, *inter alia*, extended by 17 months (to 29 months) the maximum OPT period for certain students with science, technology, engineering, or mathematics (STEM) degrees. 73 Fed. Reg. 18,944, 18,954 (Apr. 8, 2008) (promulgating 8 C.F.R. 214.2(f)(10)(ii)(C) (2009) (superseded May 10, 2016)). DHS issued that 17-month STEM extension rule without the notice-and-comment process ordinarily required under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* See 73 Fed. Reg. at 18,950. The agency relied on the APA's good-cause exception to the usual notice-and-comment requirement, 5 U.S.C. 553(b)(B),

explaining that the 17-month extension had "the potential to add tens of thousands of * * * workers in STEM occupations in the U.S. economy." 73 Fed. Reg. at 18,950. DHS viewed prompt issuance of the extension rule as necessary to "avoid a loss of skilled students" that would "seriously damage[]" the nation's "economic interest[s]" during the then-ongoing 2008 financial crisis. *Ibid.*

2. Petitioner is a labor union representing workers in technology fields. Pet. App. 3. In 2014, petitioner filed this APA action in district court, broadly challenging "the OPT program as a whole" and the more specific 17-month STEM extension rule. *Id.* at 3, 16.

a. The district court largely rejected petitioner's claims. The court dismissed petitioner's challenge to the OPT program as a whole, holding that petitioner lacked Article III standing to challenge the original 12-month OPT program and, alternatively, that any challenge to the relevant 1992 regulations was barred by the statute of limitations. 74 F. Supp. 3d 247, 251-252 & n.3 (2014); see Pet. App. 16. The court also entered summary judgment for the government on petitioner's statutory claim challenging the 17-month STEM extension, holding that the 2008 rule was within DHS's substantive authority because it was consistent with the provisions of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* See Pet. App. 59-75, 86.

The district court concluded, however, that DHS had not sufficiently justified its invocation of the APA's good-cause exception based on an "economic crisis," Pet. App. 77, 79. See *id.* at 75-81. The court nevertheless determined that immediate vacatur of the 17-month STEM extension rule would "caus[e] substantial hardship for foreign students and a major labor disruption

for the technology sector." *Id.* at 84. The court accordingly ordered that "the 17-month STEM extension" be vacated but that the vacatur order would be stayed until February 12, 2016. *Id.* at 86; see *id.* at 84-85. The district court subsequently extended that stay, over petitioner's opposition, to May 10, 2016. 153 F. Supp. 3d 93, 101 (2016).

b. While petitioner's appeal was pending, DHS initiated notice-and-comment rulemaking to revise its STEM OPT rules. 80 Fed. Reg. 63,376 (Oct. 19, 2015). DHS proposed, *inter alia*, to adopt a "24-month extension" that would "replace the 17-month STEM OPT extension" that petitioner had challenged, but that was still "available" to students because of the district court's stay. *Ibid.*

In early 2016, DHS adopted a final rule that, as relevant here, adopted the longer 24-month STEM extension. 81 Fed. Reg. 13,040, 13,041, 13,117 (Mar. 11, 2016) (promulgating 8 C.F.R. 214.2(f)(10)(ii)(C) (2017)). The rule also provided that students who had obtained a 17-month STEM extension before the rule's effective date would obtain (or retain) work authorization for the 17-month period and could apply for "an additional 7-month period of OPT" (for a total 24-month extension). *Id.* at 13,121 (promulgating 8 C.F.R. 214.16(b), (c)(1) and (2) (2017)). The final rule became effective on May 10, 2016, *id.* at 13,040, the same date on which the district court's stay ultimately expired.

c. In the court of appeals, the government filed a suggestion of mootness, explaining that petitioner's appeal would become moot on the final rule's May 10, 2016, effective date because the final rule "supersede[d] in all respects the 2008 STEM Rule" that petitioner had challenged in this case. 15-5239 Gov't C.A. Suggestion of

Mootness 2, 5 (Mar. 14, 2016). Petitioner recognized that the provisions in the final rule "mirror[ed] the 2008 OPT Rule" and "extend[ed] the [STEM] employment period" from "17 months to 24 months." 15-5239 Pet. C.A. Resp. to Gov't Suggestion of Mootness 4 (Mar. 18, 2016). Petitioner argued, however that the superseding final rule "did not moot [its] challenges to the 2008 OPT Rule." *Ibid.*

On May 13, 2016, three days after the final rule became effective, the court of appeals dismissed petitioner's appeal as "moot because the 2008 Rule [wa]s no longer in effect." Pet. App. 35-36. The court additionally "vacate[d] the judgment of the District Court." *Id.* at 36.

d. Shortly thereafter, the district court, at petitioner's request, ordered that petitioner's suit be "dismissed as moot" and directed the court clerk to enter a new final judgment "in favor of [the government]." 6/8/2016 Order 2 (capitalization and emphasis omitted). The clerk accordingly entered final judgment "in favor of the [government] against [petitioner]." 6/15/2016 Judgment (capitalization omitted).[1]

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[1] Petitioner promptly filed a new APA action in district court, challenging both the original 1992 OPT rules and the new 24-month STEM extension. The district court in that case again dismissed petitioner's challenge to the original OPT rules on Article III grounds. *Washington Alliance of Tech. Workers* v. *U.S. Dep't of Homeland Sec.*, 249 F. Supp. 3d 524, 536-537 (D.D.C. 2017), appeal pending, No. 17-5110 (D.C. Cir.). The court also dismissed petitioner's challenge to DHS's authority to promulgate the new STEM extension rule, concluding that petitioner had forfeited the claim by failing to support it in petitioner's briefing. *Id.* at 555. That separate case is not before this Court.

3. Petitioner moved the district court for an EAJA award of more than $465,000 for attorney's fees and expenses. Pet. App. 18. The court awarded petitioner $42,239. *Id.* at 31; see *id.* at 15-31.

The district court concluded that petitioner's success in obtaining a vacatur order made petitioner a "prevailing party" eligible for a reasonable fee award under EAJA. Pet. App. 19-22. The court concluded that petitioner retained its "prevailing party" status—even though DHS had promulgated a replacement rule that "neutralized the effect of vacatur," and "despite the D.C. Circuit's finding of mootness and vacatur of [the district court's] judgment"—because petitioner had obtained some "concrete relief" in securing the "opportunity to comment" on DHS's replacement rule. *Id.* at 20-22. The court acknowledged that such relief "seem[ed] like a hollow [victory]" but concluded that it was "sufficient" for "prevailing party" status. *Id.* at 21.

The district court separately addressed "what amount [of fees] would be reasonable." Pet. App. 26; see *id.* at 26-31. The court explained that petitioner's EAJA award should be reduced to reflect petitioner's "limited success in this action" because petitioner had "prevailed only on its notice-and-comment claim"; had obtained only a vacatur order that "did not prevent DHS from promulgating a replacement rule similar to the 2008 Rule"; and then had failed in its opposition to an "exten[sion of] the stay of vacatur." *Id.* at 27. That outcome, the court concluded, was "far more limited than [it would have been] if the Court had accepted [petitioner's] overarching claim that DHS exceeded its statutory authority" in promulgating the STEM extension, or its separate claims challenging "the entire OPT program." *Id.* at 28.

The district court recognized that petitioner's "various challenges to the OPT program were interrelated." Pet. App. 29. The court concluded, however, that certain work on unsuccessful matters could be easily "segregat[ed]" and should not be compensated. *Ibid.* Because petitioner had "achieved no success" after August 12, 2015, in litigating its "appeal and opposition to DHS's motion" to extend the court's stay, the court determined that work on those matters was "not compensable." *Ibid.*

With respect to other work on "interrelated" claims that could not be "compartmentalized," the district court "consider[ed] whether 'the expenditure of counsel's time was reasonable in relation to the [limited] success achieved.'" Pet. App. 28-29 (quoting *Hensley* v. *Eckerhart*, 461 U.S. 424, 436 (1983)) (second set of brackets in original). To identify a "reasonable" fee for such work, the court examined several factors. *Id.* at 30-31. First, the court noted petitioner's lack of success on its broader claims that "would have secured far greater relief than [petitioner] ultimately secured." *Id.* at 30. Second, the court explained that, although petitioner "bears the burden" of establishing the reasonableness of its fee request, petitioner had provided "scant detail" for much of that request. *Ibid.* Third, the court concluded that petitioner's seven attorneys had engaged in "unnecessary duplication of efforts on many tasks." *Id.* at 30-31. In light of those factors, and "especially in light of [petitioner's] marginal victory," the court determined that an award of $42,239 (15% of the remaining fee request) was reasonable. *Id.* at 31.

4. The court of appeals affirmed. Pet. App. 1-11. The court concluded that the district court had not

abused its discretion in fixing the amount of a "reasonable" fee award in this case. *Id.* at 6-11.

a. The court of appeals explained that a "district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation" when a prevailing litigant's counsel's time is "devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." Pet. App. 7 (quoting *Hensley,* 461 U.S. at 435). When such "'interrelated'" claims are non-frivolous and raised in good faith, the court of appeals continued, the district court may—if the plaintiff achieves "only limited success" in its action—"'identify specific hours that should be eliminated'" and deny fees for such work. *Ibid.* (quoting *Hensley,* 461 U.S. at 436).

The court of appeals accordingly concluded that the district court had not abused its discretion by, *inter alia*, denying fees for work related to petitioner's unsuccessful merits appeal, which the district court had "no difficulty segregating" from work on matters as to which petitioner had been successful. Pet. App. 7 (citation omitted). Petitioner argued that it should obtain fees for work on its appeal because the mootness-based dismissal of that appeal and associated vacatur of the district court's judgment had "produced a favorable change for [petitioner] in its legal relationship with DHS," enabling petitioner to relitigate whether the OPT program is lawful. *Id.* at 8 (citation omitted). The court of appeals rejected that contention, observing that "'fees are available only to a party that "prevails" by winning the relief it seeks'" and that, "where a controversy is mooted before a court of appeals' judgment issues, the appellant is 'not, at that stage, a "prevailing

party" as it must be to recover fees.'" *Ibid.* (quoting *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 480, 483 (1990)). Because petitioner had sought "a reversal on the merits" but had not obtained such relief, the court concluded that the district court had discretion to deny "fees for work done on [petitioner's] appeal." *Ibid.*

b. The court of appeals also held that the district court had not abused its discretion by reducing the amount of fees awarded based on petitioner's limited success. Pet. App. 9-10. The court explained that where, as here, the "plaintiff achieved only limited success" on interrelated challenges for which counsel's work cannot feasibly be separated, the district court "should award only that amount of fees that is reasonable in relation to the results obtained." *Id.* at 9 (quoting *Hensley*, 461 U.S. at 440). The court concluded that the district court had not abused its discretion in reducing the EAJA award for petitioner's "'marginal'" victory, as well as for "'unnecessary duplication'" of work by multiple attorneys and "insufficient detail in [petitioner's] billing records." *Id.* at 10 (citations omitted).

The court of appeals rejected petitioner's contention that its claims challenging the 1992 OPT rule as a whole, and its claim that the 2008 STEM extension rule exceeded DHS's statutory authority, were "merely alternative grounds" for a desired outcome (vacatur of the 2008 OPT rule) that should be fully compensated. Pet. App. 9. The court endorsed the district court's observation that "[t]he outcome [petitioner] achieved—vacatur of the 2008 [STEM extension rule], subject to DHS's later promulgation of a replacement rule—is far more limited than if the [district court] had accepted" what petitioner characterized as its alternative legal grounds.

Id. at 10 (citation omitted) (first set of brackets in original). The court explained that, if petitioner had succeeded on those broader claims, "DHS could not have promulgated the replacement rule" and petitioner would have "certainly" obtained "greater relief." *Ibid.* (citations omitted).

c. Judge Kavanaugh dissented. Pet. App. 11. He would have held that petitioner's broader and unsuccessful claims were "alternative legal grounds" for which fees should be awarded. *Ibid.* (citation omitted). Judge Kavanaugh concluded that petitioner's EAJA fees should have been calculated "without penalizing [petitioner] for having raised alternative grounds for relief." *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not implicate any division of authority. Petitioner's effort to obtain additional fees is particularly unsound because petitioner never obtained any relief from the district court before this case became moot; the district court's initial judgment was vacated; and the district court ultimately entered judgment *for the government*. Further review is not warranted.

1. Petitioner contends (Pet. 8-12) that the court of appeals erroneously viewed "prevailing party status on appeal [as] distinct from prevailing party status in the litigation" as a whole, Pet. 9. That is incorrect. The court of appeals correctly held, in sustaining the district court's determination of a "reasonable" fee award, that the district court had permissibly declined to award fees for petitioner's unsuccessful appeal.

a. EAJA generally authorizes an award of "fees and other expenses"—including an award of "reasonable at-

torney fees"—to a "prevailing party" in certain civil actions brought by or against the United States. 28 U.S.C. 2412(d)(1)(A) and (2)(A). A litigant seeking an EAJA award therefore must establish, *inter alia*, that it is a "prevailing party." *Commissioner, INS* v. *Jean*, 496 U.S. 154, 158 (1990). "[T]he determination that a claimant is a 'prevailing party'" is "a one-time threshold for fee eligibility" under EAJA. *Id.* at 160.

The determination that a particular plaintiff is a "prevailing party," however, does not resolve the proper *amount* of "reasonable" attorney's fees. *Jean*, 496 U.S. at 160-161. Prevailing-party status "may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved." *Hensley* v. *Eckerhart*, 461 U.S. 424, 436 (1983). "'[T]he most critical factor' [that a court must consider] in determining the reasonableness of a fee award 'is the degree of success obtained.'" *Farrar* v. *Hobby*, 506 U.S. 103, 114 (1992) (quoting *Hensley*, 461 U.S. at 436).[2]

In *Hensley*, this Court addressed various situations in which courts must determine the amount of a "reasonable" attorney's fee after a prevailing plaintiff has "succeeded on only some of his claims for relief." 461 U.S. at 434. The Court distinguished between situations in which "counsel's work on one claim [is] unrelated to his work on another" and those in which the plaintiff's claims are related so that it is "difficult to divide the hours expended on a claim-by-claim basis." *Id.* at 435; see *id.* at 435-437. The Court explained that, in cases

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[2] This Court's decisions "construing what is a 'reasonable' fee appl[y] uniformly" to EAJA and other statutes that authorize awards of "reasonable" fees to prevailing parties. *City of Burlington* v. *Dague*, 505 U.S. 557, 562 (1992); see *Jean*, 496 U.S. at 161 ("reasonable" fees under EAJA).

involving related claims, "the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* at 435.

The *Hensley* Court further explained that cases involving related claims (only some of which are successful) can take either of two forms. If the plaintiff obtains "excellent results," a district court ordinarily should award "a fully compensatory fee" that "should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." 461 U.S. at 435. But if the suit achieves only "partial or limited success" on "interrelated" claims, the district court must focus on "the degree of success obtained" as the "most critical factor" in setting a reasonable fee award. *Id.* at 436.

The "range of possible success is vast" when an action, like this one, challenges multiple government "practices" as "unlawful." *Hensley*, 461 U.S. at 436. A district court in such cases has substantial "discretion" either to "attempt to identify specific hours that should be eliminated" or "simply [to] reduce the award to account for the limited success." *Id.* at 436-437. "There is no precise rule or formula for making these determinations." *Id.* at 436.

b. Both courts below properly followed those teachings with respect to time spent on petitioner's unsuccessful appeal. The district court concluded that petitioner's fee award should be reduced in light of petitioner's "limited success" in obtaining a (stayed) vacatur order on "its notice-and-comment claim," Pet. App. 27, and it had "no difficulty segregating fees related to" petitioner's unsuccessful appeal, *id.* at 29. The district court rejected fees for that appeal (*ibid.*) as part of its calculation of a "reasonable" fee award, see *id.* at 26-29,

not as part of its "prevailing party" analysis, *id.* at 19-22. The court of appeals likewise concluded that the district court had discretion to deny fees for counsel's unsuccessful appellate work. The court explained that, "[e]ven where a plaintiff's claims are 'interrelated,'" a "district court may 'identify specific hours that should be eliminated'" in light of a plaintiff's "limited success." *Id.* at 7 (quoting *Hensley*, 461 U.S. at 436).

Petitioner describes (Pet. 9) the court of appeals as holding that "prevailing party status on appeal is distinct from prevailing party status in the litigation" as a whole. See also Pet. i. That is incorrect. Neither court below held that petitioner is not a "prevailing party" under EAJA. The district court concluded that petitioner was a "prevailing party," Pet. App. 19-22, before separately addressing the quantum of "reasonable" fees, *id.* at 26-31. The court of appeals likewise correctly recognized that the district court's "prevailing party" determination (*id.* at 4) was distinct from its "determin[ation of] what fee is 'reasonable,'" *id.* at 6 (quoting *Hensley*, 461 U.S. at 433). The court's analysis of the denial of fees for petitioner's appeal thus followed *Hensley*'s teachings about "what portion of the fees claimed" are properly compensable. *Id.* at 6-7.

Petitioner appears to focus on the court of appeals' quotation from *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472 (1990), which included the terms "prevail[]" and "prevailing party." Pet. App. 8 (citations omitted). But the court of appeals invoked *Lewis* only in response to *petitioner's* argument that it should obtain fees for its unsuccessful appeal in light of the principle that "prevailing party status requires a court ordered alteration in the legal relationship of the parties." Pet. C.A. Br. 15 (discussing the Court's prevailing-party analysis in

Buckhannon Bd. & Care Home, Inc. v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) (*Buckhannon*)). The court of appeals relied on *Lewis* to hold that the dismissal of petitioner's merits appeal on mootness grounds (over petitioner's opposition) was not a victory requiring fees. The court explained that petitioner "did not win the relief it sought" on appeal, and that the district court therefore had discretion to deny fees for litigating the appeal. Pet. App. 8 (rejecting petitioner's argument at Pet. C.A. Br. 15).

2. Petitioner contends (Pet. 12-15) that the court of appeals erroneously treated petitioner's broader claims as "unrelated" to its notice-and-comment challenge to the 2008 STEM extension rule, Pet. 14. Petitioner asserts (*ibid.*) that the court of appeals held that "claims are unrelated if they can produce different outcomes." Petitioner again misreads the court of appeals' decision.

The court of appeals faithfully applied this Court's guidance in *Hensley*. As explained above, this Court distinguished between cases in which the plaintiff's unsuccessful claims are wholly "unrelated to the claims on which he succeeded," *Hensley*, 461 U.S. at 434-435, and those in which the successful and unsuccessful claims are related, *id.* at 435-437. The court of appeals followed the latter portion of *Hensley*, explaining that a district court may properly deny fees for "interrelated" but unsuccessful claims by "identify[ing] specific hours that should be eliminated," as the district court did here. Pet. App. 7 (quoting *Hensley*, 461 U.S. at 436).

Petitioner highlights (Pet. 14) the court of appeals' statement that petitioner had obtained an outcome "far more limited than if the [district court] had accepted [petitioner's] overarching claim" that DHS lacked statutory authority to issue the OPT rules. Pet. App. 10.

Contrary to petitioner's assertion (Pet. 14), however, the court of appeals did not suggest that "claims are unrelated if they can produce different outcomes." Rather, the court correctly recognized that, although petitioner's successful and unsuccessful claims were *related*, petitioner had not obtained "excellent results" warranting a "fully compensatory fee," *Hensley*, 461 U.S. at 435, but instead had achieved only "partial or limited success," *id.* at 436.

The court of appeals correctly recognized that the broader, substantive APA claims on which petitioner did not prevail were not "merely alternative [legal] grounds" for the same outcome that petitioner's notice-and-comment claim ultimately produced. Pet. App. 9-10. A favorable judicial ruling on the broader claims would have wholly eliminated the OPT regulations and STEM extension. By contrast, although petitioner's notice-and-comment claim produced a district court order vacating the 17-month STEM extension, that order was stayed, and DHS ultimately adopted a 24-month extension after utilizing notice-and-comment procedures. There is consequently no sound basis for concluding that petitioner "obtained excellent results" warranting a "fully compensatory fee." *Hensley*, 461 U.S. at 435.

3. Petitioner describes (Pet. 16-18) the court of appeals as holding that district courts may "make *sua sponte* reductions to a fee request where the party has no opportunity to respond." Pet. 16. But petitioner did not argue on appeal that the district court had made *sua sponte* reductions to the fee award, and the court of appeals did not address whether a district court may do so. Rather, petitioner first raised this argument in a petition for rehearing after the court of appeals had issued its decision. Pet. C.A. Reh'g Pet. 14-15. The court

of appeals denied that petition with no member requesting a vote. See Pet. App. 88-90. This Court's "traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted).

In any event, petitioner does not identify the specific issues it believes were improperly considered. Citing Pet. App. 30-31, petitioner states only (Pet. 16) that the district court "raised four objections" *sua sponte*. At those pages, the district court explained that petitioner's fee award should be reduced in light of (1) petitioner's limited success, (2) insufficient "detail" in petitioner's billing records, and (3) "unjustifiably high" fee requests for work done by multiple attorneys who had engaged in "unnecessary duplication of efforts on many tasks." Pet. App. 30-31. That portion of the court's opinion responded to the government's argument that the fee award should be reduced (or denied outright) because, *inter alia*, (1) petitioner's "success, if any, was so limited" that much of petitioner's fee request was unwarranted, D. Ct. Doc. 62, at 13 & n.4 (June 24, 2016); see *id.* at 4, 14; (2) counsel's work was "not reasonably documented" in petitioner's fee request, which "failed to itemize [attorney time] in any remotely useful or reliable way," *id.* at 1, 13-14; see *id.* at 15 n.5; and (3) petitioner's request included "unreasonably billed work" by petitioner's "multiple attorneys," who had largely failed to identify the issues on which they had worked, *id.* at 1, 13-14. The record thus belies petitioner's suggestion that the district court raised those issues *sua sponte*.

4. Although the government did not appeal the district court's determination that petitioner was a "prevailing party," petitioner's failure to obtain meaningful judicial relief underscores that the larger award petitioner seeks would not be a "reasonable" attorney's fee. Petitioner obtained no practical relief from the district court before this case became moot. Although the district court ordered that the 17-month STEM extension rule be vacated, the court stayed its order until May 10, 2016. And by the time the stay expired, the 24-month STEM extension rule had already replaced its predecessor and thereby "neutralized the effect of vacatur." Pet. App. 20; see p. 4, *supra*.

At no time did the district court's vacatur order effect a "material alteration of the legal relationship of the parties" so as to render petitioner a prevailing party. See *Buckhannon*, 532 U.S. at 604 (citation omitted); cf. *Rhodes* v. *Stewart*, 488 U.S. 1, 4 (1988) (per curiam) (holding that declaratory judgment that was not in effect until after the time that it might have benefitted the plaintiffs did not confer prevailing-party status). And after utilizing notice-and-comment procedures during the pendency of the district court's stay, DHS ultimately adopted new regulations that *lengthened* (to 24 months) the STEM extension that petitioner had sought to eliminate. See p. 4, *supra*. The court of appeals then vacated the district court's merits judgment in its entirety, and the district court entered a new final judgment *in the government's favor*. See p. 5, *supra*. That is not the stuff of which victories are made.

If petitioner prevails in its separate suit challenging the OPT rules, cf. p. 5 n.1, *supra* (noting the dismissal of petitioner's renewed claims), petitioner may seek at-

torney's fees for that litigation. But in light of petitioner's very limited (and transitory) success in the present action, the district court did not abuse its discretion by awarding fees in an amount much smaller than petitioner had requested.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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