No. 18-1509

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
PETITIONERS

v.

RAHINAH IBRAHIM

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

REPLY BRIEF FOR THE PETITIONERS (REDACTED FOR PUBLIC FILING)

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After presiding over this litigation for eight years, the district court correctly found that neither the government nor the attorneys who defended the constitutionality of various terrorism and related watchlists had acted in bad faith. A unanimous panel of the Ninth Circuit affirmed. The en banc court nevertheless vacated that finding based on a series of incorrect assertions about the record and the law. Respondent characterizes this case as a run-of-mill dispute about the application of an accepted legal standard to unusual facts. Whether that was true before the en banc court's decision, it is not now. The en banc court described common and salutary litigation practices as illegitimate, made unfounded suggestions about the subjective intentions of attorneys who were never before it, and purported to identify a legal error in the district court's approach, which was, in fact, required by a recent decision of this

Court. The decision is profoundly wrong. The government respectfully suggests it warrants summary reversal. At a minimum, it warrants this Court's plenary review.

A. The Ninth Circuit's Decision Is Wrong

Although the en banc court recited the clearly erroneous standard, its application of that standard bears no resemblance to the approach that the Federal Rules require. Under Federal Rule of Civil Procedure 52(a), a court of appeals is supposed to ask only whether "the district court's account of the evidence is plausible in light of the record viewed in its entirety," not whether it "would have weighed the evidence differently" if it had been the trier of fact. *Anderson* v. *City of Bessemer*, 470 U.S. 654, 573-574 (1985). Yet the Ninth Circuit repeatedly substituted its own weighing of the evidence for the district court's, rejected the district court's reasonable conclusions, and scoured the record for evidence that (in its view) would "support[] a bad faith finding." Pet. App. 67a. The result cannot withstand even minimal scrutiny.

1. In the petition, the government focuses on three of the most egregious and consequential examples of the en banc court's flawed approach. Pet. 22-27. Respondent hardly defends those errors, and what she offers (at 24-25, 26) falls woefully short.

a. First is the en banc court's assertion that the government "knowingly pursued" a "baseless" argument when it contended that respondent lacked Article III standing to request removal from the No Fly List and other governmental watchlists based on alleged interference with her ability to travel. Pet. App. 65a-66a. The court of appeals initially concluded that respondent had standing at the motion-to-dismiss stage based on

the alleged "presence of her name on the No-Fly List." 669 F.3d 983, 993. Respondent contends (at 2, 25) that the earlier decision thereby "conclusive[ly]" established her standing and was "law of the case." But that is obviously wrong. The "[d]enial of [a] motion to dismiss on standing grounds does not preclude later consideration on summary judgment or indeed at trial." *In re The Bennett Funding Grp., Inc.*, 336 F.3d 94, 102 (2d Cir. 2003); see *Jackson* v. *Okaloosa County*, 21 F.3d 1531, 1536 n.5, 1541 (11th Cir. 1994). Because plaintiffs "must demonstrate standing for each stage of litigation" based on the then-existing record and applicable burden of proof, "the law-of-the-case doctrine does not apply." *United States* v. *$31,000.00 in U.S. Currency*, 774 Fed. Appx. 288, 293 (6th Cir. 2019); see *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Respondent could not rest her standing on mere allegations, particularly after it became clear that they were incorrect. And the district court's finding of no bad faith in the government's efforts to hold respondent to her burden is correct—and clearly plausible.

b. Second, the en banc court suggested that the government "falsely represented" that it would not use evidence protected by the state-secrets privilege. Pet. App. 66a. Respondent does not dispute (at 24-25) that in all of its interactions with the district court the government accurately described the governing law on the privilege. See *Mohamed* v. *Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc), cert. denied, 563 U.S. 1002 (2011). She nevertheless repeats the Ninth Circuit's assertion that the government misled the district court when the government stated it would not "rely on any information [it] ha[d] withheld on

grounds of privilege." Pet. App. 66a n.35. The government's statement, however, was legally and factually correct.

When the government argued in the alternative on summary judgment that this litigation should not proceed, it did so precisely because the government could *not* rely on the excluded evidence to make out a valid defense. That argument was sound, as respondent concedes (at 24). See *Jeppesen*, 614 F.3d at 1082-1083 (explaining that, after the evidence is "removed from the case," the court must decide "whether it is feasible for the litigation to proceed without [it]") (citation omitted). The government's argument was based on the *unavailability* of the privileged evidence to both sides, not on the evidence itself. *Ibid.* In such circumstances, neither party "prevail[s]." Br. in Opp. 24 (quoting Pet. App. 174a). The claims are simply "unadjudicable," such that "neither party can obtain judicial relief" and both are left "where they stood when they knocked on the courthouse door." *General Dynamics Corp.* v. *United States*, 563 U.S. 478, 486-488 (2011).

The government's request for that disposition was not a "late-breaking reversal." Br. in Opp. 25. When the government first invoked the state-secrets privilege, it forthrightly stated that, under *Jeppesen*, the exclusion of state-secrets evidence can "lead to dismissal of the case," including if the government could not "present a defense * * * without any use of the" privileged information or "if the chance of disclosure of the privileged information simply becomes too high." 4/18/13 Tr. 17-18. [redacted]

[redacted][1] The district court correctly (and certainly plausibly) found no bad faith in the government's request.

c. Third, the court of appeals suggested that the government "obstructed" respondent's daughter "from appearing at trial." Pet. App. 63a. As the district court found in its final judgment, upon Customs and Border Protection's discovering the possible error in the daughter's records, the error was promptly investigated, the government's records were corrected, "[t]he request for additional screening was rescinded," and the government asked "that [respondent's daughter] be allowed to board without delay" (with several more days of trial remaining). *Id.* at 204a-205a. Like the Ninth Circuit, respondent ignores those findings. She likewise fails to acknowledge that, after the trial concluded, the district court gave her "the option to reopen the trial to permit the daughter to appear," and *she* "chose not to do [so]." *Id.* at 177a. In light of those facts, the district court's finding of no bad-faith obstruction is not only plausible, but unassailable.

2. Rather than seriously defend these errors, respondent focuses her arguments on other aspects of the en banc court's decision. See Br. in Opp. 19-24. But even if the rest of the court's analysis were flawless, its "guidance," *id.* at 24, on arguments concerning the court's jurisdiction and the state-secrets privilege

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[1] These pleadings were filed with the district court under seal and provided to respondent's counsel during the underlying litigation pursuant to a protective order. See D. Ct. Docs. 438 (Mar. 15, 2013), 454 (Apr. 4, 2013). The government is pursuing efforts to make redacted versions available on the district court's public docket. At the Court's request, the government can lodge unredacted versions with this Court under seal.

would warrant review. See pp. 9-12, *infra*. In any event, the rest of the court's opinion is also deeply flawed. See Pet. 28-29.

Respondent calls (at 23) "[m]ost important[]" the en banc court's assertion that the district court did not consider the government's failure to offer a "reasonable explanation" for her placement on other watchlists. Pet. App. 65a. But as the district court noted, the reasons for those designations are protected by the state-secrets privilege. *Id.* at 196a. Indeed, the court of appeals acknowledged as much, even as it criticized the government for not stating them. *Id.* at 65a. After the government invoked the privilege to protect that information, it was not permitted to offer those reasons in defense of respondent's designations. See p. 4, *supra*. The district court thus appropriately declined to consider them, and the court of appeals' criticism was wholly unwarranted.

Respondent also repeats (at 23) the court of appeals' assertion that the government failed to remedy the No-Fly-List error until ordered to do so. But respondent acknowledges (at 25-26) that the government *did* correct the erroneous listing within a day of its discovery. Respondent complains about her subsequent visa denials and her other watchlist placements, suggesting they might have been "[]affected by the original wrong." Br. in Opp. 26 (citation omitted). But the visa denials were not caused by the erroneous placement, as the district court found. Pet. App. 214a. And the district court rightly declined to order the removal of respondent's name from other lists and databases, in a decision that respondent did not appeal. *Id.* at 196a, 211a.

Respondent contends (at 23) that the district court should have placed more weight on what she asserts was

the government's "dragg[ing] its feet" in producing certain privileged evidence to her attorneys. The en banc court stated that the government refused to produce the information because it wanted to "renegotiate an already-in-place protective order." Pet. App. 68a. But there was no protective order in place, because the court of appeals had previously vacated the outstanding discovery orders, including the previous protective order. 10-15342 C.A. Doc. 31 (Dec. 17, 2010); see 10/11/12 Tr. 6. Once the district court entered an interim protective order, D. Ct. Doc. 416, at 3 (Feb. 19, 2013), the government began producing the information within 48 hours, see D. Ct. Doc. 417, at 1 (Feb. 20, 2013).

3. Finally, respondent argues (at 19-22) that the en banc court identified a legal error in the manner the district court considered her allegations of bad faith. The district court carefully considered and correctly rejected every allegation respondent made—first in the court's principal order on fees, Pet. App. 160a-161a, and then in response to *two* different requests to reconsider its findings, 2014 WL 12641572, at *1-*2; 2014 WL 4219558, at *3-*5. But respondent asserts (at 19) that the court violated "longstanding Ninth Circuit precedent" by considering each allegation "in isolation, rather than considering conduct against the totality of the circumstances." All of respondent's accusations of bad-faith were individually meritless, and they did not gain strength in numbers. In any event, this Court's recent decision in *Goodyear Tire & Rubber Co.* v. *Haeger*, 137 S. Ct. 1178 (2017)—issued after the Ninth Circuit precedent respondent cites—makes clear that the district court's approach was not only permissible, but required.

In *Goodyear*, the Court explained that bad-faith attorney fees "must be compensatory rather than punitive in nature," and thus must be limited to fees incurred "because of" the particular misconduct at issue. 137 S. Ct. at 1186. "The court's fundamental job is to determine whether a given legal fee—say, for taking a deposition or drafting a motion—would or would not have been incurred in the absence of the sanctioned conduct." *Id.* at 1187. And the only way to determine if any of respondent's attorney fees were caused by bad-faith conduct is to determine whether any particular actions were taken in bad faith. That is precisely what the district court did.

To be sure, in *Goodyear*, the Court recognized that in "exceptional cases," the but-for standard might allow a district court to shift all of a party's attorney fees "from either the start or some midpoint of a suit" if "literally everything the defendant did * * * was 'part of a sordid scheme' to defeat a valid claim." 137 S. Ct. at 1187-1188 (citation omitted). But that plainly does not apply here. Contrary to respondent's repeated assertions (at 4, 20, 21, 25-26, 32), not once in this litigation has the government *ever* defended respondent's inadvertent placement on the No Fly list. The "decade of contentious litigation" about which she complains, Br. in Opp. 20, first involved threshold jurisdictional issues and the constitutional rights of aliens outside the country, Pet. 5-8, and thereafter focused largely on the government's *successful* defense against respondent's attempts to obtain national security information, challenges to her visa denials, allegations of religious animus, and attacks on her other watchlist designations, Pet. 8-12.

As for the No Fly List, the government merely disputed respondent's then-unprecedented claim that the government's response to the mistake violated the Constitution. See Pet. App. 80a (Callahan, J., dissenting in part). Although the district court ultimately granted limited relief on that claim, respondent cannot plausibly assert that, at any point, the government's defense of this case, "as a comprehensive whole," "lost all merit." Br. in Opp. 20-21.

B. The Ninth Circuit's Decision Warrants This Court's Review

This Court's intervention is warranted. Respondent downplays the importance of the case now without even acknowledging her previous assertion that the bad-faith question "raise[d] an issue of exceptional importance" warranting en banc consideration. Resp. C.A. Pet. for Reh'g En Banc 13. The importance of this case was not then diminished by the en banc court's broad and erroneous assertions about the government's ability to protect state secrets and to hold a plaintiff to her burden to prove her standing, or the court's needless and unfounded suggestion of ethically questionable behavior on the part of the government attorneys involved.

1. Respondent's assurance (at 28) that the decision "merely held" that the government's legitimate litigation practices "*may* be evidence of bad faith" is little comfort. Even the *potential* for a bad-faith finding casts an ominous shadow over the ubiquitous and (until now) accepted practice of challenging standing at multiple stages of proceedings. The same is true for state secrets, where the *potential* for a bad-faith finding sows confusion and unpredictability for cases involving national security and the government's foreign intelli-

gence secrets. That looming threat from an en banc decision is, if anything, more troubling if the government cannot determine, at the time it has an obligation to assert those arguments, whether they ultimately will be found acceptable or sanctionable.

2. It makes no difference that the Ninth Circuit recited the same standard of review as other courts. See Br. in Opp. 16-19. The en banc court's decision warrants this Court's review because it is flatly inconsistent with *this Court's* prior decisions and a stark departure from "the accepted and usual course of judicial proceedings," Sup. Ct. R. 10. In any event, the en banc court's application of the clearly erroneous standard does conflict with the application of that standard by its sister circuits. Pet. 31-32. That respondent identifies (at 18) only one instance in which another court of appeals reversed a district court's finding of no bad faith only proves the point. See *Gate Guard Servs., L.P.* v. *Perez*, 792 F.3d 554 (5th Cir. 2015). In that case, the court of appeals found that the government literally "destroyed evidence" and persisted in an enforcement action seeking a $6-million penalty based on a "frivolous" legal theory in the face of "'overwhelming contradictory evidence.'" *Id.* at 555, 563 (citation omitted). That is a far cry from the government's largely successful defense against respondent's novel claims here. The fact that other courts of appeals "touch on bad faith only in passing," Br. in Opp. 17, rather than devote pages of an en banc opinion flyspecking the district court's work, is exactly the point. "[T]he district court's superior understanding of the litigation" should have led the Ninth Circuit to

adopt a similar approach here. *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983).[2]

The fact that the en banc court purported to apply the correct legal standard also should not shield from review its unwarranted suggestion of "ethically questionable" behavior by career government attorneys. Pet. App. 42a n.20. This Court has summarily reversed similar errors, even though the Ninth Circuit recited the proper standard before badly misapplying it. See, *e.g.*, *Hughes* v. *Kisela*, 841 F.3d 1081, 1088 (9th Cir. 2016) (acknowledging that for qualified immunity "existing precedent must have placed the ... constitutional question beyond debate") (citations omitted), summ. rev'd, 138 S. Ct. 1148 (2018) (per curiam).

3. Finally, the en banc court's decision should not evade review because it remanded to the district court to reconsider its findings in light of the decision. If the government's alleged bad faith is to be reconsidered, it should be free of that court's misguided analysis and suggestions about the government's "knowing[]" and "reckless[]" behavior. Pet. App. 65a, 66a.[3] And regardless of the outcome of this particular case, the court's deeply flawed analyses, if left uncorrected, will threaten

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[2] In the two other out-of-circuit decisions on which respondent relies (at 18), the courts *reversed* bad-faith rulings against the government, not because they simply disagreed with the district court's assessment of the record, but because the district courts had failed to make a clear finding of subjective ill will. See *Griffin Indus., Inc.* v. *EPA*, 640 F.3d 682, 688 (6th Cir. 2011); *FDIC* v. *Schuchmann*, 319 F.3d 1247, 1253 (10th Cir. 2003).

[3] The same is true of the consideration of respondent's application for approximately $730,000 in additional fees—including bad-faith fees—for the fee appeal. C.A. Doc. 106 (Feb. 25, 2019); see C.A. Doc. 112 (Mar. 29, 2019) (referring respondent's application to the Appellate Commissioner to determine the amount of such fees).

other government litigation in the Ninth Circuit until this Court intervenes.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted. The Court should either summarily reverse the court of appeals' decision on bad faith or set the case for plenary review.

Respectfully submitted.

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