No. 23-1269

In the Supreme Court of the United States

SUZY MARTIN,
PETITIONER,

v.

SUSAN HALING, ET AL.,
RESPONDENTS.

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

REPLY BRIEF FOR PETITIONER

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Respondents (at 10-11) acknowledge that the courts of appeals have reached "different outcomes" on stigma-plus claims involving debarment of government contractors, but they insist those outcomes merely "reflect differences in the facts, … not in the legal rule applied." That account is not credible. The circuits reach diametrically different results because they apply diametrically different legal standards. In six circuits, government contractors have a due-process claim when the government banishes them from future contracts, even if they can find work elsewhere. But in four circuits, including the Seventh Circuit below, debarment alone is not enough;

plaintiffs must show that it is "virtually impossible" for them to work in their profession.

That split was outcome determinative in this case: Petitioner Suzy Martin was accused of fraud in a government report she never had an opportunity to contest. As a result, petitioner was categorically barred from future employment by multiple Chicago and Illinois government agencies, losing out on millions of dollars of potential contract revenue. Those allegations would state a claim in six circuits. But because petitioner managed to save her business by investing hundreds of thousands of dollars to expand to places like Texas and Louisiana, the Seventh Circuit foreclosed her claim. This issue cries out for review given the enormous size and importance of the trillion-dollar government-contracting industry. The minority circuits' rule lets governments malign small-business owners like petitioner Suzy Martin with effectively no recourse, so long as the government's ban does not *entirely* destroy the plaintiff's business. No precedent of this Court endorses that perverse result.

I. The Question Presented Deeply Splits the Circuits

1. Six circuits hold that debarment alone implicates a protected liberty interest. Pet. 12-17. In those circuits, state action that "formally or automatically excludes" plaintiffs "from work on some category of future State contracts or from other government employment opportunities" supports a due-process claim. *Kartseva v. Dep't of State*, 37 F.3d 1524, 1528 (D.C. Cir. 1994). A debarment like the one petitioner experienced qualifies *per se*.

Respondents (at 13-16) insist that plaintiffs prevail in the majority circuits only because they "were effectively foreclosed from obtaining other business." But the majority rule does not demand effective foreclosure.

Instead, those courts consistently hold that the debarment on its own suffices. For example, the D.C. Circuit permits suit when "the government's adverse action 'formally or automatically excludes' her from *some* category of work, *such as with debarment*." *Campbell v. District of Columbia*, 894 F.3d 281, 289 (D.C. Cir. 2018) (emphasis added) (quoting *Kartseva*, 37 F.3d at 1528). The Sixth Circuit's rule is the same: "One who has been dealing with the government … may not be blacklisted, *whether by suspension or debarment*, without being afforded procedural safeguards." *Transco Sec., Inc. v. Freeman*, 639 F.2d 318, 321 (6th Cir. 1981) (emphasis added); *see also Jones v. McNeese*, 746 F.3d 887, 898-99 (8th Cir. 2014); *ATL, Inc. v. United States*, 736 F.2d 677, 683 (Fed. Cir. 1984); *Phillips v. Vandygriff*, 711 F.2d 1217, 1223 (5th Cir. 1983).

Respondents cherry-pick quotes to suggest that even the majority circuits require that government action must "foreclose[] [the plaintiff's] future employment opportunities." BIO 11-12 (citing *Jones*, 746 F.3d at 898; *Valmonte v. Bane*, 18 F.3d 992, 999 (2d Cir. 1994); *Old Dominion Dairy Prods., Inc. v. Sec'y of Def.*, 631 F.2d 953, 964 (D.C. Cir. 1980)). But each of the cases respondents list makes clear that debarment alone suffices. *See Jones*, 746 F.3d at 898-99 (impairment of "tangible interests such as employment" qualified (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)); *Valmonte*, 18 F.3d at 1001 ("statutory impediment to … being hired in the future" is enough); *Old Dominion*, 631 F.2d at 963-64 (enough that contractor was "denied the renewal of the … contract solely on the basis … that [it] 'lacked integrity'").

Respondents (at 17-18) also suggest two cases disprove the majority rule. They don't. *Trifax Corp. v. District of Columbia*, *confirmed* that "debarring a corporation from government contract bidding constitutes a

deprivation of liberty." 341 F.3d 641, 643 (D.C. Cir. 2003) (citing *Old Dominion*, 631 F.2d at 961-62). There simply was no debarment present on "the facts of th[at] case" because the record showed the plaintiff had "won some and lost some" in bidding for contracts. *Id.* at 644. Similarly, the plaintiff in *Med Corp. v. City of Lima* failed to demonstrate that the government's one-week suspension (which was never disclosed publicly) "would impair future business opportunities." 296 F.3d 404, 413-14 (6th Cir. 2002). Nothing in the decision undermines the Sixth Circuit's rule that debarments that do impair a plaintiff's business—like the debarment here—implicates "the bidder's liberty interest." *Transco*, 639 F.2d at 321.

2. Led by the Seventh Circuit, a minority of circuits hold that debarment alone is not enough. Plaintiffs in the Seventh Circuit "face[] a high hurdle" because they must "demonstrate" that the state action has "made it '*virtually impossible* … to find … employment' within [their] occupation." *Biggs v. Chi. Bd. of Edu.*, 82 F.4th 554, 560 (7th Cir. 2023) (citation omitted); *accord Townsend v. Vallas*, 256 F.3d 661, 670 (7th Cir. 2001).[1]

The Ninth and Tenth Circuits impose the same sky-high standard. In the Ninth Circuit, "stigmatizing statements do not deprive a worker of liberty unless they effectively bar her from *all* employment in her field." *Blantz v. Cal. Dep't of Corr. & Rehab.*, 727 F.3d 917, 925

[1] *Larry v. Lawler*, 605 F.2d 954 (7th Cir. 1978) and *Doe v. Purdue University*, 928 F.3d 652 (7th Cir. 2019) (cited BIO 15) are not to the contrary. *Larry* announced no rule for debarment claims, simply holding that a three-year debarment sufficed. 605 F.2d at 958-59. The "virtually impossible" rule came later. *See* Pet. 26. *Doe* reiterated the "virtually impossible" standard but found it met because the university's actions "foreclosed the possibility" of the plaintiff joining the Navy. 928 F.3d at 663.

(9th Cir. 2013). And the Tenth Circuit requires the plaintiff to show "more harm to its business than the mere fact that it" could no longer fulfill government contracts; that court declines "to find a liberty interest when the plaintiff is denied government business but can still engage in private business." *Martin Marietta Materials, Inc. v. Kan. Dep't of Transp.*, 810 F.3d 1161, 1186 (10th Cir. 2016); *see* Pet. 17-20.

Respondents (at 9) argue that the minority "virtually impossible" formulation is not "an additional requirement," but instead "hew[s] to" this Court's decision in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). Respondents misread *Roth*. *See infra* pp. 10-11. In any event, whether *Roth* requires the minority circuits' "virtually impossible" standard, or the lower, "debarment alone" standard applied by the majority circuits, is precisely the circuit split petitioner asks this Court to address. Respondents cannot sweep that conflict under the rug simply by claiming (incorrectly) they are right on the merits.

The Seventh Circuit has explicitly acknowledged the split. As Judge Posner explained, "the D.C. Circuit believes, barring a government contractor from doing business with the government … would be a deprivation of occupational liberty." *Chi. United Indus., Ltd. v. City of Chicago*, 669 F.3d 847, 850 (7th Cir. 2012). That is not the rule in the Seventh Circuit. Respondents (at 19-20) try to minimize Judge Posner's statement, noting that he also expressed uncertainty about whether corporations could bring occupational liberty claims. But that uncertainty was beside the point; the stigma-plus claims Judge Posner discussed, like the one here, were brought by individuals—not corporations. *Id.* at 851.

3. The clear split is outcome determinative. As commentators have recognized, the "narrow judicial

interpretation[]" adopted by the Seventh Circuit "ha[s] rendered [it] exceedingly difficult" to prevail on a stigma-plus claim. Kelsey Stein, Note, *Dangers of the Digital Stockade: Modernizing Constitutional Protection for Individuals Subjected to State-Imposed Reputational Harm on Social Media*, 87 Geo. Wash. L. Rev. 996, 1007 (2019).

Respondents (at 20) suggest that "when confronted with similar facts, the lower courts reach consistent results." They do not. Compare petitioner's case to *ATL, Inc. v. United States*, 736 F.2d 677 (Fed. Cir. 1984). ATL was a small business operating "almost entirely" in Oahu, with about 85% of its work for the Navy. *ATL, Inc. v. United States*, 3 Cl. Ct. 259, 260-61 (Cl. Ct. 1983). ATL alleged a suspension based on fraud charges. 736 F.2d at 680-83. The Federal Circuit confirmed that allegation implicated ATL's liberty interest. *Id.* at 683. It was irrelevant whether ATL could obtain private-sector work, work on another island, or even work on other government contracts.

Petitioner presented practically the same case. Like ATL, she did most of her work in one location (Chicago), and the shadow debarment banished her from about 80% of her business. Pet. App. 20a. That would have sufficed in the Federal Circuit, but it did not in the Seventh Circuit because of its rigid virtually-impossible standard. *See* Pet. App. 8a-9a. That is the circuit split in action.

The split drives disparate outcomes in district courts, too. Take *Roe v. United States*, 2024 WL 925556 (W.D. Tex. Mar. 4, 2024). There, an artificial-intelligence specialist alleged shadow debarment. *Id.* at *1-2. The district court relied on Fifth and D.C. Circuit precedent to hold that the debarment implicated a protected liberty interest. *Id.* at *4-5. Dr. Roe's artificial-intelligence skills are massively marketable, so there is no chance he could have

made a "virtually impossible" claim in the Seventh Circuit. But Dr. Roe was in the Fifth Circuit, so debarment was enough. *Id.*

Or consider Judge Boasberg's opinion in *Lea v. District of Columbia*, 2022 WL 3153828 (D.D.C. Aug. 8, 2022). There, Lea alleged that the District deemed her "not suitable"—an official "scarlet letter" that barred her from being hired as a D.C. government lawyer. *Id.* at *1-2. Judge Boasberg held the allegation that Lea was "automatically … unsuitable" stated a stigma-plus claim. *Id.* at *6. Unlike in the Seventh Circuit, there was no need to consider whether Lea could find private sector work or even government work outside D.C.

II. The Question Presented Is Critically Important and Cleanly Presented

1. Whether government contractors must prove that a debarment has made it virtually impossible to work in their chosen field is not an "inherently fact-dependent" question. *Contra* BIO 26. It is a critically important *legal* question that has divided the lower courts. The stakes of that divide are enormous. Commentators recognize that "debarment can be economically devastating—a 'death sentence' for contractors." John Pachter et al., *US Debarment: An Introduction*, *in* Cambridge Handbook of Compliance 288, 288 (Benjamin van Rooij & D. Daniel Sokol eds., 2021). But because respondents' actions left petitioner's business only mostly dead, the Seventh Circuit rejected her suit. Whether a contractor has a remedy for an erroneous exercise of a massive government power should not depend on the happenstance of where the contractor lives and works.

Nor is there any merit to respondents' assertion (at 26) that "a settled legal standard" applies because all circuits look to "what opportunities … have been

foreclosed." As explained, there is no settled legal standard. The majority approach does not require the foreclosure evaluation—a key facet of the split.

Respondents (at 26) claim that the question presented arises infrequently. The volume of cases in the circuit split belies that assertion. That stigma-plus claims recur is unsurprising given the enormous size of the government-contracting industry. In 2023 alone, the federal government alone spent over $750 billion on contractors. GAO, *A Snapshot: Government-Wide Contracting* (2023 Update), https://tinyurl.com/mvt4p5j4. And the question presented goes well beyond the federal government to the untold millions of contractors serving every State, county, city, and Tribe in America.

Respondents (at 25-26) claim that a decision from this Court "is unlikely to yield a generally applicable rule." Petitioner has more confidence in the Court's abilities. Regardless, the answer to the question presented is effectively binary: either government contractors must prove that the government has made it virtually impossible to obtain other work (respondents' view), or they don't (petitioner's view). The Court can easily resolve that outcome-determinative question and leave it to the lower courts to apply the legal standard in future cases.

The right petitioner seeks to vindicate is deeply rooted in the Constitution itself. *See, e.g.*, William Baude et al., *General Law and the Fourteenth Amendment*, 76 Stan. L. Rev. 1185, 1235 (2024) (recognizing Fourteenth Amendment protection of "the right to contract or to engage in work"). Yet "since *Davis*, courts have grappled with the stigma-plus test, trying to formulate clear rules for what qualifies as a protected interest under the doctrine." Linnet Davis-Stermitz, Comment, *Stigma Plus Whom? Evaluating Causation in Multiple-Actor Stigma-Plus Claims*, 84 U. Chi. L. Rev. 1883, 1900 (2017).

Only this Court's intervention can create the kind of clear rule the lower courts have struggled to provide.

2. This case provides an ideal vehicle to resolve the question presented. Respondents (at 27) concede the Seventh Circuit "affirmed the dismissal of [petitioner's] complaint because she did not allege that she was unable to continue working in her chosen occupation." In other words, the Seventh Circuit affirmed because it required petitioner to allege that she was unable to work in elevator repair generally. As explained, petitioners' debarment from *government* employment would suffice in six circuits. *Supra* pp. 2-4.

Echoing Judge Easterbrook's concurrence, Respondents (at 27) suggest petitioner's case is a "poor vehicle" because the OIEG "report did not debar [petitioner] from anything." But the OIEG report's formal weight was neither necessary to petitioner's legal theory nor part of the holding below. Pet. App. 8a-9a. Petitioner alleged that the OIEG report snowballed into a series of suspensions and shadow debarments. Pet. App. 16a-19a. The majority credited that allegation when it acknowledged that petitioner "is effectively barred from contracting with certain State and City entities." Pet. App. 8a. But accepting that premise, the majority held petitioner would still fail to state a stigma-plus claim because "she can still pursue other avenues of public employment," "expand[] her … private client base," and "provid[e] services out of state." Pet. App. 8a-9a. It could reach that conclusion only because the Seventh Circuit applied its "virtually impossible" legal standard. *See* Pet. App. 8a.

In any event, Judge Easterbrook's opinion was a concurrence for a reason—the majority did not adopt his rationale. Any "alternative arguments," *Brownback v. King*, 592 U.S. 209, 215 n.4 (2021), can be addressed on

remand, consistent with this Court's role as "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

III. The Decision Below Is Wrong

The Seventh Circuit misinterpreted this Court's precedents, giving cities, counties, states, and federal agencies alike free rein to enact debarments without procedural protections. *See* Pet. 21-28.

Respondents defend that result by arguing that, under *Roth*, a stigma-plus claim may only proceed when the plaintiff shows that the "government imposed a stigma that foreclosed … future employment in her profession." BIO 10-11 (citing 408 U.S. at 573-75). *Roth* says no such thing. To the contrary, the Court recognized two ways to trigger a protected liberty interest. The first theory turns on being precluded from a "field of opportunity." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 185 (1951) (Jackson, J., concurring). Respondents think this is the "only" way to proceed. But the Court also recognized another theory: job nonrenewal based on a charge of "dishonesty, or immorality" implicates liberty because "a person's good name … [would be] at stake because of what the government is doing to him." *Roth*, 408 U.S. at 573 (citation omitted). Debarment is just as stigmatizing as a charge of "dishonesty." That is why the majority of circuits hold debarment implicates a protected liberty interest *per se*, even if it does not completely foreclose a person from pursuing her chosen career. Pet. 12-17.

True, the Court has since made clear that reputational damage alone does not suffice. *Paul v. Davis*, 424 U.S. 693, 710-12 (1976); Pet. 23. But it is equally clear that a change in legal status accompanying the stigmatizing

conduct *is* sufficient, for example, losing the "right to purchase or obtain liquor in common with the rest of the citizenry." *Paul*, 424 U.S. at 708-09. Petitioner's allegations easily clear that hurdle. One major university "decided to bar her and [her company] from any [university] work," "imposing … a 'shadow debarment.'" Pet. App. 17a. She has been deemed "non-responsible" by the Chicago Housing Authority, which cancelled her existing contracts and deemed her "ineligible to enter into new contracts." Pet. App. 18a. And she is "currently treated as ineligible to perform work" for the Chicago Public Schools. Pet. App. 19a.

Petitioner's allegations also set her apart from the unsuccessful plaintiffs in *Paul* and *Siegert v. Gilley*, 500 U.S. 226 (1991). In *Paul*, the alleged shoplifter's legal status did not change. 424 U.S. at 712. And in *Siegert*, the plaintiff voluntarily resigned, meaning he, not the government, caused the change legal status. 500 U.S. at 234. Here, by contrast, petitioner alleges that her liberty was infringed when she was blacklisted, set aside from the bidding market "in common with the rest of the citizenry." *See Paul*, 424 U.S. at 708-09. That is all this Court's precedents require.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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