No. ________

In the Supreme Court of the United States

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

Applicants,

v.

JULIE A. SU,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, applicants Bowers + Kubota Consulting, Inc.; Brian J. Bowers; and Dexter C. Kubota respectfully request a 60-day extension of time, to and including June 6, 2024, within which to file a petition for a writ of certiorari to review the judgment of the Ninth Circuit in this case. A divided panel of the Ninth Circuit issued an initial opinion on October 25, 2023, and an amended opinion on January 8, 2024. Also on January 8, 2024, the court of appeals denied a timely-filed petition for rehearing, with one judge voting to rehear the case *en banc*.

Without extension, the time to file a petition for a writ of certiorari in this case will expire on April 7, 2024. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). The Ninth Circuit's order denying rehearing *en banc* and amended opinion appear in a single document, which is attached.

1. This case concerns the Equal Access to Justice Act (EAJA), which was enacted "to curb abusive and costly lawsuits involving the federal government." Slip op. 5. The EAJA authorizes a party who prevails in litigation against a federal agency to seek attorneys' fees and costs if the agency's litigating position was not "substantially justified." 28 U.S.C. § 2412. The "substantially justified" standard has spawned extensive confusion and disagreement among the courts of appeals. This case presents a compelling opportunity to clarify the standard for all cases moving forward.

Underlying the EAJA question in this case are claims brought by the Department of Labor (DOL) against applicants in connection with the establishment of an employee stock ownership plan (ESOP) covered by the Employee Retirement Income Security Act (ERISA). In commencing the litigation, DOL's theory was that applicants Bowers and Kubota had sold their company, Bowers + Kubota Consulting, to the newly-formed ESOP above fair market value, violating ERISA. But as the Ninth Circuit recognized (slip op. 5), DOL's case was "shoddy" from the start. It hinged on the opinion of a single valuation expert, Steven Sherman, whose analysis was riddled with errors. The district court characterized these errors as clear and unreasonable and excluded Sherman's report and testimony from the record. Slip op. 8-9. What is more, Sherman's errors could have been avoided if "Sherman or the government's attorneys had [simply] interviewed B+K management about the company's finances," which they did not do. Slip op. 9.

After Sherman conceded his errors during the five-day bench trial, DOL's case "crumbled," and the district court entered judgment for applicants. Slip op. 9. The district court nonetheless denied EAJA fees, and a divided panel of the Ninth Circuit affirmed. The majority agreed that DOL "either knew or should have known about [the] error[s]" in the Sherman report at least "before trial because Appellants' experts pointed out" the relevant

mistakes during discovery. Slip op. 13. The majority also described the errors in the report as "plain" (*ibid.*), noting that the district court had characterized the report as containing "significant[] and unreasonabl[e]" mistakes (slip op. 9). But the majority concluded all the same that DOL could have "rationally believed that [the company's] valuation analysis was faulty, given that [it] predicted that profitability would balloon in a matter of a few months with no compelling explanation why." Slip op. 15.

As Judge Collins explained in dissent, the majority effectively relieved the government of its obligation to come forward with "substantial evidence" to support its theory of the case. The majority also failed to account for the fact that all of the evidence in the record uniformly refuted the government's case. Slip op. 21-26. As Judge Collins explained, the majority thus "replace[d] the statutory standard for when attorney's fees may be denied (*viz.*, when 'the position of the United States was substantially justified') with a standard that is much more forgiving to the Government (*viz.*, whether the United States *reasonably believed* that its position was substantially justified)," regardless of the evidence in the record. Slip op. 18-19. Describing "the majority's novel standard [as] inconsistent with the statute and precedent," Judge Collins would have reversed the district court. Slip op. 19. He also would have reheard the case *en banc*. Slip op. 5.

2. The decision below is wrong, and the petition will show that it warrants the Court's attention. The lower courts have adopted divergent interpretations of the EAJA's substantial justification standard. For instance, the Third Circuit requires the government to support its litigating position with "a solid and well-founded basis in truth for the facts alleged" in light of the record evidence, and "a solid and well-founded connection between the facts alleged and the legal theory advanced." *Taylor v. Heckler*, 835 F.2d 1037, 1042 (3d Cir. 1987). The panel majority's "reasonable belief as to substantial evidence"

standard conflicts with—and produces different results from—the Third Circuit's standard. In another example, the Fifth Circuit recently granted EAJA fees in *Nkenglefac v. Garland*, 64 F.4th 251 (5th Cir. 2023), because the government had based its litigating position on evidence not in the record. Although the government may reasonably have believed it was correct as a factual matter, that court reasoned the record actually before the court did not support that conclusion. The Fifth Circuit's EAJA standard thus also conflicts with the decision below.

The question is plainly important. Congress enacted the EAJA to "eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority." *Ardestani v. INS*, 502 U.S. 129, 138 (1991). Government agencies litigate against private parties routinely. Without the promise of EAJA fees, many of those private parties will settle without a fight rather than incurring the often crushing expense of litigating, even when the government's allegations are unsupported by evidence and factually unreasonable. This Court's guidance on the correct standard for granting EAJA fees is thus critically important as a bulwark against government abuse. This is particularly true in the ERISA context, where the protection of employee welfare benefits is at stake.

3. Against this background, the requested extension is warranted. Undersigned counsel was recently retained to prepare a petition in this case and has no prior familiarity with the facts or procedural history of the litigation. Additional time is therefore needed to review the record and conduct additional original research.

At the same time, undersigned counsel is engaged in several other matters with proximate due dates, including a supplemental merits brief due in the U.S. District Court for the District of Maryland on March 29; an oral argument scheduled in the Nebraska

Supreme Court on April 1, 2024; an oral argument scheduled in the Maryland Appellate Court on April 3, 2024; a summary judgment brief due in the Maryland Tax Court on April 5, 2024; and a brief in opposition to certiorari due in this Court on April 22, 2024. The need for additional time is made more pressing by personal international travel plans during the same period as the foregoing dates. The requested extension is thus necessary to ensure that undersigned counsel has adequate time to fully research and brief the issues for the Court's consideration.

For these reasons, the application for a 60-day extension of time, to and including June 6, 2024, within which to file a petition for a writ of certiorari in this case should be granted.

Respectfully submitted.

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