No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in vacating the district court's finding of no bad faith in the government's conduct in this novel litigation brought by a foreign national living outside the United States, asserting a due process right to challenge her presence on the No Fly List and other government lists and databases.

PARTIES TO THE PROCEEDING

Petitioners are Kevin K. McAleenan, Acting Secretary of the Department of Homeland Security; the Department of Homeland Security; Charles H. Kable, IV, Director of the Terrorist Screening Center; the Terrorist Screening Center; Christopher Wray, Director of the Federal Bureau of Investigation (FBI); Jay S. Tabb, Jr., Executive Assistant Director of the FBI's National Security Branch; the FBI; Michael R. Pompeo, Secretary of State; the Department of State; William P. Barr, Attorney General of the United States; Russell Travers, Director of the National Counterterrorism Center; the National Counterterrorism Center; and the United States of America.

Respondent is Rahinah Ibrahim.

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The Solicitor General, on behalf the Department of Homeland Security and other federal parties, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App. 1a-83a) is reported at 912 F.3d 1147. The panel opinion (App. 84a-115a) is reported at 835 F.3d 1048. The district court's order on the motion for attorney fees and expenses (App. 126a-168a) is not published in the Federal Supplement but is available at 2014 WL 1493561. The district court's order setting the amount of fees (App. 116a-125a) is not published in the Federal Supplement but is available at 2014 WL 5073582. The district

court's final judgment in the underlying litigation (App. 169a-224a) is reported at 62 F. Supp. 3d 909.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 2019. On March 25, 2019, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including May 2, 2019. On April 22, 2019, Justice Gorsuch further extended the time to and including May 31, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The pertinent statutory provision is reproduced in the appendix to this petition. App. 225a-229a.

STATEMENT

This case concerns an attorney fee award under the Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, Tit. II, 94 Stat. 2325, in long-running litigation over respondent's temporary, inadvertent placement on the No Fly List, and the court of appeals' vacatur of the district court's finding of no bad faith in connection with this litigation.

A. Statutory Background

Congress enacted EAJA to enable "certain prevailing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States" in appropriate cases. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 6 (1980). Two different provisions of EAJA authorize a district court to award attorney fees in a civil action against the United States. Section 2412(d) authorizes a court to award "reasonable attorney fees" to a "prevailing party other than the United States" if the "position of the United States" was not "substantially justified" and no special circumstances

would make an award unjust. 28 U.S.C. 2412(d)(1)(A) and (2)(A). The "position of the United States" includes both "the position taken by the United States in the civil action" and "the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. 2412(d)(2)(D). The government's position is substantially justified if it is "justified to a degree that could satisfy a reasonable person." *Commissioner, INS* v. *Jean*, 496 U.S. 154, 158 n.6 (1990) (citation omitted). In general, attorney fees awarded under Section 2412(d) "shall not be awarded in excess of $125 per hour." 28 U.S.C. 2412(d)(2)(A)(ii).

Section 2412(b) separately authorizes a court to award "reasonable fees and expenses of attorneys" to the "prevailing party in any civil action brought by or against the United States," unless "expressly prohibited by statute." 28 U.S.C. 2412(b). The United States may only be liable for fees and expenses under that section "to the same extent that any other party would be liable under the common law." *Ibid.* And under the common law "American Rule," a prevailing litigant may receive attorney fees only in "limited circumstances." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247, 257 (1975). As relevant here, one of those circumstances is "when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 45-46 (1991) (citation omitted). Section 2412(d)'s hourly-rate cap does not apply to fee awards under Section 2412(b).

B. The Underlying Litigation

1. Respondent is a citizen of Malaysia who, between 2001 to 2005, was enrolled in a Ph.D. program at Stanford University and was present in the United States on a student visa. App. 178a-179a. On January 2, 2005,

respondent attempted to fly from San Francisco to Hawaii for an academic conference, but was denied boarding and detained for two hours because she was on the No Fly List, a government watchlist used by the Transportation Security Administration (TSA) to prevent individuals from boarding an aircraft flying within, to, from, or over the United States. App. 182a-183a. Respondent was removed from the No Fly List and allowed to fly the next day. App. 183a, 191a. She was again permitted to fly after the three-day conference ended—first to Los Angeles and then to Kuala Lumpur, Malaysia. App. 183a.

Respondent's student visa was subsequently revoked because information had come to light that she might be inadmissible to the United States under 8 U.S.C. 1182(a)(3)(B) (2000 & Supp. IV 2004), which specifies various terrorism-related grounds of inadmissibility. App. 192a. Respondent learned of the visa revocation when she attempted to board a flight to the United States from Malaysia in March 2005 and was denied boarding because she did not have a valid visa. App. 183a. Although respondent subsequently filed multiple visa applications, each was denied under what was later disclosed to be 8 U.S.C. 1182(a)(3)(B)(i)(I) and (IX), which render inadmissible any alien who has, or "is the spouse or child of an alien" who has, "engaged in terrorist activity." See App. 196a-203a; D. Ct. Doc. 737-6. As a result, respondent has not returned to the United States since 2005. App. 184a.

Respondent filed the complaint in this case in January 2006 seeking the removal of her name from the No Fly List. In an amended complaint, respondent sought an injunction requiring the federal defendants to remove her name from the No Fly List and to "remedy

immediately" what she alleged were "Constitutional violations in the maintenance, management, and dissemination" of the list. First Am. Compl. 22.[1]

2. a. The district court dismissed respondent's injunctive requests, holding that because the No Fly List is an "order" of the TSA, 49 U.S.C. 46110(a) (2006) vested exclusive jurisdiction in the court of appeals to review respondent's claims concerning the list. 2006 WL 2374645, at *5-*8. A divided panel of the court of appeals reversed in part. 538 F.3d 1250 (*Ibrahim I*). The court reasoned that although the No Fly List was created by an order of the TSA, a different agency—the Terrorist Screening Center—was responsible for compiling the list of names, and therefore Section 46110(a) did not apply to respondent's challenge to her placement on the list (as distinguished from TSA's implementing policies and procedures). *Id.* at 1254-1256. The court noted that whether respondent had standing to assert such a claim was "highly fact-dependent," and it remanded to the district court to determine whether respondent could establish that she was "'realistically threatened' with concrete injury in the future." *Id.* at 1256 n.9 (citation omitted).

Judge N.R. Smith dissented. *Ibrahim I*, 538 F.3d at 1259-1261.

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[1] Respondent also asserted damages claims based on her placement on the list and the events of January 2, 2005. First Am. Compl. ¶¶ 52-126. The district court dismissed her damages claims against the federal defendants and the court of appeals affirmed. 538 F.3d 1250, 1257-1259 (*Ibrahim I*). Claims against state and private defendants were either dismissed and affirmed, or settled. *Ibid.*; 2009 WL 2246194, at *8-*12.

b. On remand, respondent filed a second amended complaint, alleging that the No Fly List "or any government screening list[] and the placement of [respondent] on such lists is unconstitutional." Second Am. Compl. ¶ 124. She alleged that her placement on the No Fly List and the subsequent "failure to remove her name" violated her rights under the First and Fifth Amendments. *Id.* at 25; see *id.* ¶¶ 122-129. She sought an injunction requiring the removal of her name from the No Fly List "and from any other related database maintained or accessed by other federal agencies." *Id.* at 25. In the alternative, respondent asked for an injunction requiring the government to provide her "a name-clearing hearing" to challenge her placement on those lists. *Ibid.*

In 2009, the government again moved to dismiss. At the time, the government had a non-disclosure policy under which it would neither confirm nor deny any person's status on the No Fly List.[2] The government contended that respondent lacked Article III standing to seek removal of her name from the No Fly List because she had not plausibly alleged that she was then *on* the No Fly List and had not plausibly alleged any realistic threat of future injury based on such a placement, particularly in light of her concession that she was able to fly after January 2, 2005. D. Ct. Doc. 167-1, at 5-8. The government further contended that, even if she had

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[2] In 2015, the government changed that policy. Under the current policy, if a U.S. person is denied boarding, files for redress, and is maintained on the No Fly List following review, the individual will be told that he or she is on the No Fly List and, upon request, will be provided with unclassified reasons for his or her status to the extent feasibly consistent with national security and law enforcement interests. See *Fikre* v. *FBI*, 904 F.3d 1033, 1036 (9th Cir. 2018).

standing, respondent could not state a claim for prospective relief based on alleged constitutional violations because, as an alien living outside the United States, she lacked any "substantive constitutional rights." *Id.* at 10 (quoting *Johnson* v. *Eisentrager*, 339 U.S. 763, 781 (1950)).

The district court again dismissed respondent's claims. 2009 WL 2246194. The court held that respondent had sufficiently pled Article III standing by alleging that she remained on the No Fly List and that she planned to visit the United States. *Id.* at *5-*6. But the court held that respondent's claims against the federal defendants failed on the merits, because the Constitution "does not apply extraterritorially to protect nonresident aliens outside our country." *Id.* at *7.

Again, a divided panel of the court of appeals reversed in part. 669 F.3d 983 (*Ibrahim II*). The majority agreed with the district court that, accepting respondent's allegations as true, respondent had established Article III standing at the pleading stage. *Id.* at 992-994. The court of appeals explained that respondent alleged that she remained on one or more government watchlists, and that it could "reasonably infer that [respondent] will suffer delays (or worse) when traveling abroad, even on foreign carriers," because of her presence on the No Fly List. *Id.* at 992-993.

Contrary to the district court, however, the majority also held that respondent could assert constitutional claims. *Ibrahim II*, 669 F.3d at 994-997. The majority concluded that respondent had "established a substantial voluntary connection with the United States through her Ph.D. studies at a distinguished American university," such that "she ha[d] the right to assert

claims under the First and Fifth Amendments" even after her voluntary departure. *Id.* at 996-997. The court "express[ed] no opinion on the validity of the underlying constitutional claims." *Id.* at 997.

Judge Duffy, sitting by designation from the Southern District of New York, dissented. *Ibrahim II*, 669 F.3d at 999-1005.

c. On remand, the government again moved to dismiss this suit. In a redacted portion of the motion, the government renewed its argument that respondent lacked standing to pursue her claims—this time supported by confidential documents that the government proposed to submit to the district court *ex parte*. D. Ct. Doc. 373, at 7-11; see D. Ct. Doc. 399, at 3-4. In an unredacted portion of the motion, the government addressed the question expressly left open by *Ibrahim II*—the merits of respondent's underlying constitutional claims. D. Ct. Doc. 373, at 11-24. The court refused to allow the government to make an *ex parte* submission and denied its standing argument on that basis. D. Ct. Doc. 399, at 3-9. It also rejected the government's merits arguments. *Id.* at 9-11.

3. a. The case proceeded to discovery and eventually trial. As one of the first cases concerning the No Fly List and related lists to proceed beyond a motion to dismiss, discovery in the litigation and the procedures for trial raised difficult questions about access to classified information and other sensitive procedures and policies surrounding this important national security program. Of note, in early 2013, the district court ordered the government, over its privilege assertion, to disclose respondent's No-Fly-List status to her counsel under

an attorney-eyes-only protective order, which the government subsequently did. D. Ct. Doc. 416, at 3; D. Ct. Doc. 476; see D. Ct. Doc. 644, at 5.

The district court upheld the government's assertion of the state-secrets privilege over certain classified information, including the reasons for, and evidence in support of, respondent's other watchlist designations. App. 172a, 196a. During briefing on respondent's motion to compel production of that evidence, the government represented to the court, consistent with state-secrets law, that the privileged evidence was "excluded from the case" and therefore the government "w[ould] not rely on" any information that it withheld or "affirmatively seek to prevail in this action based upon" such information. D. Ct. Doc. 541, at 1; see *Mohamed* v. *Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1079 (9th Cir. 2010) (en banc) ("A successful assertion of [the state-secrets] privilege * * * will remove the privileged evidence from the litigation."), cert. denied, 563 U.S. 1002 (2011).

b. At the close of discovery, the government moved for summary judgment on three independent grounds. *First*, the government argued that "the record developed in discovery [had] disprove[n] each of the allegations that prompted the Ninth Circuit's decision with respect to standing at the pleading stage." D. Ct. Doc. 593-1, at 6 (citation omitted). The government had already disclosed that respondent had not been on the No Fly List since 2005. See pp. 8-9, *supra*. And the government observed that, contrary to the Ninth Circuit's prediction in *Ibrahim II*, respondent had since acknowledged that she had traveled on at least 20 one-way international flights since that time, "without experiencing any travel difficulties." D. Ct. Doc. 534, at 12. *Second*,

the government contended, even if respondent had standing, it was entitled to summary judgment on the merits without regard to any of the excluded evidence. *Id.* at 14-23. *Third*, it argued that, in the alternative, the court should grant the government summary judgment, because the government "could not defend against the pending claims without" information protected by the state-secrets privilege, and thus, under binding Ninth Circuit precedent, the case could not proceed to trial. *Id.* at 24-25 (citing *Jeppesen Dataplan, supra*). The district court largely denied the government's motion, and the case proceeded to trial. D. Ct. Doc. 593-1.

4. After a bench trial, the district court entered final judgment, awarding respondent "[s]ome but not all of the relief sought." App. 169a; see App. 169a-224a.

The district court found that respondent was placed on the No Fly List as the result of an FBI agent's inadvertent error in completing a nomination form for other government watchlists. App. 180a-181a. It found that the error "was not motivated by race, religion, or ethnicity." App. 219a. The court also found, as the government had explained, that the government had removed respondent from the No Fly List within one day of discovering the error in January 2005, and that, although respondent had been placed on and off various other watchlists since 2005, she had never been placed back on the No Fly List. App. 191a-196a. The court also found that the denials of her visa applications were not based on respondent's temporary placement on the No Fly List. App. 214a.

The district court found that respondent did not pose, and had not posed, "a threat of committing an act of international or domestic terrorism with respect to an aircraft, a threat to airline passenger or civil aviation

security, or a threat of domestic terrorism." App. 194a. But having reviewed "the relevant classified information, under seal and *ex parte*," the court observed that, assuming that information was accurate, the denials of her visa applications were warranted. App. 214a; see App. 215a (emphasizing that the relevant provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, includes "nine eligibility categories," some of which "go beyond whether the applicant herself poses a national security threat"). The court further found that since 2009, respondent had been included on three other government lists or databases—the Terrorist Screening Database (TSDB), the Consular Lookout and Support System (CLASS), and TECS. App. 196a.[3] The reasons for those designations, the court observed, were covered by the state-secrets privilege. *Ibid.*

In its conclusions of law, the district court held that respondent's brief and inadvertent placement on the No Fly List and the procedures available for her redress violated due process as applied in this case. App. 205a-213a. To remedy that violation, the court ordered the government to cleanse its watchlists of any reference to respondent's erroneous No Fly List designation from 2005, if it had not already done so, and to inform respondent herself (and not just respondent's counsel) that she was currently not on the No Fly List and had not been since 2005. App. 208a, 213a. The court *sua*

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[3] The TSDB is the central database of individuals who are known or suspected terrorists, or who have other specific ties to terrorism. App. 184a-186a. That database, in turn, exports information to other lists and databases used by various government agencies, including CLASS, used by the Department of State, and TECS, used by U.S. Customs and Border Protection. *Ibid.*

sponte further ordered the government to inform respondent of the specific subsection of the INA under which her 2009 and 2013 visa applications were denied. App. 214a.

The district court otherwise rejected respondent's challenge to her visa denials, holding that they were unreviewable and that, in any event, must be denied "under the state secrets privilege." App. 214a (citing *Jeppesen Dataplan*, *supra*). The court did not order that respondent be removed from any other government watchlist or suggest that those listings were unlawful. The court declined to pass on respondent's First Amendment and equal protection claims because, "even if successful," they would not "lead to any greater relief than already ordered." App. 219a.

Neither party appealed.

C. Attorney Fees Litigation

1. After final judgment, respondent filed a motion under EAJA, 28 U.S.C. 2412, seeking nearly $4 million in attorney fees and expenses, which the district court granted in part and denied in part. App. 126a-168a.

The district court concluded, under Section 2412(d), that respondent was a "prevailing party," because she had obtained "some relief" in the final judgment. App. 140a. It also determined that the government's position was not "substantially justified" in some respects, and that respondent was entitled to reasonable fees and expenses for those aspects of the case. App. 143a-146a. But the court denied the vast bulk of the requested fees. The court reasoned that it would be "unfair to saddle the government with $3.67 million in fees—or anything close to it." App. 145a. It "recognize[d] the novelty of the issues involved" and "the importance of protecting

classified information when national security and counterterrorism efforts are implicated." App. 143a-144a. And the court described respondent's fee petition as "grossly overbroad," even to the point of "brazen[ly]" seeking "double recovery for items previously settled and on which fees were already recovered." App. 135a, 152a.

The district court also denied respondent's request for additional fees under Section 2412(b) based on the government's alleged bad faith. App. 160a. The court explained that bad-faith fees are warranted "where an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent." *Ibid.* (citation omitted). It observed that even recklessness does not justify an award unless it is "combined with an additional factor such as frivolousness, harassment, or an improper purpose." *Ibid.* (citation omitted). And it concluded that none of respondent's assertions of bad faith met that standard. *Ibid.*

The district court emphasized that the initial error in respondent's placement on the No Fly List was "unintentional and made unknowingly." App. 160a. The court stated that, in its view, the government "probably * * * should have sought review by the United States Supreme Court" of the court of appeals' initial standing ruling, but it rejected respondent's contention that "the government's verbal requests for dismissal and the few paragraphs in its briefs" on standing were made in bad faith. App. 161a. Although the government accurately described the state-secrets doctrine throughout the litigation, see pp. 24-26, *infra*, the district court described the government's request for summary judgment as a result of the exclusion of evidence under the state-

secrets privilege as "revers[ing] course" from the government's earlier statements on the privilege. App. 161a. But the court found "no indication" that this perceived "error was knowingly or recklessly made for harassment or improper purpose." *Ibid.* And it rejected the contention that any of the government's privilege assertions were made in bad faith. *Ibid.*

After additional proceedings, the special master recommended an award of approximately $450,000 in fees and expenses. The district court issued an order in accordance with that recommendation. App. 116a-125a.

2. Respondent appealed the district court's resolution of her motion for fees and expenses, and a unanimous panel of the court appeals affirmed in part and reversed in part. App. 84a-115a.

With respect to the Section 2412(d) award, the panel held that the district court had abused its discretion by applying the wrong standard for "substantial justification," and therefore vacated that determination. App. 90a-95a. The panel affirmed the district court's decision to disallow fees related to respondent's First Amendment and equal protection claims, explaining that, even if the government's position were not substantially justified, the district court retained discretion not to award fees incurred litigating claims that were unrelated to those on which the plaintiff prevailed. App. 102a-107a (citing *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983)).

The panel also affirmed the district court's denial of an additional award under Section 2412(b), holding that the district court did not clearly err in finding that the government had not acted in bad faith. App. 96a-102a. The panel emphasized that the district court had "expressly declined to find that the government's initial interest in [respondent] was due to her race, religion or

ethnicity." App. 98a-99a. It saw "no colorable argument" that the government's defense of the No-Fly-List issues was frivolous or made with an improper purpose, particularly given that prior to this suit "no court had held a foreign national such as [respondent] possessed any right to challenge their placement—mistaken or not—on the government's terrorism watchlists." App. 99a-100a. The panel observed that respondent had not identified "any evidence" demonstrating that the government had re-raised its standing arguments at "different procedural phases of the case" "with vexatious purpose." App. 100a. And it detected no bad faith in the government's assertions of privilege, including the state-secrets privilege, noting that many of the government's assertions were successful and that respondent identified no evidence that the unsuccessful assertions were frivolous or made with an improper purpose. App. 100a-101a.

3. By a vote of 8-3, the en banc court of appeals reversed certain aspects of the district court's order, vacated the fee award, and remanded to the district court for further proceedings. App. 1a-72a.

a. The majority agreed with the panel that the district court had applied the wrong standard for determining "substantial justification." App. 34a-40a. But rather than remanding the issue to the district court for a determination under the proper standard, the en banc majority itself made that determination in the first instance, stating that "the government's litigation position —to defend the indefensible, its No Fly list error—was not reasonable." App. 41a. And even if "some of the arguments made along the way by the government attorneys passed the straight face test until they were reversed on appeal," that did "not persuade [the court]

that the government's position was substantially justified." App. 41a-42a. The majority accused the government of "defend[ing] [respondent's] No Fly list status" without "any justification," and of "play[ing] discovery games, ma[king] false representations to the court, misus[ing] the court's time, and interfer[ing] with the public's right of access to trial." App. 42a n.20. And it stated that "the government attorneys' actual conduct during this litigation was ethically questionable and not substantially justified." *Ibid.*

The majority also determined that the district court abused its discretion by disallowing fees incurred litigating respondent's First Amendment and equal protection claims. App. 44a-60a. Contrary to the panel, the en banc court concluded that those claims were related to respondent's successful due process claim because each claim arose from the government's "administration, management, and implementation of the 'No-Fly List.'" App. 50a (citation omitted); see App. 45a-55a.

b. Although the government disagrees with the rulings concerning substantial justification and the First Amendment and equal protection claims, it does not seek review of them. Instead, as most relevant to this petition, the en banc court also held that the district court clearly erred in finding that the government had not engaged in bad-faith conduct, offering a series of considerations that it concluded would "support a bad faith finding." App. 69a; see App. 60a-70a.

The court of appeals determined, for example, that the district court "wrongly rejected" the government's repeated standing arguments "as a basis for bad faith." App. 65a. Without citing any particular evidence, the majority stated that the government "knowingly pur-

sued baseless standing arguments" by continuing to argue that respondent lacked standing even after the court of appeals had "determined unequivocally that [she] had Article III standing." *Ibid.* (citing *Ibrahim II*, 669 F.3d at 997). The majority reasoned that "the government should have sought review by the United States Supreme Court" if it disagreed. App. 66a.

The majority also faulted the government for how it invoked the state-secrets doctrine. App. 66a-67a. In its view, the government had "falsely represented" to the district court that it "would not rely on" privileged information to prevail in the action, and then later "raised the *very* argument it had promised to forgo" by seeking dismissal at summary judgment on state-secrets grounds. *Ibid.* Again without citing any evidence, the majority concluded that the district court "incorrectly found that th[is] error was not knowingly or recklessly made." App. 66a.

The en banc court also criticized as inadequate the district court's consideration of the government's post-litigation agency conduct. App. 63a-65a. The court pointed to a 2013 error in vetting passengers for a Philippine Airlines flight, which led to respondent's U.S. citizen daughter being flagged for additional screening as potentially inadmissible under the INA when she attempted to fly from Malaysia to the United States to attend the trial. App. 63a-64a. The district court had found that the error was "corrected quickly," within a day of its discovery, App. 177a; see App. 204a-205a, and that there was "no evidence" that the government had "obstructed" the daughter from appearing at trial, App. 161a. The en banc court held, however, that because respondent's daughter arrived at the airport with a U.S. passport and U.S. citizens are not subject to the INA,

the district court clearly erred in making that finding. App. 64a.

The majority also faulted the district court for failing to consider whether the government's placement of respondent on other lists at various times during the eight-year pendency of the litigation supported a bad-faith finding. App. 64a-65a. It noted that the only explanation for respondent's placements "is claimed to be a state secret." App. 65a. And it mused that such an assertion of privilege "begs the question: Why was [respondent] added to *any* watchlist once the government determined she was not a threat?" *Ibid.* It instructed the district court to take that "into account in its analysis of bad faith" on remand. App. 64a-65a.

The en banc court further held that the district court clearly erred in concluding that "the government's privilege assertions were made in good faith by considering only the merits of the privilege arguments themselves." App. 67a. The majority cited orders that the district court had issued during the extended litigation, expressing frustration at times with the government's failure to produce information over which it claimed privilege and delays in producing other information while it renegotiated a previously entered protective order. App. 67a-68a.

Finally, the en banc court instructed the district court on remand to consider all of the government's litigation conduct "through a totality of the circumstances lens," including what the majority described as the government's "abuse of the discovery process," its "interference with the public's right of access to trial," and, indeed, whether the government "had a good faith basis to defend" this case at all "as the litigation evolved." App. 69a-70a.

c. Judge Callahan, joined by Judges N.R. Smith and Nguyen, concurred in part and dissented in part. App. 75a-83a. Judge Callahan agreed with the majority that the district court applied the wrong substantial justification standard, but concluded that the majority erred in making that finding itself, rather than remanding. App. 75a-78a. And she found a similar error in the majority's vacating of the district court's bad-faith finding. App. 78a-83a. Judge Callahan observed that the district court's finding must be reviewed only for clear error. App. 78a. She reasoned that the majority's analysis "turn[ed] the standard of review on its head by analyzing and emphasizing the pieces of evidence that it concludes 'support a bad faith finding.'" App. 79a (citation omitted).

Contrary to the majority, Judge Callahan saw no clear error in the district court's finding of no bad faith in the government's overall defense against respondent's claims, particularly in light of their unprecedented nature. App. 79a-80a. She rejected the majority's analysis of the government's standing arguments, endorsing the panel's conclusion that there was no evidence that the arguments at different procedural phases of the case were made with a vexatious purpose. App. 80a-81a. And she disagreed with the majority's conclusion that the government wrongly obstructed respondent's daughter's travel. App. 81a-82a.

REASONS FOR GRANTING THE PETITION

The en banc court of appeals was profoundly wrong in setting aside the district court's finding of no bad faith in the government's conduct in this sensitive and protracted litigation brought by an alien residing abroad to challenge measures adopted by Congress and the Executive Branch to protect the national security.

The district court made its finding based on its thorough familiarity with the legal and factual issues and the parties' conduct over eight years of litigation, and a unanimous panel of the Ninth Circuit correctly affirmed that ruling. But the en banc court then chose to elevate the fee issue, engaging in a wide-ranging and fundamentally misguided critique of the government's efforts to maintain the confidentiality and integrity of the No Fly List, and other government lists, with full respect for the judicial process. In so doing, the court substantially departed from the proper role of an appellate court in reviewing a district court's factual findings under the clear-error standard of review.

Far from being in bad faith, the government's actions were entirely proper and in accord with decisions of this Court and the Ninth Circuit itself. By finding evidence of bad faith in common and legitimate litigation practices, the en banc court's decision threatens to undermine the government's efforts to fairly but vigorously litigate to protect the public interest in the future. It also unfairly impugns the integrity of the career government attorneys faithfully carrying out their duty to defend the government's policies and protect its sensitive information. And all because of a brief and inadvertent placement on the No Fly List that occurred 15 years ago and was removed within a day of its discovery. The en banc court's decision would reasonably warrant a summary reversal. At a minimum, it calls for this Court's plenary review.

A. The Ninth Circuit Erroneously Vacated The District Court's Finding Of No Bad Faith

1. Under Section 2412(b) of EAJA, a district court may award bad-faith fees only in "narrowly defined circumstances." *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 45 (1991) (citation omitted); see *Alyeska Pipeline Serv.*

Co. v. *Wilderness Soc'y*, 421 U.S. 240, 257-259 (1975). Such an award, over and above the fees and expenses available under Section 2412(d), is appropriate only when government officials have "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers*, 501 U.S. at 45-46 (citation omitted). As the court of appeals itself recognized, that stringent standard requires more than a losing argument: a finding of bad faith is warranted "where an attorney *knowingly* or *recklessly* raises a frivolous argument." App. 61a (emphasis added; citation omitted). And it noted that even recklessness does not "constitute bad faith," unless it is "combined with an additional factor such as frivolousness, harassment, or an improper purpose." *Ibid.* (citations omitted).

In light of this fact-intensive inquiry, the Ninth Circuit, like its sister circuits, has held that a district court's bad-faith finding is to be reviewed only for clear error. App. 31a (citing *Cazares* v. *Barber*, 959 F.2d 753, 754 (9th Cir. 1992)); see, *e.g.*, *Hyatt* v. *Shalala*, 6 F.3d 250, 255 (4th Cir. 1993); *American Hosp. Ass'n* v. *Sullivan*, 938 F.2d 216, 222 (D.C. Cir. 1991); *Ford* v. *Temple Hosp.*, 790 F.2d 342, 347 (3d Cir. 1986); Fed. R. Civ. P. 52(a).[4] Under that standard, as long as "the district

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[4] In *Chambers*, this Court reviewed for an abuse of discretion the district court's decision to sanction bad-faith conduct. 501 U.S. at 55 (citing *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 400 (1990)). At issue here, however, is not a district court's ultimate exercise of discretion whether to award fees based on a finding of bad faith, but the district court's underlying factual finding whether bad faith existed at all. "When an appellate court reviews a district court's factual findings, the abuse-of-discretion and clearly erroneous standards are indistinguishable: A court of appeals would be justified in concluding that a district court had abused its discretion

court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson* v. *City of Bessemer*, 470 U.S. 564, 573-574 (1985). Accordingly, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Amadeo* v. *Zant*, 486 U.S. 214, 226 (1988) (citations omitted; brackets in original).

Such a deferential standard is particularly appropriate for fee disputes. This Court has repeatedly recognized in that context "the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983); see *Goodyear Tire & Rubber Co.* v. *Haeger*, 137 S. Ct. 1178, 1187 (2017); *Fox* v. *Vice*, 563 U.S. 826, 838 (2011); *Commissioner, INS* v. *Jean*, 496 U.S. 154, 161 (1990). Particularly in this setting, "[d]uplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources." *Anderson*, 470 U.S. at 574-575. And a reviewing court "oversteps the bounds of its duty under Rule 52(a)" if it nevertheless "undertakes to duplicate the role of the lower court." *Id.* at 573.

2. The en banc court violated these bedrock principles when it vacated the district court's finding of no bad faith—and, indeed, affirmatively suggested bad faith in some respects. After eight years of presiding over this

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in making a factual finding only if the finding were clearly erroneous." *Cooter & Gell*, 496 U.S. at 401.

case, the district court issued an order awarding respondent a fraction of the exorbitant fees she requested, and it carefully considered each allegation of bad faith that she contended entitled her to greater fees. Based on the court's familiarity with this litigation, the litigants, and the issues, the court properly concluded that none of those allegations demonstrated that, in this hard-fought case, the government or its attorneys had conducted themselves "vexatiously, wantonly, or for oppressive reasons." App. 160a (citations omitted). As a unanimous panel of the court of appeals held, the district court's finding of no bad faith, as well as the underlying findings that support it, were correct or, at a minimum, not clearly erroneous. App. 96a-102a. The en banc court went out of its way, and out of its proper role, to rule otherwise.

This Court has refused to "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996) (citation omitted). The en banc court should have followed the same course. Instead, the court repeatedly faulted the district court for failing to find that the government "knowingly or recklessly" offered baseless arguments, engaged in wrongful conduct, or "willful[ly]" disobeyed the district court's orders, based on little more than its assertions. App. 66a-67a (citation omitted). None of its assertions withstands even minimal scrutiny.

First, consider the court of appeals' suggestion that, because the government did not seek this Court's review of that court's earlier decision in *Ibrahim II*, which addressed respondent's showing of standing at the pleading stage, the government must have "know[n]"

that its subsequent challenges to respondent's standing were "baseless." App. 66a. That is simply wrong. It is doubtful that the government's decision not to seek review of a court of appeals' interlocutory decision should ever be taken by a court to demonstrate anything about the merits. "Unlike a private litigant who generally does not forgo an appeal if he believes that he can prevail, the Solicitor General considers a variety of factors, such as the limited resources of the Government and the crowded dockets of the courts, before authorizing an appeal." *United States* v. *Mendoza*, 464 U.S. 154, 161 (1984). But the decision not to seek review at an interlocutory stage plainly does not demonstrate that the government *knew* that subsequent challenges to standing at *different stages* of the case, under a *different standard* and based on a *different evidentiary record*, were frivolous or made only to harass the opposing side—particularly where the courts' factual assumptions at one stage (*e.g.*, respondent's presence on the No Fly List) have been shown not to be true. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation.").

Second, consider the court of appeals' assessment that the government "falsely represented" to the district court that it would not rely on evidence protected by the state-secrets privilege. App. 66a. The government did not falsely represent anything; it accurately described the governing law. As the district court recognized and the government explained, under *Mohamed* v. *Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir.

2010) (en banc), cert. denied, 563 U.S. 1002 (2011), when "the government successfully invokes the state secrets privilege, 'the evidence is completely removed from the case.'" *Id.* at 1082 (citation omitted). Accordingly, the government assured the court that it would not (and could not) "rely on any information" it had withheld on state-secrets grounds to "prevail in this case." D. Ct. Doc. 541, at 1.

The district court apparently misunderstood the government's assurance to mean that, once the evidence was excluded, the court and parties would "pretend as if the evidence never existed" and just "litigate the case in some other way." C.A. App. 2554. But the government did not say that, and it is not a correct statement of law. Once evidence is excluded on state-secrets grounds, the court must then decide "whether it is feasible for the litigation to proceed" without it. *Jeppesen Dataplan*, 614 F.3d at 1082. If litigating the case to judgment on the merits "would present an unacceptable risk of disclosing state secrets," or "if the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim," the proper course is to "grant summary judgment to the defendant." *Id.* at 1083 (citations omitted); see *General Dynamics Corp.* v. *United States*, 563 U.S. 478, 486 (2011) (where liability depends on the validity of a plausible defense and litigation of that defense would lead to the disclosure of state secrets, "neither party can obtain judicial relief").

When the government moved for summary judgment, it did not raise "the *very* argument it had promised to forgo." App. 67a. Rather, it accurately described the standard governing the further inquiry under *Jeppesen Dataplan* and reasonably argued that it was met here.

D. Ct. Doc. 534, at 23-25. While the district court may have viewed that as "revers[ing] course," it found in the end that the government's description of binding precedent did not evince bad faith. That finding was obviously correct and readily "falls within [the] broad range of permissible conclusions" that the clear-error standard required the court of appeals to uphold. *Cooter & Gell* v. *Hartmax Corp.*, 496 U.S. 384, 400 (1990).

Third, consider the court of appeals' conclusion that the district court committed clear error in finding that the government had not "obstructed" respondent's daughter from appearing at trial. App. 63a. On the first day of trial, respondent's U.S. citizen daughter was prevented from boarding a flight from Malaysia to the United States due to questions about her inadmissibility to the United States under the INA. App. 204a-205a. As a U.S. citizen, respondent's daughter is not subject to the INA. After an evidentiary hearing on the matter, the district court found in its final judgment that the "passenger information submitted by the Philippine Airlines" to DHS for pre-flight vetting had failed to include the daughter's U.S. citizenship status. App. 204a. And the court found that when U.S. Customs and Border Protection discovered the error, it was promptly investigated, and corrected the following day. *Ibid.* Because neither party appealed the final judgment, those findings of fact are unassailable now.

Consistent with those findings, the district court in its fee order found "no evidence that the government obstructed [respondent's] daughter from appearing at trial." App. 161a. Yet five years later, reviewing the cold record, the court of appeals went the other way based solely on the fact that respondent's daughter had arrived at the airport with her U.S. passport. App. 63a-

64a. That assessment cannot be squared with the district court's final judgment. And, in any event, the district court took full account of that fact, as did the government officials. As the court explained, "[w]ithin six minutes" of encountering the daughter, U.S. Customs and Border Protection "determined that [she] appear[ed] to be a United States citizen." App. 204a. That is what triggered the investigation and correction, along with a request from U.S. government officials that the daughter "be allowed to board without delay." App. 205a. The district court's conclusion that the government had not "obstructed [respondent's] daughter from appearing at trial," App. 161a, is therefore at the very least "plausible in light of the record viewed in its entirety." *Anderson*, 470 U.S. at 574. And the fact that respondent was subsequently "given the option to reopen the trial to permit the daughter to appear" and "chose not to do [so]" only reinforces that conclusion. App. 177a.

Nor is the court of appeals' erroneous view of the record confined to the foregoing examples. The court stated that the government "was well aware that [respondent's] placement on the No Fly list was a mistake from the get-go," and yet "defend[ed] [respondent's] No Fly list status" without "any justification." App. 9a, 42a n.20. But far from defending respondent's No-Fly-List status, the government undisputedly removed respondent from the No Fly List within *a day* of discovering the error in January 2005, and never placed her back on. App. 191a-196a. The court of appeals also stated that the government may have acted in bad faith by "interfer[ing] with the public's right of access to trial by making at least ten motions to close the courtroom,"

App. 69a, but the district court *granted* those requests, App. 178a.

The en banc court suggested in passing that the government "abuse[d]" the discovery process, pointing to the government's lodging of "over 200 objections and instructions not to answer" during depositions. App. 69a & n.37. But the district court described respondent's complaints about those same objections and instructions as "largely without merit," because the government's instructions were "clearly proper" and "the *vast majority* of questions to which [respondent's] counsel did not receive satisfactory answers indeed called for privileged information." C.A. App. 2700-2701.

Finally, the en banc court criticized the district court for taking a "piecemeal approach" to bad faith and instructed it to consider the government's conduct through a "totality of the circumstances lens" on remand. App. 62a, 69a. But because a bad-faith award must be "limited to the fees the innocent party incurred *solely* because of the misconduct," *Goodyear*, 137 S. Ct. at 1184 (emphasis added), it was entirely proper for the district court to consider respondent's allegations individually. In any event, zero plus zero plus zero is still zero. Because the court did not err (much less clearly err) in finding no bad faith in any aspect of this case, there is no basis for a bad-faith finding in *all* aspects of the case.

In these and other aspects, the court of appeals' decision repeatedly fails to respect that it is the trial court's role to make "the determination[s] of fact," not the court of appeals'. *Anderson*, 470 U.S. at 574. It pervasively fails to heed this Court's admonitions about the "substantial deference" that reviewing courts owe the trial judge's determinations in this context based on the

"'superior understanding of the litigation.'" *Goodyear*, 137 S. Ct. at 1187 (citation omitted). As a result, it misconstrues the record and fails to properly apply the standard of review that the Federal Rules require.

B. The Ninth Circuit's Errors Warrant This Court's Review

The en banc court's decision warrants this Court's review and reversal. In vacating the district court's factual finding and taking upon itself to suggest bad faith in several respects, the Ninth Circuit has issued a decision that "conflicts with relevant decisions of this Court" and "has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10. Although "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law," *ibid.*, a court of appeals also rarely decides to rehear a fee dispute en banc to review factual findings of a district court that have been unanimously affirmed by the panel. Respondent herself told the court of appeals that her claim of bad faith "raise[d] an issue of exceptional importance" in her efforts to obtain en banc review. Resp. C.A. Pet. for Reh'g En Banc 13. The government respectfully submits that the en banc court's resolution of that issue presents a question of exceptional importance that now warrants this Court's review, for several reasons.

First, the en banc court's decision threatens the government's future ability to fairly and vigorously litigate in the public interest. Two examples are especially striking. It is a common litigation practice for the government to seek dismissal of claims on Article III standing grounds at different stages of a case. Indeed, because the court is obligated independently to examine

its jurisdiction even if the issue is not raised, *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010), where the developing record suggests that a plaintiff lacks standing, the government feels duty-bound to bring the issue to the court's attention.

The majority's standing analysis, however, appears to find evidence of bad faith in the government's following that very approach here. App. 65a-66a. It thus threatens to chill a salutary and respectful approach that, until now, has been assumed to be a valid procedural practice firmly grounded in this Court's and other court's precedents. See, *e.g.*, *Bauer* v. *Veneman*, 352 F.3d 625, 642 (2d Cir. 2003) (although "allegation of a credible risk may be sufficient at the pleading stage without further factual confirmation," the "[d]efendants may certainly test [plaintiff's] standing as the litigation progresses by * * * challenging [plaintiff's] standing on summary judgment or even at trial"); *Jackson* v. *Okaloosa Cnty.*, 21 F.3d 1531, 1536 & n.5, 1541 (11th Cir. 1994) (although plaintiffs "satisfie[d] the requirements for standing" at the pleading stage, "[t]he standing inquiry can be revisited at trial if it appears that facts necessary for standing are not supported by the evidence adduced at trial").

The en banc court's criticism of the government's assertion of the state-secrets privilege is also deeply misguided and threatens to sow confusion in a vitally important area of the law. That privilege is asserted in cases involving the most sensitive and closely held national security information. "[N]o governmental interest is more compelling than the security of the Nation," and "[m]easures to protect the secrecy of our Government's foreign intelligence operations plainly serve these interests." *Haig* v. *Agee*, 453 U.S. 280, 307 (1981);

see *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988) (noting the "'compelling interest' in withholding national security information from unauthorized persons") (citation omitted). And yet the court of appeals suggested that the government engaged in "abusive litigation" tactics when it *accurately* described the law governing assertions of the state-secrets privilege and the consequences of sustaining such an assertion. App. 67a (citation omitted).

These concerns are exacerbated by the en banc court's suggestion that the government had done something untoward by arguing that the case must be dismissed under the state-secrets doctrine for the "first time" as an alternative ground for summary judgment. App. 25a-26a. It is often difficult to determine whether a case can proceed without evidence protected by the state-secrets privilege until discovery is substantially completed and the district court has resolved the government's assertions of privilege. And because the effect is to prevent the adjudication of an individual's claims, the Department generally requests such a dismissal only when necessary to prevent significant harm to national security. See generally Memorandum from Eric Holder, Att'y Gen., *Policies and Procedures Governing Invocation of the State Secrets Privilege* (Sept. 23, 2009), https://go.usa.gov/xmAXW. What the en banc court seemed to view as bad faith was the government's proceeding incrementally—consistent with this Court's admonition that the privilege "is not to be lightly invoked," *General Dynamics*, 563 U.S. at 492—by moving for summary judgment, in the alternative, only when it appeared essential to protect those interests.

Second, there is little question that this case would have come out differently in other circuits. As this

Court's decisions make clear, the clearly erroneous standard is a high bar. Other courts of appeals describe Rule 52(a)'s standard as "exceedingly deferential," *United States* v. *Matos*, 328 F.3d 34, 39 (1st Cir. 2003); as demanding "great deference" to the trial judge's findings, *Guzman* v. *Hacienda Records & Recording Studio, Inc.*, 808 F.3d 1031, 1036 (5th Cir. 2015); and as permitting reversal only where the district court's finding is "egregious," *SEC* v. *Pirate Investor LLC*, 580 F.3d 233, 243 (4th Cir. 2009) (per curiam), cert. denied, 561 U.S. 1026 (2010), or "based on an utterly implausible account of the evidence," *Hopkins* v. *Price Waterhouse*, 920 F.2d 967, 974 (D.C. Cir. 1990) (citations omitted). While previous panels of the Ninth Circuit may have viewed the standard similarly, see, *e.g.*, *United States* v. *Bussell*, 504 F.3d 956, 962 (2007), cert. denied, 555 U.S. 812 (2008), the en banc opinion in this case supersedes those decisions and does not come close to justifying its findings of clear error under the proper standard.

Finally, in the decision below, the court of appeals has suggested in a published en banc decision that the career government attorneys who litigated this case may have "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." App. 60a (citations omitted). It alleged that those attorneys "played discovery games, made false representations to the court, misused the court's time, and interfered with the public's right of access to trial." App. 42a n.20. And it suggested that the manner in which those attorneys conducted themselves was "ethically questionable." *Ibid.* Those accusations are wrong and fundamentally unfair.

This Court has repeatedly intervened in the similar qualified-immunity context, when courts have unfairly impugned a government actor's actions or motives. See,

e.g., *Kisela* v. *Hughes*, 138 S. Ct. 1148 (2018) (per curiam); *White* v. *Pauly*, 137 S. Ct. 548 (2017) (per curiam); *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009); cf. *In re Department of Commerce*, No. 18A375 (Oct. 22, 2018) (staying discovery based on a finding of "bad faith" on the part of the Secretary of Commerce). The court of appeals' public accusations of bad faith and ethically questionable behavior based on factually erroneous (and in some instances legally erroneous) premises similarly warrant this Court's intervention.

In sum, a court of appeals decision so plainly incorrect and inconsistent with precedent, and with such untoward consequences, should not be permitted to stand.

CONCLUSION

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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