No. 18-1509

IN THE
Supreme Court of the United States

U.S. DEPARTMENT OF HOMELAND SECURITY, ET AL.,
Petitioners,

v.

RAHINAH IBRAHIM,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent Dr. Rahinah Ibrahim was designated to the No Fly List because of a mistake, and she posed, and poses, no threat. The Government knew these facts early on, but it revealed them only after years of litigation. At a bench trial, Dr. Ibrahim prevailed in showing the Government had violated her due process rights, a ruling the Government did not appeal. In making a fee award, the District Court concluded that the Government did not act in bad faith, but it failed to consider the totality of the circumstances—as circuit case law required—and it did not consider all relevant conduct.

In such circumstances, was it proper for the Court of Appeals to vacate and remand for the District Court to evaluate bad faith anew?

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BRIEF IN OPPOSITION

INTRODUCTION

Dr. Rahinah Ibrahim is a respected academic with deep ties to the United States: She lived in this country for over a decade, received her education here (including a Ph.D. from Stanford), was married here, and had children here. Yet she has been barred from re-entering the United States and has been placed on various watchlists for well over a decade without justification. She discovered her placement on the No Fly List in 2005, when she was detained at the airport while traveling shortly after surgery. At the time, the Government knew that Dr. Ibrahim "never belonged on the No Fly list at all," and that "she is not and never was a terrorist or threat to airline passenger or civil aviation security."

Pet. App. 70a. Although Dr. Ibrahim was permitted to fly the next day, two months later she discovered that her visa had been revoked, and she was not permitted to return to the United States. She had no way to know whether she was on the No Fly List or any other watchlists.

Dr. Ibrahim brought suit seeking an explanation and to be removed from any watchlists. Even though the Government knew Dr. Ibrahim's placement on the No Fly List was an error and that it had no reasonable suspicion to place her on any watchlists, it dug in for eight years of "scorched earth litigation," which required two trips to the Ninth Circuit before the case went to trial. *Id.* at 41a. In the meantime, Dr. Ibrahim, without her knowledge, was placed on and off various watchlists. She had visa applications denied, and one denial had a notation suggesting she was a "(Terrorist)." *Id.* at 199a. In court, the Government repeatedly re-litigated standing issues despite a conclusive Ninth Circuit decision on the issue, told the District Court it would not use state-secrets privilege to prevail and then sought to do so, and dragged its feet in complying with the court's discovery orders. Only in 2013, over seven years after the suit began, did the Government finally admit its mistake. Despite that admission, it took the case to trial.

At trial—the first ever in a No Fly List case—Dr. Ibrahim and her attorneys won a "groundbreaking victory." *Id.* at 72a. The District Court ruled that the Government had denied Dr. Ibrahim her constitutional right to due process and ordered the Government to correct its mistakes. The Government accepted the result without appealing.

The petition stems instead from Dr. Ibrahim's effort to recover fees and expenses under the Equal Access to Justice Act (EAJA), a statute meant to level the playing field between individuals and the Government by providing attorneys' fees and expenses for plaintiffs who assume the risks and costs of litigating to vindicate their rights—exactly as happened here. When the District Court denied most of Dr. Ibrahim's fee request, the case made a third trip to the Ninth Circuit. There, the Court of Appeals reversed the District Court and determined that the Government's entire litigating position was not substantially justified, a conclusion the Government does not ask this Court to review.

The Ninth Circuit also vacated the District Court's determination that the Government had not acted in bad faith. It held that the District Court had erred in *how* it evaluated bad faith: The District Court considered each element of the Government's conduct in isolation, rather than against the totality of the circumstances, as long-standing precedent required. The Court of Appeals also held that the District Court erred by failing to consider entire categories of Government conduct relevant to a bad-faith analysis. It remanded for the District Court to make a new bad-faith determination without those errors and omissions.

Rather than wait for that determination, the Government asks this Court to rush and intervene now. It does not suggest that the Ninth Circuit applied the wrong standard of review or that there is a circuit split on that issue: All agree that courts of appeals should review bad-faith determinations for clear error. Nor does the Government meaningfully challenge the Ninth Circuit's totality-of-the-

circumstances method for considering bad faith, or the court's determination that the District Court ignored important categories of conduct. Instead, the Government focuses on the Ninth Circuit's guidance to the District Court on how to evaluate certain aspects of the Government's conduct, which the District Court has not yet had the chance to reconsider.

This Court should decline the petition's extraordinary request. The Ninth Circuit's ruling is narrow and will not have the baleful effects the Government suggests. To the extent the Court of Appeals addressed the Government's litigation conduct, it did so in case-specific fashion: It was concerned that the Government failed to honor its representations to the District Court in *this* case and that it declined to abide by the law of the case in *this* litigation. The Ninth Circuit's ruling did not even turn on those issues, but was principally about *how* to evaluate bad faith, applying a legal standard used in the Ninth Circuit and other courts for decades without trouble. The crux of the Ninth Circuit's ruling is that if the Government spends years litigating to conceal what it knew all along was a mistake, that *may* support a finding of bad faith. This precedent will thus only affect those (hopefully) few cases where the Government defends what it knows are errors affecting substantial individual rights.

The petition should be denied.

STATEMENT

A. Dr. Ibrahim

Dr. Ibrahim is the Dean of the Faculty of Design and Architecture at the Universiti Putra Malaysia. Pet. App. 203a. She is a citizen of Malaysia, *id.* at 178a, but she has deep ties to the United States. She first came to the United States in 1983 to pursue her education in architecture at the University of Washington. *Id.* She received undergraduate and master's degrees in the United States. *Id.* at 178a-179a. While living in Seattle, she married her husband and had a daughter, the first of four children. *Id.* at 178a. After receiving her master's degree in 1990, Dr. Ibrahim returned to Malaysia and worked as an architect and university lecturer, becoming the first female lecturer at the Universiti Putra Malaysia. *Id.* at 179a. In 2000, Dr. Ibrahim moved back to the United States to pursue a Ph.D in construction engineering and management at Stanford University. *Id.*

On January 2, 2005, Dr. Ibrahim planned to fly to Hawaii to present her doctoral research at a Stanford-sponsored conference. *Id.* at 182a. At the time, she required wheelchair assistance, as she was recovering from an emergency hysterectomy. *Id.* When Dr. Ibrahim checked in at the airport, her name was found on the Transportation Security Administration's (TSA) No Fly List. *Id.* Dr. Ibrahim was handcuffed in her wheelchair and arrested. *Id.* She was taken to a holding cell, searched for weapons, and held for two hours. *Id.* at 182a-183a. Paramedics were called to administer medication related to her surgery. *Id.* at 183a. She was then informed that her name had been removed from the

No Fly List and that there was no evidence to justify her detention or arrest. *Id.* When she returned to the airport the next day, she was given an unusual red boarding pass labeled "SSSS," meaning "Secondary Security Screening Selection," and was told at the airport that she still *was* on the No Fly List. *Id.* at 183a, 6a. But she was permitted to fly to Hawaii, and she later flew to Malaysia. *Id.* at 183.

Two months later, Dr. Ibrahim planned to fly back to the United States to meet with her thesis advisor. *Id.* At the airport, Dr. Ibrahim discovered her student visa had been revoked without explanation and that she would not be allowed to fly to the United States. *Id.* The Government has acknowledged that Dr. Ibrahim was not then, and is not now, a threat to national security. *Id.* at 179a, 194a. It has also conceded that Dr. Ibrahim did not then, and does not now, meet the reasonable-suspicion standard for inclusion on any watchlists. *Id.* at 194a. Nevertheless, since 2005, Dr. Ibrahim has not been permitted to return to the United States. *Id.* at 184a.

Dr. Ibrahim had no way to know whether she was still on the No Fly List. She applied for visas in 2009 and 2013 but was denied both times. *Id.* at 199a, 203a. On the 2009 visa denial she received, a consular officer had handwritten "(Terrorist)." *Id.* at 199a.

B. The Government's Watchlists

The explanation, which Dr. Ibrahim would not receive until she endured eight years of contentious litigation, was "Kafkaesque." *Id.* at 212a. At the time of Dr. Ibrahim's arrest, the Government, through a multi-agency organization called the Terrorist Screening Center (TSC), maintained a byzantine "web of interlocking watchlists" in the

Terrorist Screening Database (TSDB). *Id.* at 184a. Among these lists were the No Fly list, the Selectee List, the Interagency Border Inspection System (IBIS), the Consular Lookout and Support System (CLASS), TECS, Tipoff United States-Canada (TUSCAN), and Tipoff Australia Counterterrorism Information Control System (TACTICS). *Id.* at 186a. The TSDB lists were exported as "customer databases" to other agencies and government entities, which were not always notified of subsequent changes. *Id.* at 184a, 194a.

Dr. Ibrahim's saga began with a "monumental error." *Id.* at 207a. For reasons that are still unclear, in 2004, an FBI agent nominated Dr. Ibrahim to the TSDB. *Id.* at 205a. He filled in the form in the "exactly opposite" way than was called for by the instructions, *id.*, nominating Dr. Ibrahim for the No Fly List and the IBIS *instead of* the Selectee List, the CLASS list, TUSCAN, and TACTICS. *Id.* at 180a-181a. Placement on the No Fly List meant Dr. Ibrahim was forbidden from boarding *any* plane. In contrast, the lists the agent intended to put Dr. Ibrahim on had milder consequences and were mostly informational. *See id.* at 186a. It is not in the record why the agent meant to add her to any of these lists, but it may have been related to meeting Dr. Ibrahim through an "outreach" program to her San Francisco area mosque. *Id.* at 196a, 14a-15a & nn.6-7.

Though the Government later claimed to have corrected the mistake promptly, "suspicious adverse effects continued to haunt Dr. Ibrahim." *Id.* at 209a. Her student visa was revoked in 2005. *Id.* at 191a-192a. And within the Government's list labyrinth, she was removed from the Selectee List, only to be

added to the TACTICS and TUSCAN lists. *Id.* at 194a. The next September, she was removed from the TSDB entirely, only to be added again the following March and removed again in May. *Id.* at 194a-195a. Three years later, in 2009, she was again placed on the TSDB, CLASS, and TECS, even though she did not meet the reasonable-suspicion standard. *Id.* at 196a. The Government contends that Dr. Ibrahim was renominated for reasons that are "state secrets." *Id.* Her renomination to these lists is why her second visa application was denied with the notation "(Terrorist)." *Id.* at 196a-199a.

Dr. Ibrahim would not find out about her historical or current status on these lists until 2013—after almost eight years of litigation—when the District Court ordered the Government to publicly reveal its mistake. *Id.* at 23a-24a. Only two months before trial, Dr. Ibrahim's lawyers were finally permitted to depose the FBI agent who had mistakenly nominated Dr. Ibrahim to the No Fly List—over the Government's vigorous objections. *Id.* at 24a.

"[F]rom the get-go" of this litigation, the Government knew that Dr. Ibrahim's nomination to the No Fly List was an error. *Id.* at 9a. It also knew that the watchlists contained system-wide inaccuracies. In a 2007 report, the Department of Justice noted that the TSC had a "weak quality assurance process" and that 38% of the tested records had errors. U.S. Dep't of Justice, Office of the Inspector Gen., Audit Division, Audit Report 07-41, Follow-up Audit of the Terrorist Screening Center iii (2007). That year, the Department of Homeland Security (DHS) created the Traveler Redress Inquiry Program to provide a system for redress. Nonetheless, a report two years later found that, with "few exceptions," redress-

seekers received no information about the basis for their travel difficulties. Dep't of Homeland Sec., Office of Inspector Gen., OIG-09-103, Effectiveness of the Department of Homeland Security Traveler Redress Inquiry Program 89 (2009).

C. Eight Years of Litigation

1. In January 2006, Dr. Ibrahim brought suit against multiple federal agencies seeking, among other things, an injunction requiring removal of her name from the No Fly List. Compl. 21; *see* First Am. Compl. 22. The District Court dismissed for lack of subject matter jurisdiction, *Ibrahim* v. *Dep't of Homeland Sec.*, No. C 06-00545 WHA, 2006 WL 2374645, at *5-9 (N.D. Cal. Aug. 16, 2006), but the Ninth Circuit reversed, holding that the District Court had erred in interpreting the relevant statutory provision. *Ibrahim* v. *Dep't of Homeland Sec.*, 538 F.3d 1250, 1254-55 (9th Cir. 2008) (*Ibrahim I*).

2. In 2009, Dr. Ibrahim filed a new complaint alleging that her inclusion on the watchlists violated her First Amendment right to freedom of association, her Fifth Amendment right to due process and equal protection, and the Administrative Procedure Act. Second Am. Compl. 22-25. The Government moved to dismiss, arguing that Dr. Ibrahim lacked standing because she could not show harm and, as a non-citizen who voluntarily left the United States, she lacked "substantive constitutional rights." D. Ct. Doc. 167-1, at 5-8, 10. The District Court agreed with the latter argument. *Ibrahim* v. *Dep't of Homeland Sec.*, No. C 06-00545 WHA, 2009 WL 2246194, at *1, *7 (N.D. Cal. July 27, 2009).

The Ninth Circuit reversed, holding that Dr. Ibrahim had standing and could state a constitutional

claim. The court noted that she had a "significant voluntary connection" with the United States because she had attended Stanford University—where she obtained her Ph.D.—for four years, was still collaborating with professors there, and planned to return. *Ibrahim* v. *Dep't of Homeland Sec.*, 669 F.3d 983, 997 (9th Cir. 2012) (*Ibrahim II*). The Government did not seek review by the Supreme Court. Pet. App. 172a; *see also* D. Ct. Doc. 404, at 2 (explaining that the Solicitor General had determined that "the circumstances do not warrant seeking cert").

3. Despite a Ninth Circuit ruling on standing that it chose not to appeal, the Government spent another year arguing that Dr. Ibrahim lacked standing. It made the argument in "yet another Rule 12 motion by the government," *Ibrahim* v. *Dep't of Homeland Sec.*, No. C 06-00545 WHA, 2012 WL 6652362, at *1-2 (N.D. Cal. Dec. 20, 2012); in its motion for summary judgment, D. Ct. Doc. 534, at 9-13; in its pretrial proposed findings of fact and conclusions of law, D. Ct. Doc. 598, at 11; and in statements during trial, Pet. App. 22a-23a. The argument was repeatedly rejected, even when the Government sought to support it with documents submitted *ex parte* and *in camera*. Pet. 8.

4. Beyond relitigating Dr. Ibrahim's standing, the Government vigorously contested Dr. Ibrahim's discovery requests. It "lodged over two hundred objections and instructions not to answer questions," Pet. App. 24a, and repeatedly delayed complying with discovery orders. *See, e.g.*, D. Ct. Doc. 416, at 2 ("[T]he government is responsible for this unnecessary delay."); D. Ct. Doc. 404, at 5, 7 (explaining that the Government had pursued "one delay tactic after another" and made "one mistake after the other").

The Government also repeatedly pressed overbroad arguments about privilege and confidentiality. In its third motion to dismiss, in addition to redacting its entire standing argument, the Government sought to redact from its *table of authorities* some of the reported case law on which it relied, along with statutes and a rule. D. Ct. Doc. 373, at ii-vi. In response to this request, the District Court overruled the Government's "persistent and stubborn refusal to follow the statute" concerning use of sensitive security information and remarked that "[t]his is too hard to swallow." *Ibrahim*, 2012 WL 6652362, at *6, *8.

The Government also failed to honor its promises to the District Court. The District Court accepted the Government's arguments that certain classified documents were subject to state-secrets privilege. Pet. App. 172a-173a. After this victory, the Government agreed on the record that it would "not affirmatively seek to prevail in this action based upon information that has been withheld on grounds of privilege." D. Ct. Doc. 541, at 1. The Government then "completely reverse[d]" course, Pet. App. 176a, and did exactly that: In its summary judgment motion, the Government argued that the case could not proceed because the state-secrets privilege protected important evidence. D. Ct. Doc. 534, at 24-25. It also asked the court to dismiss at the pretrial conference, arguing that the core of the case had been excluded as state secrets. Pet. App. 26a.

The District Court denied most of the Government's motion for summary judgment, permitting Dr. Ibrahim to proceed to trial on her procedural and substantive due process, equal protection, First Amendment, and APA claims.

5. Troubling treatment of Dr. Ibrahim and her family continued up to the trial. One of the witnesses at trial was Dr. Ibrahim's daughter, Raihan Binti Mustafa Kamal. *Id.* at 204a. However, before Ms. Kamal could board her flight from Malaysia to attend the trial, U.S. officials matched her to a TSDB record and flagged her as ineligible for admission under the Immigration and Nationality Act. *Id.* In fact, as a U.S. citizen, Ms. Kamal is not subject to the Act at all. *Id.*

After a one-week bench trial—the first trial ever over the No Fly List—the District Court found that Dr. Ibrahim had been denied due process. *Id.* at 205a-213a. In light of the "conceded, proven, undeniable, and serious error by the government," "due process entitle[d] Dr. Ibrahim to a correction in the government's records to prevent the 2004 error from further propagating through the various agency database and from causing further injury." *Id.* at 208a. The court ordered the Government to notify Dr. Ibrahim of her watchlist status and to remove or correct "all references to the designations made by the defective 2004 nomination form" and to ensure that the mistaken designations "be disregarded for all purposes." *Id.* at 208a, 223a-224a. The court did not reach the other constitutional or statutory claims because, were they successful, they would not have afforded Dr. Ibrahim additional relief. *Id.* at 132a. At long last, the court found—as the Government had finally conceded—that Dr. Ibrahim was not, and had never been, a threat to national security, and it ruled that the Government had violated Dr. Ibrahim's constitutional rights by preventing her from knowing of or contesting her placement on the No Fly List. *Id.* at 194a. Neither party appealed. The

eight-year "Kafkaesque" ordeal appeared to be over. *Id.* at 212a.

D. Attorneys' Fees Litigation

To compensate their years of work on this "path-breaking" litigation, Dr. Ibrahim and her attorneys sought fees and expenses. *Id.* at 56a, 132a. Under the EAJA, a district court may award attorneys' fees at as much as $125 an hour for a "prevailing party" against the Government, unless the Government's position was "substantially justified." 28 U.S.C. § 2412(a)(1), (d)(1)(A), (d)(2)(A). The EAJA also allows recovery of market-rate attorney's fees beyond the $125 per hour cap "to the same extent that any other party would be liable under the common law," *id.* § 2412(b), including when a party litigates in bad faith.

1. The District Court found that Dr. Ibrahim was a "prevailing party," Pet. App. 139a-140a, and that the "government's attempt to defend its no-fly error for years was not reasonable," *id.* at 144a. The court acknowledged that her attorneys "deserve recognition for the work they have contributed to this long-fought case." *Id.* at 126a-127a. Yet the District Court rejected most of the requested fees. First, it concluded that Dr. Ibrahim could only recover fees for work pertaining to the procedural due process claim and two other claims the court concluded were related. *Id.* at 146a-153a. The court also parsed each position the Government took in litigation for whether it was substantially justified, rather than considering its position as a whole. *Id*. After lengthy litigation before a special master, the court awarded Dr. Ibrahim only a fraction of her requested fees and expenses. *Id.* at 125a.

The District Court also held that the Government did not litigate in bad faith and thus denied market-rate fees. The court acknowledged that the Government "was wrong to assure all that it would not rely on state-secrets evidence and then reverse course." *Id.* at 161a. It also found fault in the Government's repeated requests for dismissal on standing grounds after standing had been settled. *Id.* But looking at the Government's many motions and positions over the years, each in isolation, the court did not find bad faith. *Id*. at 160a-162a.

2. Dr. Ibrahim appealed the District Court's resolution of her motion for fees and expenses. On appeal, a three-judge Ninth Circuit panel affirmed in part and reversed in part, largely ruling for the Government. *Id.* at 84a-115a. That opinion was vacated when Dr. Ibrahim successfully petitioned for rehearing en banc. *Id.* at 4a. By a vote of 8-3, a limited en banc panel reversed parts of the District Court's order, vacated the fee award, and remanded to the District Court. *Id.* at 1a-72a.

First, the en banc court rejected the District Court's analysis of "substantial justification" under the EAJA. *Id.* at 34a-44a. The District Court had examined whether each individual motion was substantially justified, but the en banc court explained that the proper course is to analyze the litigation "as an inclusive whole, rather than as atomized line-items." *Id.* at 38a (quoting *Commissioner, INS* v. *Jean*, 496 U.S. 154, 161-162 (1990)). The District Court should have ended its analysis as soon as it concluded that the Government's "defense of such inadequate due process" when Dr. Ibrahim "was concededly not a threat to national security" was "not substantially justified." *Id.* at 41a (quoting

id. at 144a). Moreover, the en banc court held that, because claims the District Court chose not to reach were not "unsuccessful," the court should have awarded Dr. Ibrahim attorneys' fees for those claims. *Id.* at 45a-46a. Finally, the en banc court explained that all of Dr. Ibrahim's claims were related under *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), because they all arose from a "common course of conduct"—that is, her erroneous placement on the No Fly List. Pet. App. 46a-55a. The Government does not ask this Court to review those rulings. Pet. 16.

The Government seeks review only of the Court of Appeals' final conclusion: that the District Court's bad-faith analysis was "incomplete." Pet. App. 70a. The Ninth Circuit held that the District Court made several errors on its way to finding that the Government did not act in bad faith. *Id.* at 62a. First, the District Court erred in adopting a "piecemeal" approach to bad faith rather than considering the "totality of the government's conduct," as longstanding precedent required. *Id.* The District Court had focused mostly on the FBI agent's error, with insufficient attention to the Government's subsequent conduct. *Id.* at 70a.

The Court of Appeals identified several key facts that the District Court failed to properly evaluate. First, the District Court had failed to consider that *after* discovering the FBI agent's mistake and *after* removing Dr. Ibrahim from the TSDB in 2006, the Government continued to place her on and off watchlists. *Id.* at 65a. Also, the District Court had overlooked the fact that, long after standing had been settled on appeal, the Government refused to accept the law of the case by repeatedly re-asserting essentially the same standing arguments. *Id.* at 65a-66a.

Furthermore, although the District Court had identified that it was "wrong" for the Government to attempt to use the state-secrets privilege to prevail after it had promised not to, the court did not adequately examine that about-face in its bad-faith analysis. *Id.* at 66a-67a (quoting *id.* at 161a). Additionally, the District Court had disregarded the Government's "stubborn refusal to produce discovery even after the district court ordered it produced." *Id.* at 67a. Finally, the District Court failed to ask whether the Government's position as a whole—aggressively litigating for eight years to defend what it knew was an error—was "baseless" and thus in bad faith. *Id.* at 69a.

Because the District Court did not adequately examine the "totality of the circumstances," the en banc court concluded that the bad-faith analysis was "incomplete" and that remand was appropriate for the District Court to make a bad-faith determination in the first instance by applying the proper analysis. *Id.* at 70a.

Without waiting for a final judgment on bad faith, the Government now petitions this Court for certiorari.

REASONS FOR DENYING THE PETITION

I. THE QUESTION PRESENTED DOES NOT IMPLICATE A CIRCUIT SPLIT.

A. The petition's question presented mostly addresses the standard of review for a court of appeals reviewing a district court's bad-faith determination, but the Government does not allege that there is any disagreement among the circuits on that issue. It acknowledges (at 21) that "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." That is correct. *See, e.g.*, *Griffin Indus., Inc.* v. *U.S. EPA*, 640 F.3d 682, 686 (6th Cir. 2011); *Mar. Mgmt., Inc.* v. *United States*, 242 F.3d 1326, 1331 (11th Cir. 2001) (per curiam). The Ninth Circuit applied that standard in this case. *See* Pet. App. 31a ("We review a district court's finding on the question of bad faith for clear error.").

Conceding that the Ninth Circuit used the correct rule, the Government argues that the court applied that rule incorrectly. Even if true—and it is not, *see infra* pp. 19-27—that does not merit this Court's review. *See* Sup. Ct. R. 10 ("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.").

B. In one paragraph at the end its petition, the Government asserts (at 31-32) that "this case would have come out differently in other circuits." The extent of its analysis is citing other courts' standards of review: the same clear-error standard that the Ninth Circuit applied here. It offers no cases where other circuits have reached conflicting results on similar facts. That is unsurprising given the extraordinary nature of this case.

None of the cases cited by the Government is even in tension with the Ninth Circuit's decision. Most touch on bad faith only in passing, and the sole case that does focus on bad faith *supports* the Ninth Circuit's conclusion. There, the First Circuit affirmed a finding of no bad faith in part because "[t]he district court carefully considered the totality of the circumstances," which bolsters the Ninth Circuit's finding of error here because the District Court failed

to use that approach. *United States* v. *Matos*, 328 F.3d 34, 42 (1st Cir. 2003).

In other cases, not cited by the Government, courts of appeals have found bad faith based on similar concerns to the Ninth Circuit's here. Some of those decisions went even further than the decision here by finding bad faith directly rather than remanding to the district court. For example, in *Gate Guard Services., L.P.* v. *Perez*, the Fifth Circuit held clearly erroneous the district court's no-bad-faith determination because that court applied the improper test. 792 F.3d 554 (5th Cir. 2015). It erred "[b]y focusing solely on whether the government's claim * * * was colorable at the outset" and "ignor[ing] both that the case lost all 'color' as it proceeded and the government's misconduct throughout th[e] litigation." *Id.* at 562; *accord Brown* v. *Sullivan*, 916 F.2d 492, 496-497 (9th Cir. 1990) ("We find that the cumulative effect of the Secretary's actions in the handling of Brown's case constitutes 'bad faith.' * * * Therefore, the district court erred * * *.").

Other decisions have reversed district courts for clear error when, as here, they did not abide by relevant precedent and ignored factual support for a contrary finding. *See, e.g.*, *Griffin Indus.*, 640 F.3d at 689 (finding clear error when a district court ignored relevant precedent on bad faith); *Rodriguez* v. *United States*, 542 F.3d 704, 710 (9th Cir. 2008) (finding clear error when the district court failed to properly consider "factual support for [the contrary] argument"); *see also FDIC* v. *Schuchmann*, 319 F.3d 1247, 1251 (10th Cir. 2003) (finding clear error when a district court relied exclusively on incomplete and uncertain evidence).

Nothing about this case—neither the legal rule applied, nor the result—implicates a split of authority in the courts of appeals.

II. THE NINTH CIRCUIT'S DECISION WAS CORRECT.

The Ninth Circuit vacated and remanded because the District Court conducted its bad-faith analysis in a manner inconsistent with longstanding circuit precedent and ignored significant categories of relevant evidence. That result was correct and unremarkable.

A. The District Court's error was fundamentally legal. It approached its bad-faith inquiry in a manner that violated longstanding Ninth Circuit precedent by considering Government conduct in isolation, rather than considering conduct against the totality of the circumstances. That piecemeal approach caused the District Court to ignore whole categories of conduct relevant for a bad-faith determination.

The Ninth Circuit has long evaluated bad faith by looking to the totality of the circumstances. Pet. App. 62a; *see, e.g.*, *Rodriguez*, 542 F.3d at 712; *Brown*, 916 F.2d at 496. Indeed, just a decade ago, the Government itself encouraged such totality review. It argued that the Ninth Circuit should overturn a district court's bad-faith finding because of excessive reliance on pre-litigation conduct and a failure to consider the totality of the Government's actions. The Ninth Circuit affirmed the finding of bad faith, but it did so only upon determining that the district court had properly applied a totality-of-the-circumstances approach. *Rodriguez*, 542 F.3d at 712.

Other circuits also consider the totality of the circumstances in evaluating bad faith for purposes of attorneys' fee awards. *See, e.g.*, *Kilopass Tech., Inc.* v. *Sidense Corp.*, 738 F.3d 1302, 1311-12 (Fed. Cir. 2013); *United States* v. *Lain*, 640 F.3d 1134, 1140 (10th Cir. 2011); *United States* v. *Heavrin*, 330 F.3d 723, 730 (6th Cir. 2003).

Here, the District Court failed to consider the totality of the circumstances, instead evaluating discrete pieces of Government conduct in isolation. In doing so, it overlooked the big-picture concern that most troubled the Ninth Circuit: the Government engaging in overzealous litigation to defend what it knew was a mistake. As this Court has held, "'bad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." *Hall* v. *Cole*, 412 U.S. 1, 15 (1973); *see Rawlings* v. *Heckler*, 725 F.2d 1192, 1195-96 (9th Cir. 1984). For that reason, an "agency's continuation of an action it knew to be baseless * * * is a prime example of 'bad faith.'" *Mendenhall* v. *Nat'l Transp. Safety Bd.*, 92 F.3d 871, 877 (9th Cir. 1996); *see Gate Guard*, 792 F.3d at 562 (bad faith where the Government's position lost all merit as the litigation proceeded).

The Government acknowledges that the action giving rise to this litigation—an FBI agent placing Dr. Ibrahim on the No Fly List because he incorrectly filled out a form—was an obvious error. Under longstanding precedent, then, the District Court should have evaluated whether the Government took a baseless position in making Dr. Ibrahim "endure over a decade of contentious litigation, two trips to the court of appeals, extensive discovery, over 800 docket entries amounting to many thousands of pages of record, and a weeklong trial the Govern-

ment precluded her (and her U.S.-citizen daughter) from attending, only to come full circle to the Government's concession that she never belonged on the No Fly list at all—that she is not and never was a terrorist or threat to airline passenger or civil aviation security." Pet. App. 70a. In other words, a bad-faith determination required that the District Court consider the Government's conduct after discovering the FBI agent's error and ask: Was it bad faith for the Government to spend years litigating to defend what it knew to be a mistake?

Especially in this context, examining the Government's behavior as a comprehensive whole makes sense. Conduct that appears benign in isolation can seem troubling in light of all of a party's actions, or vice versa. The Government in passing (at 28) attempts to contest that common-sense principle, citing *Goodyear Tire & Rubber Co.* v. *Haeger*, 137 S. Ct. 1178 (2017). But *Goodyear* pertains only to calculating what fees and expenses are traceable to bad-faith action—not to the threshold determination of whether a party acted in bad faith. *Id.* at 1184-86. In any event, the Ninth Circuit's totality approach is entirely consistent with *Goodyear*. *Compare Brown*, 916 F.2d at 497 ("The district court may award attorney fees at market rates for the entire course of litigation * * * if it finds that the fees incurred during the various phases of litigation are in some way traceable to the [government's] bad faith."), *with Goodyear*, 137 S. Ct. at 1187-88 ("[T]he but-for standard even permits a trial court to shift all of a party's fees * * * in one fell swoop * * * [when] everything the defendant did * * * was 'part of a sordid scheme' to defeat a valid claim.").

The Ninth Circuit's approach is also consistent with the purposes of the EAJA, which expressly recognizes common-law fee-shifting principles, 28 U.S.C. § 2412(b), and which is specifically intended "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). Where the entire course of litigation is an "unjustified" and "unreasonable" defense of a known mistake, the EAJA's purposes are served best by compensating the vindicated plaintiff for persevering through that improperly prolonged litigation.

After holding that the District Court's bad-faith analysis was legally "incomplete," the Ninth Circuit took the unremarkable step of remanding for the District Court to re-do that analysis in the proper manner. Pet. App. 70a. That was the core of the Ninth Circuit's ruling on bad faith—and that reasoning is not squarely challenged by the petition.

B. The petition also does not address the Ninth Circuit's rulings that the District Court missed, but should have considered, important factual issues in its bad-faith determination. When the Government says (at 28) that "zero plus zero plus zero is still zero"—implying that if all the Government's individual actions in this case were justified, the totality must also be—it overlooks that the Ninth Circuit identified significant gaps in what the District Court considered. Courts of appeals regularly remand in cases, across varied contexts, when district courts disregard key evidence. *See, e.g.*, *United States* v. *Jones*, 697 F. App'x 2, 3-4 (D.C. Cir. 2017) (per curiam) (holding a district court's factual findings

clearly erroneous when the court ignored relevant evidence); *Myers* v. *United States*, 652 F.3d 1021, 1036 (9th Cir. 2011) (same); *Jiminez* v. *Mary Washington Coll.*, 57 F.3d 369, 384 (4th Cir. 1995) (same).

The Ninth Circuit directed the District Court to evaluate entire categories of evidence that it failed to consider initially. Most importantly, the District Court failed to consider the Government's actions after discovering the FBI agent's error. These included Dr. Ibrahim's continued placement on federal watchlists, despite a February 2006 order from a government agent stating she had "no nexus to terrorism" and requesting that Dr. Ibrahim be removed from *all* watchlist databases; the Government's failure to remedy its own error until being ordered to do so; and the Government's failure to inform the FBI agent of his mistake for years. Pet. App. 65a. The petition does not challenge the relevance of these factors to a bad-faith determination.

The District Court also failed to consider important Government conduct in the course of litigation. It erred by considering only the merits of the Government's individual privilege arguments, disregarding the Government's refusal to produce discovery after the District Court ordered it to do so. *Id.* at 67a. After the District Court reprimanded the Government for its refusal, the Government dragged its feet and provided baseless justifications to thwart Dr. Ibrahim's access to information critical to her case. The District Court itself earlier characterized the Government's behavior as "persistent and stubborn refusal to follow the statute," *id.* at 68a, but it then failed in its bad-faith analysis to consider whether that behavior amounted to willful disobedience.

The District Court's failure to consider those significant categories of conduct was reason enough for the Ninth Circuit to remand for a new bad-faith determination.

C. Rather than challenge the core parts of the Ninth Circuit's opinion, the petition instead contests its guidance on certain issues that the District Court did consider. Even there, the Government's challenges are unpersuasive.

1. For example, the Government claims (at 25) that it pursued a path consistent with Ninth Circuit precedent when it argued for summary judgment based on the state-secrets privilege. According to that precedent, when evidence is excluded based on the state-secrets privilege, a case may be dismissed if it cannot proceed without the privileged evidence, or if "litigating the merits would present an unacceptable risk of disclosing state secrets." Pet. App. 26a (quoting *Mohamed* v. *Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1079 (9th Cir. 2010) (en banc)).

But the Ninth Circuit did not question whether the Government *could* have argued for dismissal under *Jeppesen*. Rather, the Ninth Circuit was troubled that the Government misled the District Court when it expressly stated that it would not rely on state-secrets privilege to prevail in the lawsuit. Indeed, the Government repeatedly announced that, if it invoked state secrets, "that evidence could not be relied upon by either side." *Id.* at 173a. Then, responding to a court order seeking clarification on this issue, the Government explicitly stated: "[T]he Government may not affirmatively seek to prevail in this action based upon information that has been withheld on grounds of privilege." *Id.* at 174a.

Seeking summary judgment based on an inability to disclose state secrets is "affirmatively seek[ing] to prevail in th[e] action," and the District Court found that the Government had indeed "completely reverse[d]" itself on this issue just before trial. *Id.* at 176a. That late-breaking reversal was the problem, not the merits of any *Jeppesen* argument.

2. The Government also argues (at 23-24) that it was justified in repeatedly challenging Dr. Ibrahim's standing as the case evolved. In *Ibrahim II*, the Ninth Circuit held that Dr. Ibrahim had standing to litigate her federal constitutional claims in district court. 669 F.3d at 994. Nevertheless, the Government repeated its standing argument on four separate occasions, raising challenges that were foreclosed by the law of the case. Indeed, the District Court characterized "the government's stubborn persistence in arguing that Dr. Ibrahim lacked standing [as] unreasonable * * * in the face of our court of appeal's decision on this very point." Pet. App. 145a. Yet in just two sentences devoid of substantial analysis, it concluded that such behavior did not amount to bad faith. *Id.* at 161a. The Ninth Circuit correctly held that—in this circumstance where the District Court had already found the Government's cumulative behavior was "unreasonable"—it should have accounted for that in its bad-faith determination. *Id.* at 66a.

3. The Government's other challenges to the Ninth Circuit's opinion are also unconvincing. First, the Government suggests (at 27) that it did not unjustifiably defend Dr. Ibrahim's No Fly List status while knowing it was a mistake because it removed her from the list within a day of discovering the error and never placed her back on it. But removal behind

the scenes does not ameliorate the Government's subsequent defense of placing her on the list, and the Government's correction in 2005 cannot justify the following decade of litigation to conceal its error. Meanwhile, Dr. Ibrahim had no way of knowing that the Government had taken her off the No Fly List and why her visas were being revoked or denied. Moreover, during this time, the Government continued to place Dr. Ibrahim on various watchlists even though it knew that she was not a threat to national security or civil aviation. Pet. App. 16a-19a. Not until the District Court ordered the Government to "cleans[e]" the TSDB and all client databases of the 2004 derogatory information could Dr. Ibrahim be assured that her visa and travel treatment would be "unaffected by the original wrong." *Id.* at 206a.

The Government also mistakenly criticizes the Ninth Circuit's conclusion that there was evidence of bad faith in preventing Dr. Ibrahim's daughter from boarding her flight to testify at the trial, even though she was a U.S. citizen and so could not have been inadmissible under the Immigration and Nationality Act. The Government (at 26) faults Philippine Airlines for failing to include her citizenship status in the information it submitted to DHS. As the Ninth Circuit highlighted, however, she could not board her flight because of *the Government's* inaccurate listing in its TSDB database. Pet. App. 64a. She had her U.S. passport. U.S. Customs and Border Protection recognized that she appeared to be a U.S. Citizen. Nevertheless, the Government requested that the airline perform additional screening in an email, and it was that email that prevented her from boarding the flight. *Id.*

The Government additionally challenges (at 27-28) the Ninth Circuit's instructions to the District Court to consider other specific litigation conduct on remand. Pet. App. 69a. This includes the Government's abuse of the discovery process, its ten motions to close the courtroom in derogation of the public's right of access, and its use of summary judgment to address issues unrelated to the merits. If the Government believes those actions were justified, it will have an opportunity to argue that before the District Court on remand. There is no need for this Court to consider those fact-bound issues in the first instance.

III. THE GOVERNMENT'S POLICY ARGUMENTS LACK MERIT AND DO NOT JUSTIFY FACT-BOUND REVIEW.

Having identified neither a circuit split nor a legal error, the Government asks this Court to take the extraordinary step of reviewing a highly fact-bound determination, despite the Court's rule that 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." Sup. Ct. R. 10; *see, e.g.*, *Price* v. *Dunn*, 139 S. Ct. 1533, 1539 (2019) (Thomas, J., concurring in the denial of certiorari) (explaining that denial of certiorari was appropriate where petitioner asked for "mere error correction" of the scope of appellate review). This is not that rare case where fact-bound review is warranted.

A. The Ninth Circuit's opinion has few implications for other cases, despite the Government's insistence (at 29) that it "presents a question of exceptional importance." The Ninth Circuit held, on a unique set of facts, that the District Court should

consider whether the Government's conduct, taken as a whole, may have displayed bad faith. The Government anticipates (at 29) a threat to its "future ability to fairly and vigorously litigate." Not so.

First, the Government's ability to litigate will not be affected by the Ninth Circuit's highly fact-bound and narrow holding. The Government suggests (at 29-30) that it will be deterred from raising standing in future cases for fear of being found to act in bad faith. But the Ninth Circuit merely held that it *may* be evidence of bad faith when the Government presses standing arguments that have already been rejected by the court of appeals *in that very case*. The Government also argues (at 30-31) that it will be deterred from raising state-secrets privilege because the Ninth Circuit criticized the Government for promising not to rely on the privilege and then "revers[ing] course." Pet. App. 174a. But the Ninth Circuit's concern was not the assertion of the state-secrets privilege itself, but that the Government reneged on its representations to the District Court concerning that privilege. *See supra* pp. 24-25. The Government cannot seriously argue that its ability to "litigate in the public interest," Pet. 29, will be threatened by the risk that it *may* be found to act in bad faith when it refuses to accept the law of the case or presses an argument it has promised a court it would not make.

Second, far from affecting the mine run of government litigation, this case was an idiosyncratic one of first impression, and similar facts are (hopefully) unlikely to reoccur, especially in light of subsequent changes to watchlist policy. The Government erroneously placed Dr. Ibrahim on the No Fly List when it had expanded its national security apparatus after

September 11 but not yet adopted consistent watchlist procedures. Because of cases like Dr. Ibrahim's, the Government has since improved its procedures. *See also Latif* v. *Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014) (holding due process requires procedures for plaintiffs to contest their placement on the No Fly List). DHS has modified its Traveler Redress Inquiry Program and now provides a process by which individuals who are disallowed from flying due to "watch list issues" can file a complaint. *See DHS TRIP: One-Stop Travelers' Redress Process*, Dep't of Homeland Security, https://www.dhs.gov/one-stop-travelers-redress-process (last published May 9, 2019). No matter what bad-faith determination the District Court makes on remand, future litigation will occur in a world with these new procedures in place and more case law on how watchlist challenges should proceed.

Third, the Government has never before treated bad-faith determinations in EAJA fee-award proceedings—which are rare in any case—as a problem worthy of this Court's attention. The only time the Government appears to have addressed the issue in this Court is in defending a finding of no bad faith when the opposing party sought certiorari. *See* Brief for the United States in Opposition at 8, *North Star Alaska Hous. Corp.* v. *United States*, No. 10-122 (U.S. Nov. 12, 2010). There have been several bad-faith determinations by circuit courts in recent years, and the Government has not petitioned for certiorari in any of them. *See, e.g.*, *Gate Guard*, 792 F.3d at 562-563 (holding that the "government's extraordinary uncivil and costly litigation tactics" justified reversing the district court and finding bad faith); *Rodriguez*, 542 F.3d at 712 (finding bad faith when

the "government's defense of privilege was so lacking in support"). In *Gate Guard*, the Fifth Circuit found bad faith because the Government had cited government-informant privilege to evade discovery and then attempted to use that same evidence for its own purposes. 792 F.3d at 563. The Government does not claim that *Gate Guard*, or any other bad-faith determination, has deterred it from vigorously litigating or asserting privilege.

B. If anything, policy concerns run *against* the Government. The fact that Dr. Ibrahim's suit successfully established important precedents for asserting constitutional rights and spurred changes in Government policy makes this a textbook case for fee-shifting under the EAJA. Pet. App. 56a-59a. Congress passed the EAJA in response to its "concern that persons 'may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights.'" *Sullivan* v. *Hudson*, 490 U.S. 877, 883 (1989) (quoting Pub. L. No. 96-481, § 202(a), 94 Stat. 2321, 2325). Dr. Ibrahim's suit helped spur the Government to face its mistakes and improve its procedures. Pet. App. 57a n.28. If public-interest lawyers are not compensated for going up against eight years of "scorched earth litigation"—a challenge that bore fruit here—they will be deterred from challenging "unreasonable governmental action." Pet. App. 41a. The Ninth Circuit's opinion vindicates Congress's recognition that "a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy." H.R. Rep. No. 96-1418, at 10 (1980). The decision below will ensure

that cases like this are litigated, that plaintiffs are not left with "no realistic choice and no effective remedy," and that, in the future, the Government is deterred from aggressively defending known errors that affect important individual rights. *Sullivan*, 490 U.S. at 883 (quoting S. Rep. No. 96-253, at 5 (1979)).

C. The Government goes so far as to ask this Court to summarily reverse. Pet. 20, 32-33. But the Government cites not a single case where this Court has even reviewed, much less reversed, an EAJA bad-faith determination on the merits. Summary reversal is inappropriate where the Court has never even had occasion to address the underlying legal principles at issue. After all, the extraordinary step of summary reversal is generally "designed to enforce the Court's supremacy over recalcitrant lower courts." William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & Liberty 1, 2 (2015).

The Government (at 32-33) analogizes to summary reversals in qualified immunity cases, but this Court has summarily reversed in those cases only when lower courts have clearly gotten the *law* wrong—a law developed in at least a dozen Supreme Court merits opinions in the last ten years alone. Qualified immunity protects government agents from personal liability for constitutional violations unless the violation is of "clearly established law." *City and County of San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1774 (2015). In determining whether a constitutional right was violated, courts of appeals have occasionally made the mistake of "defin[ing] clearly established law at a high level of generality." *Id.* at 1775-76 (internal quotation marks omitted). Here,

the Government freely admits that the Ninth Circuit, "like its sister circuits," applied the correct legal standard. Pet. 21.

Nor does this case raise the same policy concerns as qualified immunity cases. Qualified immunity is a constitutional tort doctrine shielding "government officials * * * from liability for civil damages." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). The lawyers here are not liable for civil damages; they face no personal liability whatsoever. If the District Court makes a determination of bad faith on remand, only the *Government* will have to pay additional fees, under a scheme set up by Congress in the EAJA. Qualified immunity is also, in part, intended to protect the capacity of individual law enforcement officers to make split-second decisions when they reasonably perceive danger. *See White* v. *Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam). No exigency justifies shielding the Government's ability to litigate relentlessly when it knows it is in the wrong.

Similarly, the Government's implicit analogy (at 33) to this Court's stay of extra-record discovery after a finding of "bad faith" on the part of the Secretary of Commerce is inapposite. *In re Dep't of Commerce*, 139 S. Ct. 16 (2018); *see id.* (Gorsuch, J., concurring in part and dissenting in part). There, the district judge used circumstantial evidence to find bad faith in a cabinet secretary's decisions made behind closed doors. Here, the Ninth Circuit has merely suggested that the District Court might find bad faith in eight years of aggressive litigation to defend an *acknowledged error*.

Finally, the Government expresses concern (at 20) that the Ninth Circuit's language unfairly "impugns"

career government attorneys. The court did criticize the Government's conduct in the litigation, and observed that some of it was "ethically questionable." Pet. App. 42a n.20. But the court was right: the Government's conduct was concerning, as the District Court also repeatedly observed. *See supra* pp. 10-11, 14, 23-25. Moreover, any criticism was generalized rather than personal: nowhere in its thorough opinion did the Ninth Circuit specifically name a single government lawyer. It is ironic that the Government argues its *lawyers* were the ones "impugn[ed]" in a case where a woman was erroneously treated as a national security threat and denied due process for eight years. The person most "impugn[ed]" here is Dr. Ibrahim.

IV. REVIEW NOW IS PREMATURE.

Granting the petition cannot fully resolve this case. The District Court will invariably have to recalculate its fee award no matter how this Court acts on the petition because the Ninth Circuit reversed and remanded on grounds the Government's petition does not challenge.

Nor is review in this interlocutory posture even necessary for the Government to prevail. The Ninth Circuit merely vacated and remanded the bad-faith determination and expressly left open the opportunity for the Government to show that it "had a good faith basis to defend its No Fly list error as the litigation evolved." Pet. App. 70a.

Moreover, the specific factual challenges the Government raises may prove irrelevant to the outcome of the District Court's determination under the totality-of-the-circumstances approach. Under that approach, "it is unnecessary to find that every aspect

of a case is litigated by a party in bad faith in order to find bad faith by that party." *Rodriguez*, 542 F.3d at 712. Without knowing how the District Court will weigh the totality of the circumstances, review by this Court is premature. *See Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) ("Ours is a court of final review and not first view. Ordinarily, we do not decide in the first instance issues not decided below." (internal quotation marks and citations omitted)). Even if this Court one day decides to consider how to weigh evidence in a bad-faith analysis for fee awards, it should wait for a case where the legal standard at issue has been applied to the facts so that the Court's review can be fully informed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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