No. 24-1142

In the Supreme Court of the United States

ROBERT HOLMAN, PETITIONER

v.

BROOKE L. ROLLINS, SECRETARY, DEPARTMENT OF AGRICULTURE, ET AL.

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

BRIEF FOR THE RESPONDENTS

D. JOHN SAUER
Solicitor General
Counsel of Record
BRETT A. SHUMATE
Assistant Attorney General
THOMAS PULHAM
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioner an award of attorney's fees where petitioner obtained a preliminary injunction against enforcement of a federal statute, but petitioner's suit was later jointly dismissed as moot after Congress repealed the statute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15a-45a) is reported at 117 F.4th 906. The order of the court of appeals denying rehearing (Pet. App. 1a-14a) is reported at 127 F.4th 660. The order of the district court (Pet. App. 47a-57a) is available at 2023 WL 2776733. A prior order of the district court (Pet. App. 62a-96a) is available at 2021 WL 2877915.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 2024. A petition for rehearing was denied on February 3, 2025 (Pet. App. 1a-14a). The petition for a writ of certiorari was filed on May 5, 2025 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the American Rescue Plan Act of 2021 (ARPA or Act), Pub. L. No. 117-2, 135 Stat. 4, to provide emergency assistance to persons affected by the COVID-19 pandemic. Section 1005 of the Act directed the Department of Agriculture (USDA) to pay "up to 120 percent of the outstanding indebtedness" for certain loans that were held as of January 1, 2021, by a "socially disadvantaged farmer or rancher." § 1005(a)(2), 135 Stat. 12. Congress defined the term "socially disadvantaged farmer or rancher" to mean a "farmer or rancher who is a member of" a group "whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities." 7 U.S.C. 2279(a)(5) and (6); see ARPA § 1005(b)(3), 135 Stat. 13.

Petitioner filed suit to challenge that payment condition, alleging that he would have qualified for the Act's payment assistance but for his failure to satisfy the socially-disadvantaged requirement. See Pet. App. 17a. He alleged that enforcing the requirement would violate principles of equal protection under the Fifth Amendment's Due Process Clause. See *ibid.* Other farmers and ranchers brought similar suits. See *id.* at 17a-18a, 73a. Two district courts issued preliminary relief that prohibited the government from making any payments under Section 1005 of the Act, and another district court certified two nationwide classes of farmers—both of which included petitioner—and issued a classwide preliminary injunction against taking race or ethnicity into account when administering Section 1005. See *Faust* v. *Vilsack*, 519 F. Supp. 3d 470, 478 (E.D. Wis. 2021) ("temporary restraining order" barring the government from forgiving any loans pur-

suant to Section 1005); *Wynn* v. *Vilsack*, 545 F. Supp. 3d 1271, 1295 (M.D. Fla. 2021) (preliminary injunction barring the government "from issuing any payments, loan assistance, or debt relief pursuant to Section 1005(a)(2)"); *Miller* v. *Vilsack*, No. 21-cv-595, 2021 WL 11115194, at *12 (N.D. Tex. July 1, 2021) (preliminary injunction barring the government "from discriminating on account of race or ethnicity in administering section 1005 of the [ARPA] for any applicant who is a member of the Certified Classes").

After the grants of preliminary relief in *Faust*, *Wynn*, and *Miller*, the district court in petitioner's suit entered a preliminary injunction that barred the government from "issuing any payments, loan assistance, or debt relief pursuant to Section 1005(a)(2) of the [Act]." Pet. App. 95a; see *id.* at 62a-96a. While the litigation was pending, Congress repealed Section 1005. Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 22008, 136 Stat. 2023. The parties then jointly stipulated to dismissal of petitioner's case as moot. See Pet. App. 58a-61a.

After his case was dismissed, petitioner moved for attorney's fees and costs under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412. As relevant here, EAJA authorizes an award of attorney's fees and costs "to a prevailing party" in civil litigation against the government "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A). The district court denied that motion, concluding that petitioner was not a "prevailing party" because the preliminary injunction entered in this case had "provided [petitioner] with nothing lasting—no permanent change of status, no irrevocable benefit, and

no enduring opportunity to profit from the Court's order." Pet. App. 57a; see *id.* at 47a-57a.

2. The court of appeals affirmed. Pet. App. 15a-45a.

a. The court of appeals declined to address whether petitioner was a prevailing party, instead ruling that petitioner was not entitled to fees because the government's position was "substantially justified" under EAJA. Pet. App. 22a-32a. The court explained that "[w]hat 'matters most' to the substantial justification analysis is 'the actual merits of the Government's litigating position.'" *Id.* at 23a (brackets and citation omitted). Here, the court observed that the government had "[a]cknowledg[ed] the high bar set by strict scrutiny," but had "presented substantial record evidence to defend the program's constitutionality," including evidence of "past discrimination by the USDA against socially disadvantaged farmers" and of "'the inefficacy of the race-neutral alternatives that Congress tried for years before enacting § 1005.'" *Id.* at 26a-28a.

b. Judge Larsen dissented. Pet. App. 33a-45a. In her view, the government's position in this case was not substantially justified because the government had not adequately demonstrated past discrimination against socially disadvantaged farmers, and thus could not show a compelling interest in remediating such discrimination. *Id.* at 36a-38a.

c. On February 3, 2025, the court of appeals denied rehearing en banc. Pet. App. 1a-14a. Judge Thapar dissented, agreeing with Judge Larsen that the government had not produced sufficient evidence of past discrimination to render its position substantially justified. *Id.* at 3a-14a. He observed, however, that this Court was then considering *Lackey* v. *Stinnie*, 604 U.S. 192 (2025), which presented the question "whether the win-

ner of a preliminary injunction in a case that's later mooted is a 'prevailing party'" for purposes of fee-shifting under 42 U.S.C. 1988. Pet. App. 6a n.2. Judge Thapar noted that, when this Court issued its decision in *Lackey*, that decision would "apply with full force to the statutory language at issue here." *Ibid.* Judge Larsen also dissented from the denial of rehearing en banc "for the reasons stated in her original dissent and for those stated in Judge Thapar's dissent to [the] order of denial." *Id.* at 2a-3a.

d. On February 25, 2025, this Court issued its decision in *Lackey*. The Court held that entry of a preliminary injunction "does not render a plaintiff a 'prevailing party'" under Section 1988. *Lackey*, 604 U.S. at 207.

DISCUSSION

Petitioner contends (Pet. 22-28) that the court of appeals erred in finding the government's position in this case to be "substantially justified." The intervening decision in *Lackey* v. *Stinnie*, 604 U.S. 192 (2025), makes clear, however, that petitioner, who received only a preliminary injunction, is not a "prevailing party." See *id.* at 200-208. Because the government was defending the constitutionality of an Act of Congress, petitioner's fee request fails on the additional ground that "special circumstances" would "make an award unjust." 28 U.S.C. 2412(d)(1)(A). And petitioner identifies no court of appeals that would have found it an abuse of discretion to deny EAJA fees in these circumstances.

For all those reasons, plenary review of the Sixth Circuit's substantial-justification holding is not warranted. That holding is in at least some tension, however, with this Office's recent determination that it will no longer defend USDA emergency-relief programs that are essentially indistinguishable from the one that

petitioner challenged in this case. This Court's decision in *Lackey*, which neither the panel nor the full court below had the opportunity to consider, provides a sounder basis for rejecting petitioner's current request for EAJA fees. Indeed, Judge Thapar's dissent from the denial of rehearing en banc recognized that the *Lackey* decision when issued would "apply with full force to the statutory language at issue here." Pet. App. 6a n.2. This Court should therefore grant certiorari, vacate the court of appeals' judgment, and remand for further consideration in light of *Lackey*.

1. Like other fee-shifting provisions, EAJA authorizes an award of fees only to a "prevailing party." 28 U.S.C. 2412(d)(1)(A). The term "prevailing party" is a "legal term of art" that this Court has "interpreted * * * consistently" across fee-shifting statutes. *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598, 603 & n.4 (2001). In *Lackey*, this Court held that a plaintiff who obtains only a preliminary injunction is not a "prevailing party" under one such fee-shifting statute (42 U.S.C. 1988). 604 U.S. at 200-208. The Court explained that a plaintiff becomes a prevailing party only "when a court conclusively resolves his claim by granting enduring relief on the merits that alters the legal relationship between the parties." *Id.* at 207. The Court observed that "preliminary injunctions do not conclusively resolve the rights of parties on the merits," and therefore "they do not confer prevailing party status." *Id.* at 201. That remains true, the Court confirmed, even when "external events"—in *Lackey*, the state legislature's repeal of the challenged statutory provision, see *id.* at 197—"render [the] dispute moot" before the case proceeds to final judgment. *Id.* at 201.

Because petitioner obtained only a preliminary injunction before Congress's repeal of Section 1005 rendered his case moot, *Lackey* is dispositive here. "A plaintiff who wins a transient victory on a preliminary injunction does not become a 'prevailing party' simply because external events convert the transient victory into a lasting one." *Lackey*, 604 U.S. at 203; see *id.* at 202 (reaffirming *Buckhannon*'s holding that "a voluntary change in the defendant's conduct" does not confer prevailing-party status) (citation omitted). And EAJA is not among the few statutes in which Congress has expressly "empower[ed] courts to award attorney's fees to plaintiffs who have enjoyed some success but have not prevailed in a judgment on the merits." *Id.* at 205 (citing the Freedom of Information Act, 5 U.S.C. 552, as an example of such a statute).

Petitioner contends (Pet. 32) that *Lackey* is inapplicable here because the term "prevailing party" means something different in EAJA than it does in Section 1988 and in every other fee-shifting statute that uses the term. That contention is unsound. "Congress * * * has authorized the award of attorney's fees to the 'prevailing party' in numerous statutes," and the Court "ha[s] interpreted these fee-shifting provisions consistently." *Buckhannon*, 532 U.S. at 602, 603 n.4. The Court has accordingly relied on precedent interpreting "prevailing party" in Section 1988 when interpreting that term in EAJA. See *Commissioner, INS* v. *Jean*, 496 U.S. 154, 160-161 (1990) (citing *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983)). And the Court has squarely rejected the argument that "prevailing party" means something different in EAJA than in other fee statutes, explaining that "[n]othing in EAJA supports a different reading" of the term. *Astrue* v. *Ratliff*, 560

U.S. 586, 591 (2010). To the contrary, because "the term 'prevailing party' in fee statutes is a 'term of art' that refers to the prevailing litigant," the term as used in EAJA "carries its usual and settled meaning." *Ibid.* (citation omitted); see *Buckhannon*, 532 U.S. at 603. Consistent with that understanding, Judge Thapar's dissent from the denial of rehearing en banc recognized that the ultimate decision in *Lackey* would control this case. See Pet. App. 6a n.2.

Petitioner's contrary position relies exclusively (Pet. 32-36) on various committee reports. But "legislative history is not the law." *Azar* v. *Allina Health Services*, 587 U.S. 566, 579 (2019) (citation omitted). In any event, the reports on which petitioner relies make clear that "[i]t is the committee's intention that the interpretation of the term ['prevailing party'] in [EAJA] be consistent with the law that has developed under existing statutes," Pet. App. 133a-134a (excerpting H.R. Rep. No. 1418, 96th Cong., 2d Sess. (1980)), and that the term's "interpretation is to be consistent with the law that has developed under existing statutes," *id.* at 138a (excerpting H.R. Rep. No. 1434, 96th Cong., 2d Sess. (1980)). Those reports undermine rather than support petitioner's argument for an EAJA-specific definition of "prevailing party." This Court's decision in *Lackey* thus confirms that petitioner was not entitled to fees under EAJA.

2. Petitioner's EAJA claim fails for the additional reason that "special circumstances" existed that would make it "unjust" to award fees in this case. 28 U.S.C. 2412(d)(1)(A); see *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38 (1989) (explaining that a respondent is entitled to "defend its judgment on any ground properly raised below whether or not that ground was relied

upon, rejected, or even considered by the District Court or the Court of Appeals") (citation omitted). It is one thing to award fees where a plaintiff challenges agency action that is alleged to contravene a congressional directive; it is quite another to do so when, as here, the challenged action is that of Congress itself. Cf. S. Rep. No. 586, 98th Cong., 2d Sess. 7, 17 (1984) (explaining that EAJA is intended to deter "the use of excessive regulatory authority" and to "restrain agency actions which go beyond Congress' intent"). "In enacting the EAJA, it is implausible that Congress intended to penalize the government for defending the constitutionality of its own enactments." *Kiareldeen* v. *Ashcroft*, 273 F.3d 542, 550 (3d Cir. 2001).

A fee award here would be especially unjust given that the government has a general duty to defend Acts of Congress, and courts must apply a "presumption of constitutionality" to duly enacted statutes. *United States* v. *Morrison*, 529 U.S. 598, 607 (2000). Indeed, lower courts have frequently held that EAJA fees are unavailable in that situation. See, *e.g.*, *United States* v. *One Parcel of Real Property*, 960 F.2d 200, 210 (1st Cir. 1992); *Vacchio* v. *Ashcroft*, 404 F.3d 663, 675 (2d Cir. 2005); *Kiareldeen*, 273 F.3d at 550-551; *Gonzales* v. *Free Speech Coalition*, 408 F.3d 613, 618 (9th Cir. 2005); *United States* v. *Certain Real Estate Property*, 838 F.2d 1558, 1562 (11th Cir. 1988); *Grace* v. *Burger*, 763 F.2d 457, 458 n.5 (D.C. Cir.), cert. denied, 474 U.S. 1026 (1985). Although those courts have relied on EAJA's "substantially justified" prong, the point remains that defense of a federal statute typically should not trigger an EAJA award.

The fact that petitioner had already benefited from the interim remedial orders in *Faust*, *Wynn*, and *Miller*

—and thus did not receive even a temporary tangible benefit from the preliminary injunction entered in his own suit—provides a further reason for viewing an award of EAJA fees as unjust. Indeed, the certification of the nationwide classes in *Miller* arguably precluded petitioner from continuing to seek relief in this case unless and until he opted out of those classes. Cf. *Smith* v. *Bayer Corp.*, 564 U.S. 299, 313 (2011). And the plaintiffs in *Faust*, *Wynn*, and *Miller* themselves did not receive EAJA fees. Cf. *Wynn* v. *Vilsack*, No. 21-cv-514, 2023 WL 6158488 (M.D. Fla. Sept. 21, 2023) (denying fee motion).

Petitioner does not address whether "special circumstances make an [EAJA] award unjust" here. 28 U.S.C. 2412(d)(1)(A). Instead, petitioner objects to the court of appeals' analysis of EAJA's "substantially justified" language on the ground that "the government did not come close to satisfying strict scrutiny." Pet. 22; see Pet. 22-28. Petitioner also argues that the court of appeals improperly "place[d] special emphasis on the government's litigation position" by giving "the USDA's unreasonable promulgation of race classifications * * * *less* weight than the government's defense of the law in court." Pet. 17-18.

Petitioner does not dispute, however, that the substance of the USDA's promulgated guidance was effectively mandated by Congress. Cf. ARPA § 1005(a)(2) and (b)(3), 135 Stat. 12-13; 7 U.S.C. 2279(a)(5) and (6). And he elsewhere acknowledges that a court should consider both the "actions leading up to litigation, as well as the government's subsequent litigation positions in court." Pet. 1 (citing *Jean*, *supra*). Petitioner's fact-bound disagreement with the relative weight the lower

courts assigned to each aspect of the government's conduct does not warrant further review.

3. Petitioner asserts that the courts of appeals are in conflict about whether "objectively unreasonable pre-litigation conduct is dispositive in favor of fees," or whether such conduct instead may be "cure[d] * * * by taking an otherwise reasonable position on the merits in court." Pet. 1, 14 (emphasis omitted); see Pet. 18-22. That assertion is incorrect. All circuits apply the same framework to determine whether the government's position is substantially justified under EAJA, and any variance in outcome is simply the result of varying facts.

Petitioner asserts that the Second and Third Circuits "say that the government's objectively unreasonable pre-litigation conduct is dispositive in favor of EAJA fees." Pet. 18 (citing, *inter alia*, *Smith by Smith* v. *Bowen*, 867 F.2d 731 (2d Cir. 1989), and *Taylor* v. *Heckler*, 835 F.2d 1037 (3d Cir. 1987)). But in decisions postdating this Court's 1990 decision in *Jean*—which made clear that "EAJA * * * favors treating a case as an inclusive whole, rather than as atomized line-items," 496 U.S. at 161-162—those circuits have acknowledged that *both* pre-litigation conduct *and* arguments made in litigation should be considered in determining whether the government's position is substantially justified.

In *Gomez-Beleno* v. *Holder*, 644 F.3d 139 (2011), for example, the Second Circuit found that "deficiencies in the [agency] proceedings" precluded the court from concluding that the government's pre-litigation conduct "had a reasonable basis in law and fact." *Id.* at 146. The court then explained, however, that this finding "does not end our inquiry, as we also must consider the [Department of Justice's] litigation position before this Court." *Ibid.* The Third Circuit likewise has explained

that, in determining whether the government's position was substantially justified for purposes of EAJA, "a district court must consider not only the agency's litigating position, but the agency's pre-litigation actions as well." *Hanover Potato Products, Inc.* v. *Shalala*, 989 F.2d 123, 130 (1993); see *Williams* v. *Astrue*, 600 F.3d 299, 302 (3d Cir. 2009) ("The government's position consists of both its prelitigation agency position and its litigation position.").

Petitioner is also wrong in asserting (Pet. 20) that the Fourth, Ninth, and Tenth Circuits place "special emphasis on the government's unreasonable pre-litigation posture." All three of those courts of appeals reject any per se approach and apply the *Jean* framework on a case-by-case basis. See, *e.g.*, *United States* v. *515 Granby, LLC*, 736 F.3d 309, 316 (4th Cir. 2013) (declining to adopt "a bright-line rule"); *United States* v. *Marolf*, 277 F.3d 1156, 1164 n.5 (9th Cir. 2002) (declining to "adopt[] a per se rule" and acknowledging that "there may be cases in which a reasonable litigation position will outweigh the unreasonableness of the underlying conduct"); *Hackett* v. *Barnhart*, 475 F.3d 1166, 1174 (10th Cir. 2007) (declining to adopt a "categorical[]" rule and "limit[ing] [its] holding to the specific circumstances of this case"). Petitioner has not established that any of those courts would have found an abuse of discretion in the denial of the fee motion here. And none of the decisions on which petitioner relies addressed a constitutional challenge to an Act of Congress.

4. For all the foregoing reasons, the Sixth Circuit's substantial-justification holding does not warrant plenary review by this Court. On March 10, 2025, however, this Office provided notice under 28 U.S.C. 530D that

the Department of Justice would no longer defend USDA emergency-relief programs to the extent that they provide for increased payments to farmers or ranchers who are "socially disadvantaged" as determined by race or sex. Letter from Sarah M. Harris, Acting Solicitor General, to Hon. Mike Johnson, Speaker of the House, *Race- and Sex-Based Preferences in USDA Emergency Relief Programs* (Mar. 10, 2025), www.justice.gov/oip/media/1393166/dl. Because Section 1005 had been repealed in 2022, it was not encompassed by that letter. But Section 1005's racial classifications were effectively indistinguishable from those in the other relevant USDA programs. There is at least some tension between the government's determination that it will no longer defend such programs against constitutional challenges, and the Sixth Circuit's holding that the government's prior defense of Section 1005 was substantially justified.

Denying petitioner's fee request on the alternative ground that petitioner did not obtain a favorable merits judgment would raise no similar concerns. *Lackey* makes clear that petitioner's temporary success in obtaining a preliminary injunction did not suffice to make him a "prevailing party." *Lackey* was not available to the court of appeals because it postdated the denial of rehearing en banc in this case, but the district court denied petitioner's fee request on the ground that petitioner is not a "prevailing party," see pp. 3-4, *supra*, and Judge Thapar's dissent from the denial of rehearing en banc recognized that *Lackey* would ultimately govern petitioner's EAJA claim, see Pet. App. 6a n.2.

It therefore would be appropriate for this Court to grant the petition, vacate the court of appeals' judgment, and remand (GVR) for further consideration in

light of this Court's decision in *Lackey*. This Court has a well-established practice of issuing GVR orders in analogous circumstances where there is an alternative basis supporting the court of appeals' judgment. See, *e.g.*, *Stampe* v. *United States*, 142 S. Ct. 1356 (2022) (No. 21-6412); *Santos* v. *United States*, 587 U.S. 1012 (2019) (No. 18-7096); *Myers* v. *United States*, 587 U.S. 981 (2019) (No. 18-6859); *Franklin* v. *United States*, 586 U.S. 1189 (2019) (No. 17-8401); *Close* v. *United States*, 583 U.S. 802 (2017) (No. 16-9461).

Here, *Lackey* clearly compels rejection of petitioner's EAJA claim. And because *Lackey* had not yet been decided when the Sixth Circuit panel ruled in this case or when the court of appeals denied rehearing en banc, the court's prior decision to rely on a different rationale provides no reason to doubt that the court would now view *Lackey* as dispositive. Under these circumstances, this Court should GVR.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of *Lackey* v. *Stinnie*, 604 U.S. 192 (2025) (No. 23-621). Otherwise, the petition should be denied.

Respectfully submitted.

D. JOHN SAUER
Solicitor General
BRETT A. SHUMATE
Assistant Attorney General
THOMAS PULHAM
Attorney

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