No. 06-670

In the Supreme Court of the United States

JANICE F. WILLIS, PETITIONER

v.

GOVERNMENT ACCOUNTABILITY OFFICE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly dismissed petitioner's petition for review of a Government Accountability Office Personnel Appeals Board decision when petitioner had not filed her own claim in the administrative proceeding but rather had been permitted to intervene only for the limited purpose of supporting the attorney's fees request of a party who opted not to seek judicial review.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 448 F.3d 1341. The opinion of the Government Accountability Office Personnel Appeals Board (Pet. App. 23a-41a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2006. A petition for rehearing was denied on August 16, 2006 (Pet. App. 42a-43a). The petition for a writ of certiorari was filed on November 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Sandra Davis, an employee of the United States Government Accountability Office (GAO), filed three

petitions for review with the GAO Personnel Appeals Board (Board), asserting four claims of unlawful conduct by GAO personnel. Pet. App. 23a-24a. Petitioner was Davis's attorney through the administrative hearing; thereafter, Davis ended petitioner's representation and retained new counsel. *Id.* at 24a. The administrative judge (AJ) rejected all but one of Davis's claims and ordered GAO to take remedial action with respect to the remaining claim. *Ibid.* GAO and Davis cross-appealed to the full Board, which affirmed. *Ibid.*

Davis filed a request for attorney's fees through her new counsel.[1] Davis requested $128,867.17, representing the value of the work performed by Davis's new counsel during the appeal to the Board plus the value of 335.25 hours of work billed by petitioner. Pet. App. 2a. Davis expressly declined to request an additional $63,325 that petitioner had billed, concluding that her own "credibility would be compromised by including [petitioner's] inflated invoice for $63,325.00" because that amount included duplicative and unjustified work and because "the amount of hours and fees claimed by [petitioner] is preposterously high." Gov't C.A. Br. 9 (quoting Davis's Request for Attorney's Fees and Costs).

Petitioner subsequently moved to intervene; Davis and GAO objected. Pet. App. 24a. The AJ permitted petitioner to intervene to support Davis's fee request on the condition that she could not seek payment of fees

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[1] The Board awards attorney's fees "consistent with the standards set forth at 5 U.S.C. 7701(g)." 4 C.F.R. 28.89. Section 7701(g) provides that "[t]he Board * * * may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board * * * determines that payment by the agency is warranted in the interest of justice." 5 U.S.C. 7701(g)(1).

beyond those Davis had already requested. *Id.* at 3a, 24a. Petitioner filed an intervenor's brief supporting Davis's fee request. In addition, despite the limit on her intervention, petitioner's brief also asked the AJ to award fees for the $63,325 in charged time that Davis had expressly excluded from her request. *Id.* at 25a.

The AJ held that Davis was entitled to a fee award and then evaluated Davis's request by the usual lodestar method. Pet. App. 25a-29a. With respect to Davis's fee request for the work of her new counsel, the AJ awarded Davis $11,995.60. *Id.* at 28a. With respect to Davis's fee request for petitioner's work in the proceeding, the AJ awarded Davis $34,350. *Id.* at 29a. The AJ reasoned that petitioner's time was worth $150 per hour (not the $335 that petitioner argued for in her intervenor's brief) and that the total hours billed by petitioner should be reduced because (1) petitioner had double counted some hours and had not documented others, (2) petitioner's pre-termination filings were "repetitive" and "poorly drafted, resulting in added work for both the Board and the Agency," and (3) Davis ultimately succeeded on only one of four claims. *Id.* at 28a-29a, 31a; Gov't C.A. Br. 7. In keeping with the limited nature of petitioner's intervention, the AJ "gave no consideration to any aspect of [petitioner's] brief which sought payment for time not included in [Davis's] Fee Request." Pet. App. 28a.

Both Davis and petitioner appealed to the Board. Davis argued that the AJ should not have reduced the award further after she had voluntarily reduced the amount she requested. Pet. App. 30a. Petitioner argued that the AJ should have awarded Davis more than the $34,350 attributable to petitioner's work and that the AJ should have considered her separate request for the

additional fees that Davis refused to seek. *Ibid.* The Board affirmed, adopting the AJ's findings of fact and conclusions of law. *Id.* at 38a. With respect to petitioner's appeal, the Board determined that the AJ had properly limited the scope of petitioner's intervention to only those issues already raised in Davis's fee request. See *id.* at 35a-36a.

2. Petitioner alone sought review in the court of appeals, presenting essentially three issues: first, whether the Board's fee award to Davis was based on the correct hours and hourly rates; second, whether the Board was wrong to reduce the total award in light of Davis's limited success; and third, whether the Board should have awarded petitioner the fees that she requested in her intervenor's brief but that Davis had excluded from her own request. Pet. C.A. Br. 28-30. At no point did petitioner challenge the AJ's decision that petitioner, as an intervenor, could not file her own, separate request for fees in Davis's action.

The court of appeals dismissed petitioner's petition for review for want of jurisdiction, finding sua sponte that petitioner had no standing to challenge the Board's decision in the court of appeals. Pet. App. 4a-5a. Beginning with this Court's decision in *Diamond* v. *Charles*, 476 U.S. 54 (1986), the court of appeals observed that an intervenor who has filed no claim in an action cannot continue the action in the absence of the party on whose side intervention was permitted unless the intervenor independently satisfies the standing requirements of Article III. Pet. App. 5a. Applying this Court's third-party standing decisions, the court of appeals held that petitioner had no standing to seek review of the two issues relating to the calculation of Davis's fee award. *Id.* at 13a-15a (discussing *Caplin & Drysdale, Chartered* v.

United States, 491 U.S. 617 (1989)). As for the additional fees sought by petitioner beyond those requested by Davis, the court of appeals reasoned that petitioner had no appellate standing because attorneys in GAO proceedings have no independent statutory or regulatory entitlement to an award of fees. *Id.* at 7a-11a (discussing *Evans* v. *Jeff D.*, 475 U.S. 717 (1986)).

In dissent, Judge Bryson would have affirmed the Board's decision on the merits as "plainly justified." Pet. App. 21a. Judge Bryson noted that it was "questionable whether [petitioner] has a cause of action in a case like this one—i.e., whether an employee's former attorney in a [Board] proceeding is entitled to seek fees on her own behalf and appeal from a fee award decision without the participation of the employee." *Id.* at 20a. He would have reached the merits of petitioner's appeal, however, on the ground that the government had waived any argument that petitioner had no cause of action. *Ibid.*

ARGUMENT

Petitioner now claims (Pet. 9) that she was asserting only "her own statutory rights to reasonable attorneys fees," and her petition for a writ of certiorari does not challenge the portion of the court of appeals decision that dealt with third-party standing, deeming "[t]he [p]rinciples of [p]rudential [s]tanding * * * [i]napplicable" to this case. *Ibid.* Petitioner thus challenges (Pet. 6-8) only the portion of the decision below that held that she has no cause of action under the attorney's fees statutes and regulations. That challenge, however, is not properly presented to this Court. Even if it were, the court of appeals decision is correct and does not conflict with any decisions of this Court or of

other courts of appeals. Further review is not warranted.

1. The court of appeals correctly dismissed petitioner's challenge to the Board's "denial" of her "claim" for attorney's fees because a person has no standing to appeal the rejection of a claim that has never been filed. Even assuming that attorneys who represent prevailing parties in GAO proceedings are permitted to file fee requests on their own behalf (but see pp. 7-9, *infra*), a favorable federal court decision could not bring petitioner any closer to obtaining monetary relief, because she has never filed her own claim for an award of attorney's fees before the GAO. Indeed, petitioner was precluded from filing such a claim in this case because her participation as an intervenor was expressly limited to supporting Davis's fee request. Petitioner did argue in her intervenor's brief that the agency should award her additional fees, but that misplaced request did not constitute the submission of a claim. See 4 C.F.R. 28.11, 28.18 (describing the procedures by which a person can file a claim with the Board); see also Pet. App. 35a-36a. Accordingly, the AJ and the Board properly refused to address the merits of that "claim."

Although petitioner could perhaps have argued to the court of appeals that the AJ and Board erred in limiting the scope of her intervention, but cf. *Vinson* v. *Washington Gas Light Co.*, 321 U.S. 489, 498 (1944) (intervenors are admitted to the proceedings as they stand and in respect to the pending issues, but are not permitted to enlarge those issues), she did not preserve any such challenge. Thus, petitioner has acquiesced in the limits on her participation, and the court of appeals was correct to dismiss her petition for review.

2. Even leaving aside the unchallenged limitation on the scope of petitioner's intervention, the court of appeals correctly determined that an attorney in petitioner's position has no right to file her own claim for an award of attorney's fees.[2] The fee-shifting statute applicable to actions before the GAO Board provides that the Board "may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board * * * determines that payment by the agency is warranted in the interest of justice." 5 U.S.C. 7701(g)(1). By its own terms, then, the statute permits an award of attorney's fees only to "an employee or applicant for employment" who "is the prevailing party" in a Board proceeding. Thus, the stat-

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[2] The dissenting judge below all but agreed with the majority's conclusion in that regard (Pet. App. 20a), but reasoned (*id*. at 19a-20a) that the absence of a cause of action should not affect petitioner's standing to appeal. According to the dissent (*ibid*.), the majority's contrary holding conflated the existence of federal jurisdiction with the existence of a cause of action, which this Court forbade in *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998). But petitioner *never filed a claim in the agency proceeding to begin with*, so the question before the court of appeals was *not* whether petitioner had standing to appeal from or seek review of the denial of a claim she had filed. Instead, the question was whether petitioner, a limited intervenor with no claim of her own, "fulfill[ed] the requirements of Art. III." *Diamond* v. *Charles*, 476 U.S. 54, 68 (1986). Applying circuit precedent, the court of appeals concluded that a person who has not filed a claim before an agency but who nonetheless seeks monetary relief from the agency in a judicial review proceeding can "fulfill[] the requirements of Art. III" only if she comes "within the class of persons legally protected by the statute under which" she would have sought relief had she *actually* filed a claim for relief. Pet. App. 6a. This Court's decision in *Steel Co.* does not address that issue.

ute confers no freestanding entitlement on *attorneys* to seek to an award of fees on their own behalf.[3]

As the court of appeals observed (Pet. App. 8a-9a), this Court addressed a related issue in *Evans* v. *Jeff D.*, 475 U.S. 717 (1986). That case involved 42 U.S.C. 1988, which provides that a court in a civil rights action "may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. 1988(b). In that statute, the Court held, Congress "bestowed on the 'prevailing *party*' (generally plaintiffs) a statutory eligibility for a discretionary award of attorney's fees" that the party in some instances can waive or assign. 475 U.S. at 730-731 (footnote omitted). See *Venegas* v. *Mitchell*, 495 U.S. 82, 87-88 (1990) ("Section 1988 makes the prevailing *party* eligible for a discretionary award of attorney's fees * * * rather than the lawyer * * * . And just as we have recognized that it is the party's entitlement to receive the fees in the appropriate case, so have we recognized that as far as § 1988 is concerned, it is the party's right to waive, settle, or negotiate that eligibility."). Interpreting similarly worded fee-shifting statutes consistently, see *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 n. 4 (2001); *Independent Fed'n of Flight Attendants* v.

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[3] GAO's implementing regulations are to the same effect. A "petitioner, if he or she is the prevailing party, may submit a request for the award of reasonable attorney's fees and costs." 4 C.F.R. 28.89. "Petitioner" is defined as "any person filing a petition for Board consideration" (4 C.F.R. 28.3), and "person" is defined as "an employee, an applicant for employment, a former employee, a labor organization or the GAO." *Ibid.* Attorneys for a petitioner are not "persons" under the regulations and, thus, have no regulatory entitlement to seek an award of fees.

Zipes, 491 U.S. 754, 758 n. 2 (1989); *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 n. 7 (1983), the court of appeals rightly concluded that petitioner, as an attorney, is not eligible for fees under Section 7701(g)(1) and the governing regulations.

3. a. Petitioner argues (Pet. 13-17) that the Court should grant certiorari because the decision below creates a "split" among various decisions of the Federal Circuit. That contention does not merit review, as it is the task of the court of appeals to reconcile any intracircuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, there is no such conflict here. Indeed, as petitioner herself acknowledges,"[t]his was a case of first impression before the [Federal Circuit] from the [Board]. Title 31 U.S.C. 755 has never been interpreted by the [Federal Circuit]." Pet. 14.

b. Petitioner also contends (Pet. 17-19) that the court of appeals' standing decision conflicts with *Lipscomb* v. *Wise*, 643 F.2d 319 (5th Cir. 1981), and *Mathur* v. *Board of Trustees of Southern Illinois University*, 317 F.3d 738 (7th Cir. 2003). Petitioner is incorrect, because the conflict she identifies is illusory; neither decision found standing in a situation analogous to petitioner's.

In *Lipscomb*, although the court of appeals held that the attorney-appellants had standing to appeal from a denial of their client's attorney's fees award, 643 F.2d at 321, the court noted that the attorneys would *not* have had appellate standing if their claims had not been "first presented to the district court in an appropriate manner," *id.* at 321 n. 2. The *Lipscomb* court held that the attorneys had presented their claim to the district court, which denied it, *id.* at 322-323, and they therefore had

standing to appeal from that denial. Petitioner, unlike the attorneys in *Lipscomb*, did not present her claim in the agency proceeding before she sought judicial review, so the AJ and Board never considered—let alone denied—the claim for which she sought judicial review. In any event, *Lipscomb* was decided before *Evans*, and so the Fifth Circuit had no opportunity to address the question of an attorney's ability to seek a fee award in light of this Court's precedent. See *Martin* v. *Medtronic, Inc.*, 254 F.3d 573, 577 (5th Cir. 2001) (court of appeals decision is binding only to the extent an intervening Supreme Court case does not explicitly or implicitly overrule that prior precedent), cert. denied, 534 U.S. 1078 (2002).

In *Mathur*, the attorney-appellants were appealing from the district court's ruling on their client's request for a fee award, and the court of appeals held that the client's claim could be appealed by the attorneys. 317 F.3d at 741-742. In this case, by contrast, petitioner's client affirmatively *declined* to assert the claim for which petitioner sought judicial review, so petitioner cannot argue that she is like the *Mathur* attorneys who were found to have standing to appeal their client's claim. Because neither *Lipscomb* nor *Mathur* confronted the question whether an attorney has standing to seek judicial review of an attorney's fees claim that neither the attorney nor the client had previously filed, there is no conflict.

4. Finally, petitioner argues (Pet. 19-23) that, by not permitting her to pursue a claim for attorney's fees in her own right, the court of appeals' decision runs afoul of this Court's recognition that "a fundamental aim of [fee-shifting] statutes is to make it possible for those who cannot pay a lawyer for his time and effort to obtain

competent counsel, this by providing lawyers with reasonable fees to be paid by the losing defendants." *Pennsylvania* v. *Delaware Valley Citizens' Council*, 483 U.S. 711, 725 (1987). That general statement of purpose does not defeat the statute's clear text, which, as this Court noted in *Evans*, affords "prevailing parties," not their attorneys, the statutory entitlement to a fee award.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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