No. 09-325

In the Supreme Court of the United States

ALEXANDRE ARONOV, PETITIONER

v.

JANET NAPOLITANO, SECRETARY OF HOMELAND SECURITY, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether an applicant for naturalization who sought judicial review of an agency's delay in adjudicating the application, and whose application the agency thereafter granted without having been ordered to do so by a court or agreeing to do so as part of a court-approved settlement, is entitled to attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-59a) is reported at 562 F.3d 84. The opinion of the district court (Pet. App. 108a-114a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 2009. On July 7, 2009, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including September 10, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. An alien who seeks to become a naturalized United States citizen must file an application with the

United States Bureau of Citizenship and Immigration Services (CIS) in the Department of Homeland Security (DHS). 8 U.S.C. 1445(a); see 6 U.S.C. 271(b), 557. Once an application has been filed, CIS must conduct "a personal investigation" of the alien. 8 U.S.C. 1446(a); see 8 C.F.R. 335.1. Congress has provided that "none of the funds appropriated or otherwise made available to [CIS] shall be used to complete adjudication of an application for naturalization unless [CIS] has received confirmation from the [FBI] that a full criminal background check has been completed." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (1998 Act), Pub. L. No. 105-119, Tit. I, heading labeled Immigration and Naturalization Service, Salaries and Expenses, 111 Stat. 2448-2449 (relevant language reprinted at note following 8 U.S.C. 1446).[1]

As part of the naturalization process, Congress also has directed CIS to conduct an in-person "examination[]" of the alien himself. 8 U.S.C. 1446(b); see 8 C.F.R. 335.2(a). CIS regulations specifically provide that an "initial examination" will not be scheduled until "after [CIS] has received a definitive response from the [FBI] that a full criminal background check of an applicant has been completed." 8 C.F.R. 335.2(b). The

[1] The funding prohibition contained in the 1998 Act refers to the former Immigration and Naturalization Service (INS). In 2003, the INS was abolished and its naturalization functions were transferred to the newly created CIS. 6 U.S.C. 271(b)(2). Congress has instructed that any reference in a statute to the former INS "shall be deemed to refer" to the entity to which the relevant function has been transferred. 6 U.S.C. 557. For ease of reference, this brief refers to CIS throughout. Accord Pet. App. 22a (describing a 2002 decision as having been made by CIS rather than INS).

regulations further provide that "[a] decision to grant or deny the application [for naturalization] shall be made at the time of the initial examination or within 120-days after the date of the initial examination." 8 C.F.R. 335.3(a); see 8 C.F.R. 335.3(b) (describing circumstances in which CIS "may continue the initial examination" and conduct "one reexamination," which generally must occur "within the 120-day period after the initial examination").

Congress has provided that an alien whose application for naturalization has been pending 120 days or more following his "examination" under Section 1446(b) "may apply to the United States district court for the district in which the applicant resides for a hearing on the matter." 8 U.S.C. 1447(b); see H.R. Rep. No. 187, 101st Cong., 1st Sess. 11-12, 14 (1989) (discussing past agency tendency to put complex applications on the "backburner"). Once such an application has been filed, Congress has further provided that the court "has jurisdiction over the matter and may either determine the matter or remand the matter, with appropriate instructions, to [CIS] to determine the matter." 8 U.S.C. 1447(b).

2. This case arises from the confluence of two related situations, both of which subsequently have been addressed.

a. First, in the wake of the terrorist attacks of September 11, 2001, the Federal Bureau of Investigation (FBI) developed a significant backlog of uncompleted name checks with respect to naturalization cases. To implement its obligation to conduct "a personal investigation," 8 U.S.C. 1446(a), including "a full criminal background check," 1998 Act 111 Stat. 2448-2449, of every applicant for naturalization, CIS has

long requested both a "fingerprint check" and a "[n]ame [c]heck" from the FBI. Pet. App. 82a, 86a. An FBI name check involves a search of FBI "files to determine whether an individual has been the subject of, or mentioned in, any FBI investigations." *Id.* at 82a. Until 2002, however, CIS limited its requests to a search of the FBI's "'main' files." *Id.* at 83a.

In 2002, CIS "began requiring more comprehensive FBI name checks," including "a search of the FBI's 'reference' files in addition to its main investigation files," and it "resubmitted 2.4 million applicant names to the FBI for these expanded checks." Pet. App. 83a. While acknowledging that these expanded name checks "may require a more lengthy processing time," CIS concluded that they were "essential to identifying national security and public safety concerns that would not have been uncovered by other means." *Id.* at 25a-26a (citation omitted). Although 99% of CIS-requested name checks continued to be completed within six months, *id.* at 85a, others took longer. As of February 2008, it was estimated that approximately 140,000 CIS name check requests had been pending with the FBI for more than six months. *Ibid.*

We also have been advised that, beginning around 2003, CIS began scheduling many naturalization examinations before having received the results of the FBI name check. In the vast majority of cases, this practice did not result in the adjudication of an alien's application for naturalization being delayed more than 120 days after the completion of the in-person examination required by Section 1446(b).[2] Because the overall

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[2] See Memorandum from Michael Aytes, Acting Associate Director, Domestic Operations, U.S. Citizenship and Immigration Services, to

volume of naturalization applicants is so large, however, a substantial number of applicants did not obtain a decision within the 120-day time frame. In April 2006, CIS announced that it would cease scheduling examinations until after it had received the result of the FBI name check. See *Aytes memo*, note 2, *supra*; see also *Walji* v. *Gonzales*, 500 F.3d 432, 439 n.7 (5th Cir. 2007) (noting change in CIS practice). As of April 2, 2008, however, the FBI had not completed name checks for approximately 29,800 naturalization applicants whose names had been submitted to the FBI before March 2006 and whose examination under Section 1446(b) had already been conducted. Pet. App. 94a n.19.

b. Congress, CIS, and the FBI have taken substantial steps to eliminate the backlog in name check requests and to ensure that it will not reoccur. In December 2007, Congress appropriated $20 million to CIS "to address backlogs of security checks associated with pending applications and petitions," contingent on the submission of "a plan to eliminate the backlog of security checks that establishes information sharing protocols to ensure United States Citizenship and Immigration Services has the information it needs to carry out its mission." Department of Homeland Security Appropriations Act, 2008, Pub. L. No. 110-161, Div. E, Tit. IV, 121 Stat. 2067; see Pet. App. 22a-23a. In April 2008, CIS and the FBI announced a joint plan to eliminate the backlog of pending name checks by June 2009, and to ensure that, going forward, 98% of name checks would be processed within 30 days and that the

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Regional Directors et al., *Background Checks and Naturalization Interview Scheduling* (Apr. 25, 2006) (*Aytes memo*), *reprinted as* Attach. to 83 No. 21 Interpreter Releases 988, 989 (Thomson/West May 22, 2006).

remaining 2% would be processed within 90 days.[3] By August 2008, the number of pending name checks had dropped from 270,000 to 95,000. *Id.* at 20a n.16. In June 2009, CIS and the FBI announced that they had successfully eliminated the backlog.[4]

3. Petitioner is a native of Russia who filed an application for naturalization in May 2004. Pet. App. 61a. On February 14, 2005—before the FBI had completed petitioner's name check—CIS conducted its examination of petitioner pursuant to Section 1446(b). *Id.* at 61a-62a. At that time, petitioner was told that his application for naturalization could not be approved until additional security checks were concluded. *Id.* at 62a. On March 23, 2006, petitioner received a letter from CIS informing him that his application was still being processed but that additional review was required. *Ibid.* The March 23, 2006, letter also advised petitioner that he should contact CIS if he did not receive a decision within six months. *Ibid.*; see C.A. App. 62 (reproducing letter).

On August 28, 2006—approximately five months after receiving CIS's letter and 18 months after his examination by CIS—petitioner filed suit in federal district court pursuant to Section 1447(b). Pet. App. 3a. As relief, petitioner sought an order "[a]djudicating [petitioner's] Application for Naturalization" or

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[3] U.S. Citizenship & Immigration Services, *News Release: USCIS and FBI Release Joint Plan to Eliminate Backlog of FBI Name Checks* (Apr. 2, 2008) <http://tinyurl.com/ylps8js>; see Pet. App. 20a n.16.

[4] U.S. Citizenship & Immigration Services, *News Release: USCIS, FBI Eliminate National Name Check Backlog* (June 22, 2009) (*June 22, 2009 News Release*) <http://tinyurl.com/uscisbacklog>.

"[r]equiring [respondents] to adjudicate [petitioner's] application." C.A. App. 57.

Respondents did not file an answer or otherwise respond to petitioner's complaint. Pet. App. 5a. Instead, on October 6, 2006, the parties filed a joint motion "to remand this matter to [CIS], so that [it] can grant [petitioner's] application for naturalization, and schedule [petitioner's] oath ceremony for no later than November 8, 2006." *Id.* at 62a-63a. The joint motion recited that, since the filing of the complaint, CIS had "completed its review of [petitioner's] application for naturalization." *Id.* at 62a. The joint motion further stated that, "if jurisdiction is returned to the agency, [CIS] would grant the application and schedule [petitioner's] oath ceremony for no later than November 8, 2006." *Ibid.* The joint motion did not contain any statements about the history of petitioner's application for naturalization, any impetus for CIS's completion of its review of petitioner's application, or any negotiations between the parties that led to the filing of the joint motion. *Id.* at 5a.[5] The district court did not conduct a hearing about

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[5] When petitioner filed suit, CIS had a written policy stating that it would ask the FBI to expedite the name check process in various circumstances, one of which was "[w]rit of Mandamus—lawsuit pending in Federal Court." C.A. App. 45; see Pet. App. 27a & n.19. In February 2007, CIS announced that it was "no longer routinely requesting the FBI to expedite a name check when the only reason is that a mandamus (or other federal court petition) is filed in the case." United States Citizenship & Immigration Services, *USCIS Update: USCIS Clarifies Criteria to Expedite FBI Name Check* (Feb. 20, 2007) <http://tinyurl.com/uscispolicy>. Under current policy, CIS may request expedited processing if a case meets one of four criteria, including "[m]ilitary [d]eployment," "[a]ge-out cases not covered under the *Child Status Protection Act*, and applications affected by sunset provisions such as diversity visas," "[s]ignificant and compelling

whether to grant the joint motion. *Ibid.* Instead, on October 12, 2006, the district court entered an electronic order that stated, in its entirety: "Electronic ORDER granting [3] Joint Motion to Remand to U.S. Citizenship and Immigration Services." *Id.* at 5a-6a. On November 8, 2006, petitioner was sworn in as a United States citizen. *Id.* at 64a.

4. On November 28, 2006, petitioner filed an application for attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(1)(A). EAJA authorizes a court to award a reasonable attorneys' fee to a qualifying "prevailing party" in a "civil action" brought by or against the United States unless the position taken by the United States in the proceeding at issue "was substantially justified" or "special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A).

The district court granted petitioner's application and awarded $4270.94 in fees. Pet. App. 108a-114a. The district court acknowledged that this Court's decision in *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001) (*Buckhannon*), "rejected the 'catalyst' theory * * *, under which a party could be considered as prevailing if the filing of the legal action could be causally related to an extra-judicial action bringing about the ends sought by the plaintiff." Pet. App. 110a. The district court concluded, however, that petitioner obtained the sort of "judicial imprimatur" required by *Buckhannon* because here the government "was granted not a dismissal, but a remand to the agency *conditional*

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reasons, such as critical medical conditions," and "[l]oss of social security benefits or other subsistence." *Ibid.*

on the granting of [petitioner's] naturalization action by November 8, 2006." *Id.* at 111a.

The district court also determined that the government's "position pre-litigation" had not been substantially justified. Pet. App. 112a. The court observed that Section 1447(b) provides that "[a]n applicant is entitled to a hearing in district court" if his application for naturalization has not been resolved within 120 days of his examination by CIS, and it stated that "[b]y the time [petitioner] filed this action, the government had already taken more than four times this length of time, and would presumably have taken longer if the action had not been filed." *Ibid.* The district court rejected CIS's claim that its position was substantially justified because CIS "was unable to act on [petitioner's] application sooner because the FBI did not complete [petitioner's] background check until September 2006." *Ibid.* The court stated that it did "not matter whether blame for the delay is properly ascribed to the FBI or [CIS]." *Ibid.* (citation omitted). Pointing to CIS's then-existing policy of expediting name checks for applicants who had filed suit, see note 5, *supra*, the court also stated that "[i]t is not 'substantially justified' for the government to force naturalization applicants to incur additional expense—and the courts to be burdened—just to have naturalization applications processed in the timely manner already supposedly guaranteed by statute." Pet. App. 113a.

5. The government appealed. A divided panel of the court of appeals initially affirmed the district court's fee award, Pet. App. 60a-107a, but the full court granted rehearing en banc and reversed the district court's award of fees, *id.* at 1a-59a.

a. The en banc court concluded that petitioner was not entitled to fees for two independent reasons.

i. As a threshold matter, the en banc court held that petitioner was not a prevailing party. Pet. App. 8a-18a. The court observed that "*Buckhannon* explicitly identified two and only two situations which meet the judicial imprimatur requirement: where a plaintiff has 'received a judgment on the merits[]' * * * or 'obtained a court-ordered consent decree.'" *Id.* at 9a-10a (quoting *Buckhannon*, 532 U.S. at 605). The court agreed with various other circuits, however, "that the formal label of 'consent decree' need not be attached," stating that the appropriate inquiry is "whether the order contains the sort of judicial involvement and actions inherent in a 'court-ordered' consent decree." *Id.* at 10a-11a.

The court of appeals concluded that the district court's remand order in this case "lacked all the core indicia of a consent decree." Pet. App. 14a-15a. First, the district court's remand order "did not order [CIS] to do anything." *Id.* at 15a. Second, "[t]he [district] court made no evaluation at all of the merits of the case," and "[t]here was no basis on which the court could evaluate the merits because [CIS] never filed an answer, never raised the potential defenses it had, and there never was any engagement of any sort on the merits for the district court to consider." *Ibid.* Third, the district court's remand order "did not contain provisions for future enforcement typical of consent decrees," but rather "merely returned jurisdiction to the agency to allow the parties to carry out their agreement." *Id.* at 16a. The en banc court also determined that it "need not resolve * * * whether [CIS] could have acted without the remand," because an "order remanding to the agency is

alone not enough to establish the needed imprimatur." *Id.* at 18a.

The en banc majority rejected the dissenting judges' view that, in granting the joint motion to remand, the district court had "essentially issued an injunction requiring [CIS] to" administer the oath of citizenship to petitioner by November 8, 2006. Pet. App. 16a n.13. This view, the en banc court emphasized, was "not based on the actual October 12, 2006 remand order, but on the district court's later characterization of the order." *Ibid.* "On its face," the majority observed, "the [remand] order was unambiguous and lacked any provision mandating [CIS] to act or expressly retaining jurisdiction to force the government to act." *Ibid.* The court of appeals agreed that "the allowance of motions for remand after litigation may meet the EAJA criteria for judicial imprimatur," but it concluded that the remand order at issue here "did not" satisfy those criteria. *Ibid.*

The en banc court also stated that the case before it was "factually distinguishable from the Tenth Circuit's recent decision in *Al-Maleki v. Holder,* 558 F.3d 1200 (10th Cir. 2009)." Pet. App. 15a n.11. The court observed that *Al-Maleki* involved a situation where the district court "denied the government's initial motion for an unrestricted remand after a hearing, ordered the government to file an answer, accepted the representations in the answer, then granted a joint motion to remand, and entered an order expressly directing [CIS] to administer the oath of citizenship to the applicant." *Ibid.* The en banc court further observed that, in *Al-Maleki*, "[t]he court found an order directing the agency to act was required because, as the court noted, 'at the time the district court's order was entered, [CIS] had not yet naturalized Al-Maleki or made a binding

commitment to do so.'" *Ibid.* (quoting *Al-Maleki* v. *Holder*, 558 F.3d 1200, 1205 (10th Cir. 2009)). Here, in contrast, the en banc court explained that "there were no such proceedings," "[n]o such order was entered," and "the [district court] only remanded to the agency for it to act on its promise to grant citizenship." *Id.* at 15a-16a n.12.

ii. The en banc court also held that "[e]ven if" petitioner were a prevailing party, he was not entitled to fees under EAJA because the government's position was substantially justified. Pet. App. 18a-28a. The court concluded that Congress's decision not to define the precise contours of the "full criminal background check" mandated by the 1998 Act constituted a delegation to CIS to decide, "with its particular expertise," the precise form and content of the required check. *Id.* at 22a. The en banc court stated that CIS's determination "that the inclusion of FBI name checks provided better full criminal background checks" was "within [CIS's] legal authority and * * * reasonable," *id.* at 22a-23a, and that, "[o]nce [CIS] made that choice, it acted under the requirements of law—its own regulations—in awaiting the full background check" before acting on petitioner's application for naturalization, *id.* at 24a.

The en banc court disagreed with petitioner's assertion that the government's position was not substantially justified because 8 U.S.C. 1447(b) requires CIS "to complete all checks within 120 days." Pet. App. 24a. The court observed that the "literal[]" text of Section 1447(b) "does not command [CIS] to act within the deadline," but rather provides that "if the agency fails to make a determination of citizenship within the 120-day period after the interview," the applicant may seek relief in court. *Ibid.* Accordingly, the en banc

court stated that "the agency could reasonably believe it does not violate the statute by not acting within 120 days." *Ibid.* The court also stated that the regulation requiring that naturalization applications be acted upon within 120 days of the examination mandated by Section 1446(b) must "be read in the context of the regulations defining when" that examination "may take place," and it reiterated its earlier observation that petitioner's initial examination had been "premature" under the regulations. *Id.* at 25a.

The en banc court also concluded that, even if CIS was "wrong as to the requirement for FBI name checks and as to whether the statute and/or regulation imposed a flat 120-day deadline, its views were still substantially justified." Pet. App. 25a. The court explained that because "[n]either the Supreme Court nor" it previously had addressed those questions, this case "[a]t most" involved "a situation in which an agency has imposed regulatory requirements on itself that are in tension, and the solution it chose, to bend the 120-day rule because the background check was not completed, is entirely reasonable." *Ibid*. The en banc court also stated that, "[i]ndependently, the choice by [CIS] to favor national security in requiring a full check of the background of a citizenship applicant over a self-imposed 120-day deadline * * * cannot be unreasonable." *Ibid.*

The en banc majority likewise rejected petitioner's contention that CIS's former policy of asking the FBI to expedite a name check if an applicant filed a mandamus action or fell within certain other categories (see note 5, *supra*) had unreasonably "created an incentive system which require[d] candidates to sue to get priority in having FBI name checks done." Pet. App. 27a. The

court stated that this argument failed because it "assume[d] there is some right in the applicant to priority" notwithstanding the lack of any "statutory right * * * to jump the queue." *Ibid.* The court also determined that "the agency's choice to give priorities to the categories it selected was a rational allocation of resources, which must be spent on litigation if the agency does not work out a voluntary solution." *Id.* at 28a-29a (footnotes omitted).

Finally, the en banc court also distinguished *Al-Maleki* with respect to the substantial-justification issue. Pet. App. 28a n.21. In *Al-Maleki*, the en banc court explained, "[t]he *only* justification presented by the government * * * was that it was unable, at th[e] [relevant] point, to request expedition" of the alien's name check, and the Tenth Circuit concluded that assertion "was factually untrue." *Ibid.* (emphasis added). Accordingly, the en banc court stated that the *Al-Maleki* panel "was not faced with the justifications offered to us." *Ibid.*

b. Judge Torruella dissented. Pet. App. 29a-32a. In his view, petitioner was a prevailing party because "the remand order effectively mandated the relief [petitioner] sought and changed the jurisdictional landscape such that that relief could be awarded." *Id.* at 30a-31a. Judge Torruella also reasoned that the government's position had not been substantially justified because CIS violated its own "clear rule [that] decisions must be made within 120 days of the initial examination." *Id.* at 31a.

Judge Lipez also filed a dissenting opinion, which Judge Torruella joined. Pet. App. 32a-59a. In his view, the district court's remand order "incorporated [CIS]'s representation that it would naturalize [petitioner] by a

certain date" and thus "provided a continuing basis for enforcing the agreement if [CIS] did not comply with its representations to the court." *Id.* at 48a. Judge Lipez also concluded that "[t]he law does not require that the district court state explicitly that it has evaluated the fairness, reasonableness, and adequacy of a proposed consent decree," and that "[t]he record in this simple case [was] ample" to permit the district court "to make that evaluation." *Ibid.* Accordingly, Judge Lipez reasoned that "the [district] court's remand order was the functional equivalent of a consent degree, and [petitioner] was a prevailing party." *Id.* at 48a-49a.

Judge Lipez also concluded that the government's position had not been substantially justified. Pet. App. 49a-58a. In his view, Section 1447(b) imposes a 120-day "deadline" on processing applications for naturalization, *ibid.*, and he cited CIS's "*regular practice* to violate its own regulations by examining candidates before receiving [name check] results," *id.* at 54a. Judge Lipez acknowledged that, "if [CIS] had complied with its regulations and waited to interview [petitioner] until [after] the FBI name check had been completed, his waiting time for the completion of the naturalization process might have been longer than it was here." *Id.* at 54a n.13. In Judge Lipez's view, however, that fact did "not alter the legal analysis" because "[o]nce [CIS] gave [petitioner] his initial interview, it had to confront the clear timing obligation imposed by Congress." *Ibid.* Judge Lipez also expressed the view that this case did not involve a "challenge to the general validity of the name-check policy" or a suggestion that petitioner's "naturalization application should have been approved without the security check that the agency deemed necessary." *Id.* at 55a. Instead, he continued, CIS's

former policy of expediting name checks for applicants who filed lawsuits "should not be cost-free in light of the additional expense it impose[d] on the applicant for naturalization," and the government had "advanced no * * * particularized justification" that was "grounded in the facts of [this] particular case for not complying with the 120-day statutory requirement." *Id.* at 56a.

ARGUMENT

Petitioner contends (Pet. 12-31) that the court of appeals erred in concluding that he was not entitled to attorneys' fees under the EAJA. That claim does not merit further review. The court of appeals' decision rests on two independent holdings—*i.e.*, that petitioner was not a prevailing party and that, even if he was, the government's position was substantially justified. Accordingly, petitioner could not obtain relief unless this Court were to grant review and disagree with the court of appeals with respect to both of those holdings. Those holdings, however, are both correct. In addition, the court of appeals' decision in this case does not conflict with any decision of another court of appeals, and this case would be a poor vehicle for addressing the substantial-justification issue because of the minimal factual record. Finally, the issues in this case are of diminishing importance because of recent steps by Congress, CIS, and the FBI to address the substantial but temporary backlog of naturalization applications that gave rise to it. Accordingly, the petition for a writ of certiorari should be denied.

1. The court of appeals' decision is correct.

a. The court of appeals properly held that petitioner "is not a prevailing party under the [remand] order entered by the district court." Pet. App. 8a. As the court of appeals explained, the district court "made no

evaluation at all of the merits of the controversy" because "there never was an engagement of any sort on the merits for the district court to consider." *Id.* at 15a. In addition, the district court's one-line electronic order granting the parties' joint motion to remand the case to CIS "did not order [CIS] to do anything," "did not resolve a dispute between the parties," and "did not contain provisions for future enforcement typical of consent decrees." *Id.* at 15a-16a. Accordingly, the district court's remand order "did not meet the judicial imprimatur standards for a prevailing party." *Id.* at 14a.

Petitioner errs in asserting that the district court's remand order provided a "judicial[] sanction[]" for a change in the parties' legal relationship on the theory that, but-for the remand order, CIS would have "lack[ed] jurisdiction to act on [petitioner's] application for naturalization." Pet. 22 (citation omitted). As the court of appeals noted (see Pet. App. 18a n.14), the lower courts have reached different conclusions about whether the filing of an action under Section 1447(b) divests CIS of authority to grant an application for naturalization absent a remand by the district court. The court of appeals correctly determined that it was unnecessary to resolve that question here, however, because an "order remanding to the agency is alone not enough to establish the needed imprimatur" under *Buckhannon*. *Id.* at 18a.[6]

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[6] Petitioner is mistaken when he asserts (at 24) that this conclusion "is in serious tension with" *Shalala* v. *Schaefer*, 509 U.S. 292 (1993). Unlike this case, *Schaefer* did not involve an "order remanding to the agency * * * *alone*." Pet. App. 18a (emphasis added). Rather, *Schaefer* involved an order that "revers[ed] the decision of the Secretary [of Health and Human Services] . . . [and] remand[ed] the cause for a rehearing." 509 U.S. at 294 (third set of brackets in original)

Petitioner likewise errs in contending that "the only plausible understanding of the remand order in this case is that it necessarily incorporated the government's commitment to act upon and grant petitioner's application for naturalization by a specified date." Pet. 23. The court of appeals correctly rejected that claim, which "is not based on the actual October 12, 2006 remand order, but on the district court's later characterization of the order." Pet. App. 16a n.13. In any event, "[w]hether an order contains a sufficient judicial imprimatur can only be determined by determining the content of the order against the entire context before the court," *id.* at 14a, and a case-specific disagreement about the proper interpretation of the district court's one-sentence remand order does not merit this Court's review.

b. The court of appeals also correctly held that petitioner's fee-request fails for the independent reason that the government's position was "substantially justified." Pet. App. 18a.

Petitioner first argues (at 25-26) that CIS "could have" deferred conducting his examination under Section 1446(b) until after it received the results of the FBI name check and then "act[ed] on petitioner's application promptly after his examination."[7] As the court of appeals recognized, however, the error with respect to the timing of petitioner's examination "was harmless and accrued to [petitioner's] benefit," because it meant

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(quoting 42 U.S.C. 405(g)); see *id.* at 304 (describing the order in question as "a judgment *for* the plaintiff").

[7] Petitioner does not challenge (see Pet. 25) the reasonableness of CIS's conclusion in 2002 that a comprehensive FBI name check is an essential part of the "full criminal background check" that Congress mandated in the 1998 Act, 111 Stat. 2448.

that petitioner "was immediately eligible for citizenship upon successful completion of the FBI background check and, under the literal terms of § 1447(d), was able to bring suit if the agency did not act on his application within 120 days" Pet. App. 5a (footnote omitted); see *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 659–660 (2007) ("In administrative law, * * * there is a harmless error rule.") (citation omitted).

Petitioner also errs in contending (at 26) that the government's position was not substantially justified because, once CIS conducted a premature initial examination, "there is no reason to believe that" CIS could not have completed processing his application before the expiration of the 120-day period. In particular, petitioner asserts (*ibid.*) that CIS "could have sought to expedite petitioner's background investigation," and he points to CIS's former policy of "expediting a background investigation * * * after an applicant filed suit to challenge the delay in processing his application." See note 5, *supra*.

As explained above, see pp. 3-4, *supra*, developments following the terrorist attacks of September 11, 2001, created an enormous backlog of name check requests at the FBI. Petitioner does not challenge the court of appeals' conclusion that he personally had no special "right * * * to priority" or "to jump the queue" of applicants who were caught up in that backlog. Pet. App. 27a. Under the circumstances, it was necessary for CIS "to give priorit[y] to" certain categories of name check requests, and the categories it selected reflect "a rational allocation of resources." *Ibid.*; see note 5, *supra* (listing categories). In particular, CIS's (subsequently repealed) policy of expediting name checks in cases in

which an applicant had filed suit pursuant to Section 1447(b) represented a sensible use of scarce agency resources that otherwise would have been "spent on litigation if the agency d[id] not work out a voluntary solution." Pet. App. 28a. In any event, petitioner's argument that he is entitled to fees *because* of that policy would have the perverse effect of "impos[ing] EAJA fees" on CIS for having "benefitted an applicant by giving priority to the applicant's name check." *Id.* at 27a.

2. The court of appeals' decision does not conflict with the decisions of any other court of appeals.

a. Petitioner's principal contention (at 13-14) is that the court of appeals' decision in this case conflicts with the Tenth Circuit's decision in *Al-Maleki* v. *Holder*, 558 F.3d 1200 (2009). But the court of appeal specifically distinguished *Al-Maleki* with respect to both the prevailing-party and substantial-justification issues. See Pet. App. 15a n.12 (prevailing party); *id.* at 28a n.21 (substantial justification); see also pp. 11, 14, *supra*. In addition, although the court of appeals stated that its identification of various distinctions between the case before it and the situation presented in *Al-Maleki* "should not be taken as agreement with the panel decision of the Tenth Circuit on * * * any * * * point," *id.* at 16a n.12, the court of appeals did not specifically identify any point on which it disagreed with the *Al-Maleki* panel and it did not state that it would have reached a different result in *Al-Maleki* itself. At the same time, the Tenth Circuit has not confronted a case involving the factual circumstances presented in this case. Accordingly, notwithstanding petitioner's claim (Pet. 16) that the distinctions between *Al-Maleki* and this case cited by the court of appeals are

"formalistic and ultimately illusory," there currently is no ripe conflict between the First and Tenth Circuits.[8]

b. Petitioner contends (Pet. 18) that "[t]his case also implicates broader uncertainty among the courts of appeals as to when a court order renders a party 'prevailing' for purposes of EAJA." Even assuming that the differences in verbal formulations adopted by the courts of appeals for describing the test for prevailing-party status translate into differences in real-world outcomes, there are at least two reasons why this case would not be an appropriate vehicle for resolving any disagreement that exists. First, the court of appeals' decision in this case also rests on the independent ground that petitioner was not entitled to fees because the government's conduct was substantially justified. Pet. App. 18a (stating that "[e]ven if" petitioner were a prevailing party, "the remaining condition for an EAJA award has not been met"). Second, the court of appeals specifically concluded that the remand order at issue in this case "would not create prevailing party status under the tests adopted by any of the circuits." *Id.* at 17a.

3. As noted previously, petitioner could not obtain relief unless this Court were to grant review with respect to both the prevailing-party and substantial-

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[8] Petitioner also asserts that the Tenth Circuit's decision in *Al-Maleki* conflicts with "unpublished decisions of the Fifth and Ninth Circuits." Pet. 14. Any such conflict, however, would not implicate this case. In any event, a conflict between a precedential decision from one circuit and non-precedential decisions from other circuits would not warrant this Court's review.

Petitioner also suggests (Pet. 17) that "the federal district courts are in complete disarray as to the availability of fees under EAJA for applicants who have brought suit, and obtained relief, under Section 1447(b)." Any such "disarray" can and should be addressed by the courts of appeals in the first instance.

justification issues. This case, however, would be a poor vehicle with respect to the latter issue because of the minimal factual record that has been compiled with respect to it. When the district court ruled on petitioner's application for attorneys' fees, it had before it only a single page of evidence involving the nature of, and reasons for, CIS's conduct—a January 2005 Notice in which CIS set forth its then-effective "*FBI Name Check Expedite Criteria*." See C.A. App. 45. Since then, the court of appeals and the parties have cited numerous extra-record sources to illuminate CIS processes and policies, the changes made to those processes and policies over time, and the nature and extent of the backlog in processing applications for naturalization. See, *e.g.*, Pet. 3-4, 26 n.7, 28; Pet. App. 20a n.16, 22a & n.17, 23a n.18, 25a-27a, 82a-86a, 94a n.19. To the extent that the proper resolution of the substantial-justification issue implicates disagreements about what happened or why, however, it would be more appropriate for this Court to resolve that issue in a case with a factual record that has been fully developed in district court.

4. This Court's review also is unwarranted because the issues in this cases are of little continuing importance. By April 2006, CIS ceased scheduling an alien's initial examination under Section 1446(b) until the results of the FBI name check have been received. See p. 5, *supra*. Because the 120-day period set forth in Section 1447(b) does not begin to run until "the date on which the examination is conducted," 8 U.S.C. 1447(b), this change—which occurred more than three years ago—has now corrected the problem that gave rise to this and similar cases.

In addition, a case may be brought under Section 1447(b) only if CIS has "fail[ed] to make a determi-

nation" on an alien's request for naturalization. 8 U.S.C. 1447(b). As of June 2009, however, CIS and the FBI had eliminated the backlog in processing times that gave rise to this and many similar suits. See p. 6, *supra*. Accordingly, it is unlikely that there will be many additional filing under Section 1447(b) arising from name check delays.[9] Finally, it is likely that a great many of the cases that have been brought under Section 1447(b) either already have or would reach final judgment before this Court could issue any decision in this case.

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[9] Petitioner identifies four new cases that have been filed since CIS and the FBI announced the elimination of the backlog in conducting name checks. See Pet. 29 n.9. That announcement stated, however, that "the adjudication of cases that were previously delayed as a result of a pending FBI name check request may now include updating fingerprint results, scheduling interviews, requesting additional evidence and other reviews." *June 22, 2009 News Release*. Accordingly, the fact that some new cases have been filed since June 2009 provides no support for petitioner's broad speculation (at 28) that "there is no reason to believe that [CIS] will suddenly start processing all naturalization applications in a timely manner." In addition, the government's statement to the court of appeals that "[t]his case presents questions of great legal and practical significance," see Pet. 27 (quoting Gov't C.A. Supp. Br. 1) was made six months before CIS and the FBI announced the elimination of the backlog that gave rise to this suit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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