No. 19-506

In the Supreme Court of the United States

W.M.V.C., ET AL., PETITIONERS

v.

WILLIAM P. BARR, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
TIMOTHY G. HAYES
Attorneys

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

QUESTION PRESENTED

Whether the court of appeals permissibly exercised its discretion in denying attorney's fees under a provision of the Equal Access to Justice Act, 28 U.S.C. 2412(d), where the court had granted an unopposed remand to the agency without vacating the agency's decision or resolving whether that decision should be upheld on the merits, and where the court concluded that the government's position regarding the more prominent issues in the litigation was substantially justified.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) denying an award of attorney's fees is reported at 926 F.3d 202. The order of the court of appeals granting the government's unopposed remand motion (Pet. App. 145a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2019. On August 26, 2019, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including October 18, 2019, and the petition was filed on that date. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This attorney's fee dispute arises from a petition for review of a decision of the Board of Immigration Ap-

peals (Board). The government moved the court of appeals for a voluntary remand to the Board, emphasizing that its request did not concede any error in the agency decision. Pet. App. 5a. Petitioners consented to that disposition, choosing not to pursue their claims of error on judicial review. The court of appeals granted the motion and remanded the matter to the agency without vacating the underlying order of removal and without addressing whether the agency decision was erroneous. *Id.* at 145a. Petitioners subsequently requested attorney's fees under a provision of the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). The court of appeals denied that request. Pet. App. 1a-23a.

1. Petitioner WMVC and her minor daughter, petitioner APV, are citizens of Honduras who entered the United States and were placed in removal proceedings. Pet. App. 32a-33a, 91a-92a. Neither contested their removability. *Id.* at 33a, 92a. They instead sought relief and protection from removal by asserting multiple claims for asylum, 8 U.S.C. 1158; statutory withholding of removal, 8 U.S.C. 1231(b)(3); and withholding of removal under regulations implementing the Convention Against Torture (Convention), 8 C.F.R. 1208.16(c)(4), 1208.17. See Pet. App. 33a, 92a.[1]

a. An alien who seeks a discretionary grant of asylum has the burden of proving that she qualifies as a

[1] Because the Convention is not self-executing, adjudicators apply regulations that implement the United States' obligations under Article 3 of the Convention. See 8 C.F.R. 1208.16(c)(1); see also, *e.g.*, *Omar* v. *McHugh*, 646 F.3d 13, 17 (D.C. Cir. 2011) (Kavanaugh, J.); *Pierre* v. *Gonzales*, 502 F.3d 109, 119-120 (2d Cir. 2007); *In re H-M-V-*, 22 I. & N. Dec. 256, 258-260 (B.I.A. 1998). References to the Convention in this brief refer to those regulations.

"refugee," 8 U.S.C. 1158(b)(1)(A) and (B)(i), by establishing that she is unable or unwilling to return to her country of nationality because of either "[past] persecution or a well-founded fear of [future] persecution on account of," *inter alia*, her "membership in a particular social group" or her "political opinion," 8 U.S.C. 1101(a)(42). See *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481-483 & n.1 (1992). With exceptions that are not relevant here, a "'particular social group'" must be composed of members who "share a common immutable characteristic," and must be both "defined with particularity" and "socially distinct within the society in question." *In re M-E-V-G-*, 26 I. & N. Dec. 227, 237 (B.I.A. 2014). Such a group must also exist and be defined independently from the harms to which its members are purportedly subjected. *Id*. at 236 n.11; see *In re L-E-A-*, 27 I. & N. Dec. 581, 595 (Att'y Gen. 2019); *In re A-B-*, 27 I. & N. Dec. 316, 334-335 (Att'y Gen. 2018).

An alien seeking a mandatory grant of withholding of removal under Section 1231(b)(3) must make a similar but more difficult showing. To be eligible for statutory withholding, the alien must show that, if she were removed to a country, her life or freedom "would be threatened" in that country "because of," *inter alia*, her "membership in a particular social group" or her "political opinion." 8 U.S.C. 1231(b)(3)(A). That requires proving that it is "more likely than not" that she would be persecuted if so removed. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 419 (1999) (citation omitted).

Finally, an alien seeking withholding of removal under the Convention must prove that it is "more likely than not" that "she would be tortured if removed to the proposed country of removal," 8 C.F.R. 1208.16(c)(2),

"by or at the instigation of or with the consent or acquiescence of" a government official, 8 C.F.R. 1208.18(a)(1).

b. Petitioner WMVC based her multiple claims primarily on her contention that, while living in Honduras, she had been forced into an abusive same-sex relationship for 16 years by Angelica Perez, a retired female police officer who employed her as a housekeeper. Pet. App. 2a. WMVC contended that Perez had frequently raped and abused her and had threatened to kill WMVC's family if she attempted to leave. *Ibid.* WMVC separately contended that, after she opened a store, gang members began to extort her by threatening her life and that, shortly after she was unable to make the demanded payments, she fled to the United States. *Id.* at 2a-3a, 45a-47a, 74a.

WMVC raised multiple asylum and statutory withholding claims in which she asserted that she had suffered past persecution and that, if returned to Honduras, she would suffer future persecution based on six distinct traits: (1) an imputed anti-gang political opinion; and her membership in five purported social groups, namely, (2) "Honduran women unable to leave a domestic relationship"; (3) "Honduran women viewed as property by virtue of their status in a domestic relationship"; (4) "Honduran women without a male protector"; (5) persons (incorrectly) "perceived" as homosexual; and (6) "Honduran female [small] business managers without a male partner." Pet. App. 3a; see *id.* at 65a-74a. APV sought derivative asylum based on WMVC's asylum claims, see 8 U.S.C. 1158(b)(3)(A), and additionally sought asylum and withholding on the basis of her own imputed anti-gang political opinion and her membership in three additional purported social groups: (7) "nuclear family member[s]" of WMVC; (8) children of Honduran

women unable to leave a domestic relationship; and (9) children of Honduran women viewed as property because of their status in a domestic relationship. Pet. App. 123a-131a. For each of those nine distinct claims, each of which was asserted as a claim for both asylum and withholding, petitioners were required to establish the validity of the theory at issue and its application to each petitioner, see *id.* at 65a-74a, 123a-131a, and then separately to show that the relevant petitioner had been, had a well-founded fear of being, or would likely be persecuted because of those traits, see *id.* at 75a-81a, 131a-136a. See also *id.* at 82a-83a, 137a-138a (statutory withholding).

c. In separate opinions, an immigration judge (IJ) denied each petitioner's claims and ordered that each petitioner be removed. Pet. App. 31a-89a (WMVC); *id.* at 90a-144a (APV).

As relevant here, the IJ denied petitioners' asylum and statutory withholding claims on multiple grounds. Pet. App. 58a-83a, 116a-138a. The IJ determined that five of petitioners' eight purported social groups—"Honduran women viewed as property by virtue of their status in a domestic relationship," "children of" such women, "Honduran women without a male protector," "Honduran female small business managers without a male partner," and "nuclear family members of [WMVC]" —did not qualify as "particular social group[s]." *Id.* at 68a-70a, 72a-73a, 123a-125a, 128a-130a (capitalization altered; emphasis omitted). The IJ further determined that, although the Board had recognized at the time that married women in Guatemala who are unable to leave their relationship could constitute a particular social group, the rationale of that decision did not extend to WMVC's asserted membership in the social group of

Honduran women unable to leave a domestic relationship or APV's asserted membership in the related group of the children of such women. *Id.* at 65a-68a, 125a-128a (discussing *In re A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014), overruled by *In re A-B-*, 27 I. & N. Dec. 316 (Att'y Gen. 2018)). The IJ further determined that petitioners had failed to establish that they were persecuted, had a well-founded fear of persecution, or would likely be persecuted because of any imputed anti-gang beliefs or membership in any of the eight purported social groups. *Id.* at 73a-83a, 130a-138a.

The IJ separately denied protection under the Convention because petitioners had not established that the Honduran government had acquiesced, or would acquiesce, in any harm rising to the level of torture. Pet. App. 87a-89a, 142a-143a.

d. The Board dismissed petitioners' appeal. Pet. App. 26a-30a. The Board affirmed the IJ's factual finding that petitioners had failed to show that "past harm []or any future harm ha[d] been or would be motivated by either [of petitioners'] membership in any of the proposed social groups or 'political' opposition to the criminal gangs in Honduras." *Id.* at 28a. The Board also upheld the IJ's finding that, under the Convention, petitioners had failed to show that Honduran officials had acquiesced, or would acquiesce, in petitioners' torture. *Id.* at 29a-30a.

2. Petitioners petitioned for review of the Board's decision and filed an appellate brief. 2/28/18 Pet. C.A. Am. Br. Petitioners argued that the Board had erred on three grounds concerning WMVC's fear of future persecution based on perceived sexual orientation, *id.* at 20-30; her status as a Honduran woman unable to

leave a domestic relationship in light of the Board's decision in *A-R-C-G-*, *id.* at 30-46; and petitioners' claims under the Convention, *id.* at 47-53. Based on those asserted errors, petitioners asked the court of appeals to "grant the petition for review and vacate and remand the [Board's] decision." *Id.* at 54.

The government consulted with petitioners' counsel about a possible voluntary remand to the Board, a course to which counsel consented. 3/26/18 Gov't Unopposed C.A. Mot. to Remand (Remand Mot.) 4 n.1. The government accordingly moved for such a remand rather than filing a brief as respondent. Pet. App. 5a. The government explained that a remand would "allow the Board to further consider" petitioners' contentions raised in their briefing to the Board and thereby permit further "examination of issues critical to the disposition of this case," "including, but not limited to, the claim that W.M.V.C. has a well-founded fear of persecution on account of her perceived homosexuality by Honduran society at large." Remand Mot. 3. The government stated that, "[u]pon remand, the parties may request a briefing schedule"; emphasized that its "request to remand the proceeding to the agency [wa]s not a concession of error"; and explained that petitioners' counsel had "consented to the motion to remand." *Id.* at 3-4 & n.1.

The government requested that the court of appeals direct that the parties bear their own fees and costs. Remand Mot. 4 & n.1. Petitioners opposed that separate request and asked that the court "not address the issue of fees and costs at this time." 4/5/18 Pet. C.A. Opp. to Resp. Request Regarding Fees & Costs 4. Petitioners otherwise did not respond to the remand motion.

The court of appeals granted "[the government's] unopposed motion to remand the case to the Board" but

denied its "opposed motion for each party to bear their own fees and costs." Pet. App. 145a. The court's two-sentence order did not grant petitioners' petition for review, nor did it grant petitioners' request to vacate the Board's decision. *Ibid.*

3. a. Petitioners subsequently moved for an EAJA award of nearly $53,000 in attorney's fees and costs. 7/23/18 C.A. Appl. for Attorneys' Fees (C.A. EAJA Appl.) 1. Under EAJA, a federal court in a civil action against the United States, including a proceeding for judicial review of agency action, may award to a "prevailing party" (other than the government) fees and other expenses if, *inter alia*, the "position of the United States" was not "substantially justified." 28 U.S.C. 2412(d)(1)(A). The party seeking EAJA fees has the burden of "show-[ing]," *inter alia*, "that the party is a prevailing party." 28 U.S.C. 2412(d)(1)(B). To qualify as a "prevailing party," a litigant must obtain "a 'judicially sanctioned'" and "'material'" "'change in the legal relationship of the parties.'" *CRST Van Expedited, Inc.* v. *EEOC*, 136 S. Ct. 1642, 1646 (2016) (citations omitted).

EAJA's substantial-justification inquiry requires an examination of the "position of the United States," 28 U.S.C. 2412(d)(1)(A), which "means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. 2412(d)(2)(D). "While the parties' postures on individual matters may be more or less justified," the substantial-justification inquiry "favors treating a case as an inclusive whole, rather than as atomized line-items." *Commissioner, INS* v. *Jean*, 496 U.S. 154, 161-162 (1990). A court therefore makes "only one [such] threshold determination for the entire civil action," *id.* at 159, so that the prevailing

party becomes eligible for an EAJA award based on a "single finding that the Government's position lacks substantial justification," *id.* at 160. A position is substantially justified if it is "justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person." *Id.* at 158 n.6 (quoting *Pierce* v. *Underwood*, 487 U.S. 552, 565 (1988)) (internal quotation marks omitted).

b. The government opposed petitioners' EAJA-fee request. 8/6/18 Gov't C.A. Opp. to Pet. Mot. for Attorneys' Fees. The government did not address whether petitioners qualified as "prevailing parties." See *id.* at 1-13. It instead stated that, "[i]f a court determines that a petitioner is a prevailing party," EAJA fees may be awarded where, *inter alia*, the position of the United States is not "'substantially justified.'" *Id.* at 3 (citation omitted). The government then argued that no fees were warranted here because the government's overall position was substantially justified. *Id.* at 1, 5-7.

4. The court of appeals denied petitioners' EAJA-fee request. Pet. App. 1a-18a.

a. The court of appeals first stated that petitioners had obtained "prevailing party status" because they had "sought a remand to the [Board]" and "[the court's] decision to grant such relief constitutes a 'judicially sanctioned change in the legal relationship of the parties.'" Pet. App. 7a n.2 (citation omitted). The court noted that the government did "not contest that petitioners are prevailing parties." *Id.* at 7a.

The court of appeals concluded, however, that an EAJA award was unwarranted because the government's position was substantially justified. Pet. App. 7a-18a. The court surveyed petitioners' various claims

and concluded that the government's position was reasonable at least with respect to most of them, including the most prominent issues in the litigation. *Id.* at 11a-17a. The court stated that, because petitioners had challenged the denial of only three of their claims, the government had prevailed on all of the remaining claims. *Id.* at 11a.

The court of appeals did not decide whether the agency had erred in rejecting the remaining claims that petitioners had pressed in their opening brief on appeal. The court instead determined that the agency had at least acted reasonably in denying protection under the Convention, Pet. App. 12a-13a, and in declining to extend *A-R-C-G-* to WMVC's claimed membership in a group of Honduran women unable to leave a domestic relationship, *id.* at 14a-16a. The court noted that the agency's determination that WMVC had failed to show that such membership was the reason for any persecution constituted a second, independent basis for rejecting WMVC's women-unable-to-leave-a-domestic-relationship claim, and it "assume[d]—without deciding"—that this supplementary ruling was unreasonable. *Id.* at 16a. The court also "assume[d], without determining, that the agency's dismissal of [WMVC's] sexual-orientation claim was unreasonable," but it noted that the claim was "not a central issue" and had received "less than two pages of briefing" before the agency. *Id.* at 17a. The court further concluded that the government's conduct during the petition-for-review proceedings was reasonable. *Id.* at 17a-18a.

In light of those determinations, the court of appeals turned to the question "whether the government's position [is] substantially justified" in a case where "the agency [has] made multiple determinations—some of

which were reasonable and others that were not." Pet. App. 7a. Based on this Court's admonition that EAJA "'favors treating a case as an inclusive whole, rather than as atomized line-items,'" the court agreed with other courts of appeals that have awarded EAJA fees "only where the government's position as a whole lacked substantial justification." *Id.* at 8a-9a (quoting *Jean*, 496 U.S. at 161-162). That inquiry, the court explained, can take into consideration "the prominence of the issues" rather than simply counting "the rote number of reasonable and unreasonable claims." *Id.* at 9a.

Applying that overall approach, the court of appeals determined that, "when viewed in the aggregate, the position of the United States was reasonable" in this case. Pet. App. 11a. The court explained that the government had prevailed on most of petitioners' claims and had reasonably denied both their prominent *A-R-C-G*-based and Convention-based challenges. *Id.* at 18a. "[A]t most," the court stated, the agency lacked sufficient justification for denying WMVC's imputed-sexual-orientation claim, which had not been a "central issue" in the proceedings, and for an alternative ground that the Board had identified for denying the *A-R-C-G*-based claims. *Id.* at 17a-18a. The court concluded that, "when viewed 'as an inclusive whole,' the government's position was substantially justified." *Id.* at 18a.

b. Judge King dissented. Pet. App. 19a-23a. She stated that "[t]he Government's position was that the petitioners must be removed from the United States," and that the fact that "the Government was wrong for only one of several possible reasons does not make its position any more justified as a whole." *Id.* at 19a. Judge King concluded that, when a litigant challenges a "single administrative determination" with "alternative

arguments, the success on any one of which [would] require[] a complete remand to the agency," EAJA's substantial-justification inquiry must "focus only on the Government's position with respect to the litigant's winning argument." *Id.* at 20a.

ARGUMENT

Petitioners contend (Pet. 23-27) that the court of appeals erred in denying their EAJA-fee application on the ground that the position of the United States was substantially justified. Petitioners further contend (Pet. 16-23) that the court's decision implicates a division of authority with other courts of appeals. The court of appeals correctly rejected petitioners' fee request, and its judgment does not conflict with any decision of this Court or any other court of appeals.

Where, as here, a reviewing court grants a voluntary remand to an agency without resolving the merits or setting aside the challenged agency decision, the remand merely enables the agency to exercise its discretion to reconsider the matter and does not confer prevailing-party status on litigants like petitioners. In addition, EAJA's substantial-justification inquiry properly includes consideration of the reasonableness of the government's overall position both in agency proceedings and on judicial review. And given the atypical procedural posture here, this case would be a poor vehicle for the Court to consider the substantial-justification question that petitioners present. Further review is not warranted.

1. The court of appeals determined that a voluntary remand to the Board gave petitioners prevailing-party status under EAJA. Pet. App. 7a & n.2. That determination was unnecessary to the court's judgment (since the court ultimately denied petitioners' EAJA request),

and it is incorrect. Although the government did not take a position in the court of appeals on the prevailing-party question, see p. 9, *supra*, it is entitled as respondent in this Court to "defend the judgment below on any ground which the law and the record permit." *Smith* v. *Phillips*, 455 U.S. 209, 215 n.6 (1982); see *Bondholders Comm.* v. *Commissioner*, 315 U.S. 189, 192 n.2 (1942). Moreover, the prevailing-party inquiry is logically antecedent to, and significantly informs, the substantial-justification analysis. We therefore address those issues in their usual order.

a. A "'prevailing party' is one who has been awarded some relief by the court" on her claims. *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001) (*Buckhannon*). "[R]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of [her] claim before [she] can be said to prevail." *Ibid*. (quoting *Hewitt* v. *Helms*, 482 U. S. 755, 760 (1987)); accord *Sole* v. *Wyner*, 551 U.S. 74, 82 (2007).

This Court has accordingly held that the "'touchstone of the prevailing party inquiry'" is a "'material alteration of the legal relationship of the parties'" that is "marked by 'judicial *imprimatur*.'" *CRST Van Expedited, Inc.* v. *EEOC*, 136 S. Ct. 1642, 1646 (2016) (citations omitted). "A defendant's voluntary change in conduct," even one that occurs only because the plaintiff filed suit, may ultimately "accomplish[] what the plaintiff sought to achieve by the lawsuit," but it "lacks the necessary judicial *imprimatur* on the change." *Buckhannon*, 532 U.S. at 605 (rejecting catalyst theory). Interim judicial relief (*e.g.*, a contested preliminary injunction that is lifted later in the litigation) can provide a form of "fleeting

success," but it does not establish the "material alteration" in the parties' legal relationship that would accompany a definitive judicial resolution of the merits. *Sole*, 551 U.S. at 82-83. Instead, a plaintiff (here, a petitioner) in court will attain prevailing-party status if she "secures an 'enforceable judgmen[t] on the merits' or a 'court-ordered consent decre[e],'" each of which effects "a 'judicially sanctioned'"—and "'material'"—"'change in the legal relationship of the parties.'" *CRST Van Expedited, Inc.*, 136 S. Ct. at 1646 (citations omitted; brackets in original).[2]

The same principles apply to proceedings for judicial review of agency action. A judgment of a court on judicial review that "'revers[es] the decision of the [agency]'" and "'remand[s] the cause'" for further administrative proceedings will confer prevailing-party status because the "judgment reversing the [agency's decision]" is "a judgment *for* the plaintiff," who has thereby "'succeeded on [a] significant issue in litigation.'" *Shalala* v. *Schaefer*, 509 U.S. 292, 294, 302 (1993) (citations omitted). Such a judgment reversing agency action will materially alter the parties' legal relationship because it "overturn[s]" an agency order that would otherwise be legally enforceable. See *Black's Law Dictionary* 1513 (10th ed. 2014) (defining "reverse").[3] The associated remand allows the agency to implement the ruling of the

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[2] The prevailing-party analysis is different when the question is whether the *defendant* has prevailed in a judicial action, because the defendant against whom a plaintiff seeks judicial relief "seeks to *prevent*" a "material alteration in the legal relationship between the parties." *CRST Van Expedited, Inc.*, 136 S. Ct. at 1651 (emphasis added).

[3] See also *SecurityPoint Holdings, Inc.* v. *TSA*, 836 F.3d 32, 35, 39 (D.C. Cir. 2016) (holding that litigant who secured a judgment

reviewing court, whose "function * * * ends when an [agency's] error of law is laid bare." *Federal Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952); see *INS* v. *Ventura*, 537 U.S. 12, 13, 16, 18 (2002) (per curiam) (explaining that reviewing courts should apply "the ordinary 'remand' rule" after "revers[ing] the [Board's] holding" for legal error); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 200-201 (1947) (agency must "deal with the problem afresh" after reviewing court reverses an agency decision and remands).

By contrast, if a reviewing court merely grants a voluntary remand to the agency, without reversing or vacating the agency decision and without deciding the merits of any of the plaintiff's challenges, the court's remand merely terminates its own consideration of the case and "return[s] jurisdiction to the agency" without "order[ing] [the agency] to do anything." *Aronov* v. *Napolitano*, 562 F.3d 84, 92 (1st Cir. 2009) (en banc), cert. denied, 558 U.S. 1147 (2010); see *id.* at 86 (addressing a court's "one-line order granting the [parties'] joint motion to remand"). That is particularly so when, as in the court of appeals proceedings here, the government does not confess any error in the challenged agency decision. The judicial remand leaves the agency's order in force in such contexts because no court has reversed, vacated, or otherwise set it aside. See *Cushman* v. *Shinseki*, 576 F.3d 1290, 1295-1296 (Fed. Cir. 2009) (explaining that a court that has granted a "voluntary remand" has "no authority" to force agency to reconsider its order at a later date). And although a federal agency may choose to reconsider its order in light of the remand, it also may

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that "vacated the [agency order]" with "a remand terminating the case and requiring further administrative proceedings in light of agency error" was a prevailing party; citing cases).

leave the order in place.[4] As a result, regardless of the agency's subsequent decision, a court "order [simply] remanding to the agency is alone not enough to establish the needed [judicial] imprimatur" for conferring prevailing-party status. *Aronov*, 562 F.3d at 93-94.[5]

b. Multiple considerations confirm that a bare remand order standing alone is insufficient to confer prevailing-party status that can warrant an EAJA award.

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[4] If a federal agency declined to reconsider its decision after the government had obtained a voluntary remand, the private petitioner could promptly move the reviewing court to reinstate its petition for review. Absent unusual circumstances, the government would have no sound basis to oppose such a request.

[5] The Ninth Circuit has concluded that a court order granting an unopposed motion to remand an immigration case to the agency can constitute a "material alteration[] of the parties' legal relationship[]" that confers prevailing-party status under EAJA. *Li* v. *Keisler*, 505 F.3d 913, 918 (2007). The court in *Li*, however, did not address whether a bare remand order that leaves the agency decision in place would have that effect. The court instead appears to have focused only on whether a merits ruling was required, concluding that a litigant who "obtain[s] the desired relief from [a] federal court" can obtain prevailing-party status, "regardless of whether the federal court's order addressed the merits of the underlying case." *Id.* at 917. The court also indicated that the petitioners before it had succeeded in "obtaining the desired relief" that they had sought in their briefs—including a remand to the agency and a "reopened removal proceeding" to seek relief from removal. *Id.* at 917-918. That language suggests that the court's decision may have been based on an understanding that more than a bare remand was at issue. Such litigants typically pursue the relief available to them, namely a "judgment determining the validity of, and *enjoining, setting aside, or suspending*, in whole or in part, the order of the agency." 28 U.S.C. 2349(a) (emphasis added); see 8 U.S.C. 1252(a)(1) ("Judicial review of a final order of removal * * * is governed" by the Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*).

Permitting EAJA awards in such contexts would subvert important policy objectives. When the government is willing to accept a voluntary remand and the challenger consents to that approach, the parties have agreed to forgo judicial review of the merits of the challenger's claims. For the private challenger, that course can provide a valuable opportunity because a remand enables the agency to exercise its discretion to reconsider her claims. When that reconsideration occurs, the petitioner not only can reargue her position before the agency under a standard more favorable than the deferential standards that apply on judicial review, but also may be able to expand the administrative record to better support her case. Cf. 8 U.S.C. 1252(b)(4) (standards for judicial review); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 423-425 (1999) (applying *Chevron* deference to this judicial-review context).[6]

If voluntary remands entered at the parties' joint request conferred "prevailing party" status on the private challenger, potentially triggering satellite EAJA-fee litigation, the government would have a significant disincentive to agree to such dispositions. The approach that petitioners advocate would subject the government to the lopsided risk that the ensuing fee litigation could result in "a circuit-court loss on the merits, without the opportunity for a circuit-court victory on the merits." *Pierce* v. *Underwood*, 487 U.S. 552, 561 (1988). If the court of appeals found the government's position not

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[6] Although the record in this case does not include the proceedings on remand, the Board remanded the case to the IJ, 4/22/19 Board Order; see Pet. 11, who allowed petitioners to submit additional supporting evidence and subsequently granted asylum based on WMVC's well-founded fear of future persecution on account of her perceived homosexuality, 12/18/19 IJ Order 2-4, 8-12, 16.

substantially justified, it would necessarily determine that the position was incorrect, "effectively establish[ing] the circuit law [on those merits issues] in a most peculiar, secondhanded fashion." *Ibid.* But if the court found the government's position reasonable and thus substantially justified, its decision would not resolve whether that position was actually correct.

The disincentive to such voluntary remands would be especially pronounced because fee litigation is (from the government's perspective) an unattractive setting in which to litigate the merits. When a court of appeals adjudicates a petition for review, the petitioner has the burden of showing that the agency position was in error. But in the EAJA-fee context, "[t]he burden of establishing 'that the position of the United States was substantially justified,' * * * must be shouldered by the Government." *Scarborough* v. *Principi*, 541 U.S. 401, 414 (2004) (citation omitted). In addition, important merits issues could effectively be resolved not on full appellate briefing (which may never be completed), but on briefing in response to a fee application that need only make the bare "allegation" that the government's position is not substantially justified. *Ibid.* The court of appeals' decision in this case simply to "assume—without deciding" —that certain aspects of the government's position were not substantially justified, Pet. App. 16a-17a, may reflect appropriate discomfort with resolving such merits issues, which had already been remanded to give *the agency* an opportunity to reconsider them.

Finally, allowing such merits-focused EAJA litigation based on a bare remand would be inconsistent with this Court's repeated admonition that EAJA-fee requests "should not result in a second major litigation." *Commissioner, INS* v. *Jean*, 496 U.S. 154, 163 (1990)

(citation omitted); *Underwood*, 487 U.S. at 563. Indeed, fee litigation in the present procedural context is worse than a second major litigation. Unlike in the usual EAJA dispute, where the court determines a party's entitlement to fees based at least in part on knowledge the court acquired in deciding the case on the merits, treating petitioners as prevailing parties induced the court below to address merits issues that it otherwise could have avoided altogether.

c. The two-sentence order in this case (Pet. App. 145a) simply "remand[ed] the case to the Board" (*ibid.*), based on a motion in which the government emphasized that it was not confessing error in the agency decision, *id.* at 5a. See pp. 7-8, *supra*. That order did not grant the relief that petitioners had previously requested, which was a judgment "grant[ing] the[ir] petition for review and vacat[ing] and remand[ing] the decision of the [Board]," 2/28/18 Pet. C.A. Am. Br. 54. As a result, the court of appeals' remand did not compel the agency to take any action and did not materially alter the legal relationship of the parties.

The court of appeals' interim order granting petitioners' "[u]nopposed motion for [a] stay of deportation pending review," 1/22/18 C.A. Order, also did not confer prevailing-party status. That stay pending review expired when the matter was remanded because, as petitioners have acknowledged, the court "granted [the government's remand] motion, without retention of jurisdiction." C.A. EAJA Appl. 12. Petitioners therefore are not prevailing parties entitled to attorney's fees.

2. Even if petitioners were prevailing parties, the court of appeals did not abuse its discretion in determining that the position of the United States was substantially justified. Cf. *Underwood*, 487 U.S. at 562 (holding

that abuse-of-discretion standard applies to substantial-justification determinations).

a. This Court has instructed courts in resolving EAJA applications to make "only one threshold [substantial-justification] determination for the entire civil action," because EAJA "favors treating a case as an inclusive whole, rather than as atomized line-items." *Jean*, 496 U.S. at 159, 161-162. That directive reflects Congress's identification of the "'position of the United States'" as the subject that must be substantially justified, which suggests a single inquiry embodying the "numerous phases" of a case. *Id.* at 159, 161.

EAJA requires a court to consider, "in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. 2412(d)(2)(D). Because such "words importing the singular include and apply to several * * * things," Dictionary Act, 1 U.S.C. 1, EAJA's text suggests that a court, in making its unitary assessment of substantial justification, may consider the various arguments that the government asserted during the litigation, as well as the agency actions or failures to act that gave rise to the suit. Courts accordingly "look beyond the issue on which the petitioner prevailed to determine, from the totality of circumstances, whether the government acted reasonably." *Roanoke River Basin Ass'n* v. *Hudson*, 991 F.2d 132, 139 (4th Cir.), cert. denied, 510 U.S. 864 (1993); see also, *e.g.*, *Gatimi* v. *Holder*, 606 F.3d 344, 349-350 (7th Cir. 2010) (finding the government's position substantially justified, where the government's position on "the more prominent" of the two issues that it lost on review was itself justified), cert. denied, 562 U.S. 1256 (2011); *Williams* v. *Astrue*, 600 F.3d 299, 302 (3d Cir. 2009) (explaining that "a party's

success on a single claim will rarely be dispositive of whether the government's overall position was substantially justified" because a court must consider the entire civil action) (citation omitted). That approach appropriately reflects the limited scope of EAJA's waiver of sovereign immunity from fee awards. See *FAA* v. *Cooper*, 566 U.S. 284, 290-291, 299 (2012) (requiring narrow construction of "the scope of a [statutory] waiver" of sovereign immunity).

The court of appeals permissibly considered the whole case, examined the numerous claims that petitioners had presented in seeking relief and protection from removal, and determined that the government's overall position was substantially justified. See pp. 9-11, *supra*. Because each petitioner "conceded the sole charge of removability" against her, Pet. App. 33a, 92a, the government fully established its case. Petitioners therefore sought relief by asserting several affirmative claims, including asylum and withholding claims that were based on petitioners' asserted membership in eight distinct "particular social groups," most of which the agency correctly denied. See pp. 4-5, 9-10, *supra*. Petitioners do not dispute in this Court that the agency also reasonably denied their claims related to another such group, which was "a prominent issue" in the litigation, Pet. App. 15a-16a, and their claims under the Convention, *id.* at 12a-13a. The court of appeals assumed without deciding that the agency's position on two additional matters was not substantially justified. *Id.* at 16a-17a. But one was merely an alternative ground for denying a claim that the agency had reasonably denied on other grounds, *id.* at 16a, and the other was not a "central issue" in the litigation, *id.* at 17a. Indeed, petitioners' brief to the Board devoted only two pages to that latter

issue. Administrative Record (A.R.) 62-63; see A.R. 9-66 (brief). Given that context, the court did not abuse its discretion in finding that the position of the United States was substantially justified.

b. Although petitioners accept (Pet. 23) that the case must be considered "as an inclusive whole," *Jean*, 496 U.S. at 161-162, they argue that the court of appeals impermissibly treated their arguments as "atomized line-items." Petitioners fail to recognize that a whole is composed of its parts. This Court has not, as petitioners assert, instructed courts "not to focus on 'the parties' postures on individual matters.'" Pet. 24 (citation omitted). Rather, the Court has simply observed that, while such postures on "individual matters may be more or less justified," courts must consider "a case as an inclusive whole." *Jean*, 496 U.S. at 161-162. The court of appeals followed that directive here.

Relying on *Texas State Teachers Ass'n* v. *Garland Independent School District*, 489 U.S. 782 (1989) (*Garland*), petitioners contend (Pet. 25) that the court of appeals erred in considering the "prominence" of disputed matters when deciding whether the government's overall position was sufficiently justified. But *Garland* is not an EAJA case, and it does not speak to the issues here. Although *Garland* teaches that *prevailing-party status* does not depend on success on a case's "central issue," 489 U.S. at 785, 790, it does not address the proper methodology for determining substantial justification.

Petitioners analogize (Pet. 24) the Board's resolution of their numerous distinct claims to an agency's issuance of a regulation. Petitioners observe (*ibid.*) that an agency that "issues a rule that has no plausible basis in the statute could hardly be said to be acting in a reason-

able fashion," even if the agency could satisfy other prerequisites to a valid rulemaking. The Board proceedings here, however, were triggered by petitioners' requests for relief, and the claims that petitioners chose to assert set the parameters for those proceedings. The substantial-justification inquiry properly distinguishes between a prevailing litigant who focuses on a strong claim and one who raises a grab-bag of contentions, only one of which is ultimately found meritorious. EAJA vests the court that considers the matter with "discretion" and "needed flexibility" in evaluating the government's overall position in particular contexts. *Underwood*, 487 U.S. at 562; see *id.* at 559-563. Here, the court of appeals did not abuse its discretion in concluding that the agency's overall position would be substantially justified even if two aspects of its analysis were assumed not to meet that threshold.

3. Petitioners contend (Pet. 17-23) that the court of appeals' ruling conflicts with decisions of the Sixth, Ninth, Tenth, and D.C. Circuits. That is incorrect.

In each of the decisions that petitioners cite to illustrate the purported conflict, the court of appeals considered an EAJA-fee request after the reviewing court had reversed or vacated the agency's decision on the merits and remanded for further proceedings. See *Glenn* v. *Commissioner of Soc. Sec.*, 763 F.3d 494, 497 (6th Cir. 2014) (court "reversed and remanded" based on "five [agency] errors"); *Hackett* v. *Barnhart*, 475 F.3d 1166, 1171-1172 (10th Cir. 2007) (reversal and remand based on agency error); *Thangaraja* v. *Gonzales*, 428 F.3d 870, 872, 874 (9th Cir. 2005) (indicating that court "'reversed'" agency decision by "grant[ing]" "petition for review" based on agency error) (citation omitted); *Air Transp. Ass'n of Can.* v. *FAA*, 156 F.3d 1329, 1331 (D.C. Cir.

1998) (per curiam) (court "vacated" agency action based on litigants' "meritorious" "substantive objections"). Those courts neither considered whether an EAJA award might be appropriate based on a mere voluntary remand like the one in this case, nor addressed how to conduct a substantial-justification inquiry in that context. As a result, nothing in those decisions would compel a court within the relevant circuit to award EAJA fees to a litigant similarly situated to petitioners.

In addition, petitioners misread some of the decisions they cite. In *Glenn*, the Sixth Circuit concluded that the government's "litigating position in opposing remand" to the agency was not substantially justified where the plaintiff had established five independent errors that required the agency decision to be set aside, several of which were "plainly contrary to law" and none of which had "a reasonable basis in both fact and law." 763 F.3d at 498-499 (emphasis omitted). In light of that "'string of losses,'" the court concluded that the plaintiff's "inclusion of three unsuccessful claims in [his] petition for review" was insufficient to render the government's position reasonable. *Id.* at 499. That analysis does not conflict with the decision here. And the Sixth Circuit has more recently explained that it examines "the Government's position 'as a whole,'" and that an EAJA request "fails if the multiple claims involved in the case are 'distinct' and if the more 'prominent' claims were substantially justified." *Amezola-Garcia* v. *Lynch*, 835 F.3d 553, 555 (6th Cir. 2016).

The Tenth Circuit in *Hackett* held that EAJA fees "generally" should be awarded "where the government's underlying action was unreasonable even if the government advanced a reasonable litigation position." 475 F.3d

at 1174 (citation omitted). The court found that the government's success on five of the six issues on review was insufficient to render the government's position substantially justified, because its litigation defense "did not alter the fact that [the agency] acted unreasonably in denying [social security] benefits at the administrative level." *Id.* at 1173 n.1. Perhaps because the *Hackett* court "limit[ed] [its] holding to the specific circumstances of th[e] case," *id.* at 1174, the Tenth Circuit has since concluded (in an unpublished decision) that *Hackett* does not "preclude considering the parties' success on their merits arguments" on review, and that the agency's "wining arguments" can be considered when evaluating the case "as 'an inclusive whole.'" *Hays* v. *Berryhill*, 694 Fed. Appx. 634, 637-638 (10th Cir. 2017) (citation omitted).

The Ninth Circuit's decision in *Thangaraja* is inapposite. The *Thangaraja* court concluded that an agency's decision lacked a reasonable basis in the evidence, and that the government's defense of that decision "confirm[ed] that the 'position of the United States' was not substantially justified," because the government's various arguments ignored the court's binding precedents and rested on "unsupported * * * assertion." 428 F.3d at 874-875. The court had no occasion to address whether it might consider matters other than "a case-dispositive issue," Pet. i, when deciding substantial justification.

In *Air Transport Ass'n*, the D.C. Circuit did conclude that, when a court has vacated agency action on judicial review and the private litigant has thereby "succeeded in obtaining precisely the relief it prayed from the government because of the substantially unjustified element [of the action] under litigation," the agency's success on other issues does not preclude an EAJA

award. 156 F.3d at 1332. That decision does not speak to the circumstances here, where petitioners did not obtain the vacatur they had initially requested because the parties instead urged the court to remand the matter to the agency without resolving the merits. Petitioners have identified no basis for concluding that the D.C. Circuit would grant EAJA fees in this context.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
TIMOTHY G. HAYES
Attorneys

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