No. 10-122

IN THE
Supreme Court of the United States

NORTH STAR ALASKA HOUSING CORP.,
Petitioner,

v.

UNITED STATES,
Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The petition for certiorari demonstrated that the courts of appeals are irreconcilably divided over whether and when a party's bad faith misconduct outside of proceedings before a court is immune from the court's inherent authority to award attorney's fees. *See* Pet. 11-20. The assertions of the Brief in Opposition (BIO) that certiorari should be denied notwithstanding that this case directly implicates the acknowledged circuit conflict on this "issue of broad and continuing importance," BIO 8, and moreover controls the availability of fees in *all* government contract disputes, lack merit.

1. This case presents a unique opportunity to decide the question presented because the ordinarily fact-bound question whether the charged party actually engaged in misconduct is not contested here. The United States admits that it engaged in a pervasive pattern of gross misconduct, which forced petitioner unnecessarily to litigate its claims and which, as a consequence, wasted the time and resources of the federal judiciary.

The government's initial bad faith acts were "calculated to hinder petitioner's contract performance," BIO 1, and left petitioner no choice but to pursue its rights in the mandatory claims resolution process. Federal law required petitioner to "submit[] certified claims to designated contracting officers," BIO 1 (citing 41 U.S.C. § 601 et seq.), as a prerequisite to its federal court suit. The government acted in bad faith there as well by purposefully "undermin[ing] the impartiality of the contracting officers," *id.*, including with the specific purpose to distort the federal court litigation petitioner

instituted in response, Pet. App. 166a & n.71. It is thus undisputed that "the agency claim process 'was conducted in bad faith'" by the United States, BIO 6 (quoting Pet. App. 18a), conduct that "threatens the integrity of the dispute resolution process." Pet. App. 160a.

2. In *Sullivan v. Hudson*, 490 U.S. 877 (1989), this Court held that such mandatory administrative proceedings should be treated as part of the litigation for purposes of court-awarded attorney's fees. The government's reliance on the fact that the claim for fees in *Sullivan* technically arose under a different provision of the Equal Access to Justice Act (EAJA), *see* BIO 12, ignores the far broader basis for this Court's holding: "Our past decisions interpreting other fee-shifting provisions make clear that where administrative proceedings are intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded." *Sullivan*, 490 U.S. at 888 (citing decisions under the attorney's fees provisions of the Clean Air Act, Title VII, and 42 U.S.C. § 1988). That holding was not limited to one statutory provision but instead followed from "the very purposes behind the EAJA itself": "to diminish the deterrent effect of seeking review of, or defending against, governmental action." *Id.* at 890. It makes no sense to believe that Congress intended to leave such an important gap in the critical incentives created by EAJA for the government to conduct itself fairly in the adjudication of parties' claims.

The United States notably does not dispute that the government contracting system perfectly fits the model of an "interlocking system of judicial and administrative avenues to relief" for which a party may be eligible for fees arising from its opponent's bad faith misconduct in administrative proceedings. *Sullivan*, 490 U.S. at 889. The contracting officer is a "quasi-judicial official," John Cibinic, Jr., et al., *Administration of Government Contracts* 1286 (4th ed. 2006), who has the duty to provide "impartial, fair, and equitable treatment," 48 C.F.R. § 1.602-2(b), and whose decision is a prerequisite to federal court review. Indeed, as the petition explains, at 24-25, the importance of this case is substantially heightened by the fact that, by deeming the *entire* contracting officer process immune as a matter of law from the deterrent effect of a fee award for misconduct, the decision below presents a material threat to the government contracting system. At the very least, contractors will pass through the costs arising from the increased risk that the government will in bad faith abuse the mandatory process for resolving contracting disputes.

3. The government's two arguments that this case is a poor vehicle in which to review the question presented are unpersuasive. *First*, the United States's assertion that "the CFC rejected most of [petitioner's] claims," BIO 2, is seriously misleading to the extent it suggests that petitioner lost on the *substance* of most of its claims. As the petition explained, at 6-7, and the charts appended to this Reply demonstrate, petitioner prevailed on the substantial majority of its claims. Petitioner presented thirty-five claims and prevailed on twenty-six – more than two-thirds. The CFC adjudicated

eleven claims in petitioner's favor, awarding roughly $250,000 in damages. App. A. The CFC also made a variety of specific determinations about petitioner's rights. On that basis, petitioner on remand prevailed on a further sixteen claims that the CFC did not itself resolve in the first instance, for which petitioner was awarded an additional $1.6 million. App. B; BIO 4 n.2.

The CFC instead far more narrowly rejected petitioner's calculation of certain of petitioner's "alleged damage[s]." BIO 2. Although the CFC agreed with petitioner that the government breached the parties' contracts, the court declined to adopt petitioner's damages model. The CFC thus explained, after acknowledging the square circuit conflict over the question presented and adopting the rule at one "end of the spectrum" that "fee shifting can never be based upon 'bad faith' conduct that solely predates the litigation":

> Under this narrower view of the 'bad faith' exception [adopted by the court], the Army's "bad faith" conduct as to the claims process here does not support the imposition of attorney's fees. For one thing, even though that process plainly was conducted in bad faith, many, if not all, of plaintiff's claims would have been denied – and, in *some instances*, should have been denied – even in a perfectly fair process. This court said as much in its prior opinion, in which it rejected much of the *relief* originally requested by plaintiff in its CDA claims, including plaintiff's claim that it was entitled to

> damages for the loss of its business value, by far the most dollar-intensive of its claims.

Pet. App. 18a-19a (emphases added). The denied "claims" to which this passage refers were thus petitioner's *damages* claims; not its substantive claims for relief, on which petitioner substantially prevailed. The CFC could not have been more clear in finding gross misconduct by the government and furthermore by ruling in petitioner's favor on the majority of its claims. *See supra*; App. A, B.

But in any event, whether and to what extent the CFC ruled for petitioner on various claims or awarded particular damages is irrelevant as a matter of law to petitioner's entitlement to fees. To the extent the United States is correct that the CFC held that a party's right to fees depends on whether it wins its case in court, *id.* 2, that ruling squarely conflicts with this Court's precedents. "'The imposition of sanctions under the bad-faith exception' at common law thus 'depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation.'" BIO 5 (quoting *Chambers v. NASCO*, 501 U.S. 32, 53 (1991)). Here, "during the" mandatory adjudication of petitioner's claims before the contracting officer, the government "conducted itself" in absolute bad faith. As a result, petitioner could receive a fair adjudication of its claims only by litigating before the CFC.

There is no more merit to the United States's closely related assertion that petitioner failed "to demonstrate a causal link between the relevant bad faith and the fees it ultimately incurred." BIO 10. The United States characterizes the CFC as stating that, because petitioner would not have prevailed on

its largest damages calculations in even a fair contracting process, *see supra*, the government's misconduct did not "cause[] petitioner to incur additional litigation expenses." BIO 6 (citing Pet. App. 18a-19a). That is inaccurate: as noted, it is undisputed that the government acted in bad faith in the administrative proceedings. That misconduct is itself a part of the litigation process for purposes of a fee award, *see Sullivan*, *supra*, and moreover forced petitioner to litigate in the CFC.

The CFC instead said far more narrowly that even if the government had acted in good faith petitioner inevitably would have lost on some claims and presumably would have gone to court to litigate at least some issues – *viz.*, petitioner could not have "*avoided this action* and the significant expenditure of judicial resources it entailed." Pet. App. 19a (emphasis added). The facts that petitioner would inevitably have litigated *some* questions before the CFC in even a fair contracting process, *id.*, or that petitioner's claims should have been denied in "some instances" and that the court did not agree entirely with petitioner's requested "relief," *id.*, obviously does not immunize the government from the consequences of its admitted bad faith misconduct for the many claims that petitioner was forced to litigate because of the government's bad faith. *See* App. A, *infra*. There has been no determination of the "causal link" between the government's misconduct in the administrative proceedings and certain fees claimed by petitioner, *see* BIO 10, only because the CFC categorically held that fees are unavailable *even when* such a causal link does exist. As explained in the petition, at 28-29, an appropriate award on remand could be limited to the specific fees that are

"traceable to the [government's] bad faith." *Brown v. Sullivan*, 916 F.2d 492, 497 (9th Cir. 1990).

Second, respondent's contention that because petitioner invoked the government's misconduct in pleading its claim that respondent "'breached its covenant of good faith and fair dealing,'" such misconduct "would not warrant an award of bad-faith fees," BIO 16 (quoting Pet. App. 19a), blurs the critical distinction between two very different aspects of the government's misconduct. Petitioner proved that Army officials breached the government's duty of "good faith and fair dealing" in performing the party's underlying contracts relating to the "housing project at Fort Wainwright." *Id.* 2. The government argues, and a number of circuits hold (though others do not, *see infra*), that such *primary conduct* is immune from an award of attorney's fees. *See id.* 15. But petitioner's eligibility for an award of fees relies principally on the distinct further fact that "the agency *claim process* 'was conducted in bad faith.'" *Id.* 6 (quoting Pet. App. 18a) (emphasis added). Even if the government were correct that its "conduct forming the basis for petitioner's *breach-of-contract claim* would not warrant an award of bad-faith fees," *id.* 16 (emphasis added), petitioner would remain eligible for the significant fees arising from the government's gross misconduct in the administrative proceedings, misconduct that was closely related to the judicial proceedings and necessitated the federal court litigation.

In any event, as the petition explained, at 26-27, it would be absurd to hold that a party which otherwise would be required to pay attorney's fees on the basis of its bad faith misconduct ironically is

automatically immunized from such an award whenever its bad faith *also* happens to be part of the substantive claim in the litigation. Obviously, a party may neither recover twice for the same harm nor recover if such a remedy were not intended. Here, if petitioner's substantive breach of contract claim were designed to account for its attorney's fees, petitioner could not also secure those fees under the court's inherent powers. But this is not such a case, which was litigated as an ordinary breach of contract action, in which petitioner could recover the litigation costs it incurred as a result of the government's bad faith only through its motion for attorney's fees. The EAJA also demonstrates that Congress did not otherwise intend to immunize the government from an award of fees for misconduct in the mandatory administrative adjudication of contracting disputes, at least when as here that misconduct is closely related to federal court litigation.

3. There also is no merit to the government's attempt to refute the CFC's own objective acknowledgment, *see* Pet. App. 14a-15a, that other circuits would have awarded petitioner its attorney's fees. The Third, Seventh, and Tenth Circuits agree with the categorical rule adopted below that fees may never be awarded for conduct that occurs outside the court proceedings. *See* Pet. 12-13. But other circuits reject that sweeping holding and would award fees in these circumstances. The United States itself has acknowledged that the CFC's decision was compelled by settled Federal Circuit precedent, which in turn refuses to follow contrary "out-of-circuit authority." *See* Pet. 10 (quoting Resp. C.A. Br. 10).

The D.C., Fourth, and Eleventh Circuits reject the government's position that fees cannot be awarded for bad faith primary conduct. *See* Pet. 13-16. The government attempts to draw thin factual distinctions, noting that the D.C. Circuit in one case "affirmed the *denial* of bad-faith fees," and in another awarded fees relating to misconduct in implementing "a consent order to settle a dispute," BIO 13-14, and furthermore that the misconduct authorizing a fee award in an Eleventh Circuit case occurred "during the litigation itself," *id.* 14. But the precise fact pattern of the individual cases did not drive the courts' legal holdings. The D.C. Circuit unambiguously holds that fees are available for "an aspect of the conduct giving rise to a lawsuit" when the litigant violated "a clear statutory or judicially imposed duty," *Am. Hosp. Ass'n v. Sullivan*, 938 F.2d 216, 219-20 (D.C. Cir. 1991), which led the Federal Circuit itself to acknowledge the circuit conflict. *See* Pet. 14. The Eleventh Circuit expressly adopts the D.C. Circuit's standard and holds that fees are available for "bad faith *preceding* and during litigation." *Maritime Management Inc. v. United States*, 242 F.3d 1326, 1333 (11th Cir. 2001) (per curiam) (emphasis added). The United States next contends, at 14, that the Fourth Circuit's prior precedent has been superseded by *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), but that court has continued to consider such claims. *Williams v. Professional Transportation, Inc.*, 294 F.3d 607, 614 (4th Cir. 2002).

The Second, Fifth, Sixth, Eighth, and Ninth Circuits similarly reject the rule that fees may only be awarded for misconduct in the litigation itself, although they would hold that fees are unavailable

for a party's primary conduct – here, the underlying breach of contract. Most starkly, the Fifth and Ninth Circuits' holding that fees are available for misconduct in administrative proceedings squarely conflicts with the ruling below that "how an agency handles an administrative claim, Pet. App. 18a, is immune from a fee award. The United States acknowledges the Ninth Circuit's holding in *Brown v. Sullivan*, 916 F.2d 492, 496 (9th Cir. 1990), that fees may be awarded for misconduct in administrative proceedings, but it weakly attempts to suggest in a parenthetical that the ruling involved "agency actions taken *after* [the] suit for judicial review was filed in 1981." BIO 17. That is no distinction at all: much of the administrative misconduct in this case occurred after petitioner filed suit in the CFC. *See, e.g.*, Pet. App. 166a & n.71. But in any event, the government's characterization of *Brown* is not correct: in that case, the government's administrative misconduct "necessitated Brown's filing *the first action* in the district court." 916 F.2d at 496 (emphasis added). Further, the timing of the events was not relevant to the Ninth Circuit's holding that fees are available because – just as in government contracting cases – "[t]he process of review of benefit allowances . . . is statutorily defined" to include the administrative proceedings. *Id.*

The Fifth Circuit similarly would award fees for the government's bad faith "*response* to [petitioner's] substantive claim," without regard to whether that response occurred "before or after [this] action [was] filed." *Sanchez v. Rowe*, 870 F.2d 291, 295 (5th Cir. 1989) (emphasis in original). Notably, in two cases, the Fifth Circuit has specifically awarded fees for

governmental misconduct in administrative proceedings. *See* Pet. 17. The United States asserts that the Fifth Circuit's decisions "would not aid petitioner" because "the government defended the agency's decisions in this suit and largely prevailed in the CFC." BIO 17. For the reasons described *supra*, that assertion is factually incorrect and legally irrelevant: petitioner prevailed on two-thirds of its claims and was awarded nearly $2 million in damages; and eligibility for fees depends not on who wins or loses, but on whether a party acts in bad faith. Nothing in the decisions of the Fifth Circuit supports the government's asserted distinctions, and that court would award fees here in light of its express and repeated holding that misconduct in administrative proceedings is subject to an award of fees.

The government gains nothing from the Fifth Circuit's recognition that this Court in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), "did not grant a district court the power to police the administrative courts . . . when those courts do not threaten the court's own judicial authority or proceedings." *FDIC v. Maxxam, Inc.*, 523 F.3d 566, 593 (5th Cir. 2008). In this case, the administrative and judicial proceedings were integrally related, *cf. Sullivan v. Hudson*, *supra*, so much so that the CFC specifically found that the government's actions "threaten[] the integrity of the dispute resolution process." Pet. App. 160a. *Maxxam*, in stark contrast, involved a request for fees arising from an entirely separate "proceeding that was not before the district court . . . . addressed different legal issues and prosecuted six defendants who were not involved in the [district court] case." 523 F.3d at 593. The government further

acknowledges that *Chambers* left open "the question whether a federal court has 'inherent power to sanction [a litigant] for conduct relating to the underlying [claim]' at issue in a lawsuit," BIO 9, which it correctly recognizes as "an issue of broad and continuing importance," BIO 8.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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