

Supreme Court of the United States.
Marshall PECORE and Conrad Waniger, Petition-
ers,
v.
UNITED STATES OF AMERICA, Respondent.
No. 12-250.
June 25, 2012.

On Petition For A Writ Of Certiorari To the United
States Court of Appeals For The Eleventh Circuit

Petition for a Writ of Certiorari

Glenn C. Reynolds,^[FN*] Rebecca A. Paulson,
Reynolds & Associates, 407 E. Main Street, Madis-
on, WI 53703, (608) 257-5551, Attorneys for Peti-
tioners.

FN* Counsel of Record

QUESTIONS PRESENTED

1. Is a case the Government brings against private citizens and loses at trial “substantially justified” under the Equal Access to Justice Act from the perspective of a “reasonable person” or a “reasonable lawyer”?

2. In Equal Access to Justice Act attorney fees litigation, does a district court's denial of a defendant's motion for summary judgment create a rebuttable presumption that the Government's position was “substantially justified” in law and fact?

3. Is a district court's pretrial ruling that the Government could sue employees of an Indian tribe under the False Claims Act preserved for appeal on the denial of a request for Equal Access to Justice Act attorney fees, particularly when the Tribe is dismissed from the case on the grounds of sovereign immunity?

*ii TABLE OF CONTENTS

QUESTIONS PRESENTED ... i

TABLE OF CONTENTS ... ii

TABLE OF AUTHORITIES ... iv

OPINIONS BELOW ... vi

JURISDICTIONAL STATEMENT ... vi

STATEMENT OF THE CASE ... 1

I. INTRODUCTION ... 1

II. FACTUAL BACKGROUND ... 4

A. Origins of the Menominee ... 4

B. Misunderstanding Between the Parties ... 5

C. Political Dispute and Investigation ... 7

III. PROCEDURAL HISTORY ... 9

A. Motions for Judgment as a Matter of Law ... 9

B. Exculpatory Evidence ... 10

C. EAJA Attorney Fees Litigation ... 12

D. Appeal to the Seventh Circuit ... 13

*iii REASONS FOR GRANTING THE WRIT ... 15

I. Review is necessary to clarify the meaning of “substantial justification” ... 16

A. Circuits have split over how to interpret substantial justification ... 16

B. This Court should adopt a “reasonable lawyer” standard for substantial justification inquiries ... 18

II. Review is necessary to clarify that the government has the burden of proof to show both a factual and a legal justification ... 24

A. The Seventh Circuit's presumption radically departs from this Court's precedent and creates a circuit split ... 24

B. Rebutting the Seventh Circuit's presumption requires the same showing necessary to win summary judgment ... 25

C. The Seventh Circuit's presumption impermissibly shifts the burden to prove substantial justification ... 25

III. Review is necessary to determine whether an EAJA claimant can waive an issue negating substantial justification when the district court decided that issue ... 27

***iv CONCLUSION** ... 28

APPENDIX A: Seventh Circuit's decision ... 1a

APPENDIX B: District Court's decision ... 21a

APPENDIX C: Order denying rehearing *en banc* ... 40a

APPENDIX D: Statutes involved ... 41a

TABLE OF AUTHORITIES

Cases

Bah v. Cangemi, 548 F.3d 680 (8th Cir. 2008) ... 22

Comm'r, INS v. Jean, 496 U.S. 154 (1990) ... 18, 21, 26, 8, 12

Cruz v. Comm'r of Soc. Sec., 630 F.3d 321 (3d Cir. 2010) ... 17

Dantran, Inc. v. U.S. Department of Labor, 246 F.3d 36 (1st Cir. 2001) ... 22, 25

Davidson v. Veneman, 317 F.3d 503 (5th Cir. 2003) ... 17

E.E.O.C. v. Great Steaks, Inc., 667 F.3d 510 (4th Cir. 2012) ... 26

Goad v. Barnhart, 398 F.3d 1021 (8th Cir. 2005) ... 28

Gomez-Beleno v. Hoder, 644 F.3d 139 (2d Cir. 2011) ... 28

Healey v. Leavitt, 485 F.3d 63 (2d Cir. 2007) ... 18

Houskins v. Sheahan, 549 F.3d 480 (7th Cir. 2008) ... 27

***v** *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 (1968) ... 4

Menominee v. United States, 388 F.2d 998 (Ct.Cl. 1967) ... 4

Menominee v. United States, 91 F.Supp. 917 (Ct.Cl. 1950) ... 5

Pierce v. Underwood, 487 U.S. 552 (1988) ... 15, 22, 23, 24, 25

S.E.C. v. Zahareas, 374 F.3d 624 (8th Cir. 2004) ... 25, 23

Saysana v. Gillen, 614 F.3d 1 (1st Cir. 2010) ... 16, 17, 18, 26

Tchemkou v. Mukasey, 517 F.3d 506 (7th Cir. 2008) ... 26

United States v. Hallmark Const. Co., 200 F.3d 1076 (7th Cir. 2000) ... 18

United States v. Hurt, 676 F.3d 649 (8th Cir. 2012) ... 26

United States v. Pecore, 664 F.3d 1125 (7th Cir. 2011) ... vi

United States v. Thouvenot, 596 F.3d 378, 381-382 (7th Cir. 2010) ... 17, 18, 24, 25, 26

Vencor, Inc. v. Std. Life & Accident Ins. Co., 317 F.3d 629 (6th Cir. 2003) ... 27

Wilson v. Williams, 182 F.3d 562 (7th Cir. 2007) ... 27

Statutes

[28 U.S.C. § 1254\(1\)](#) ... 5

[28 U.S.C. § 1291](#) ... 5

[*vi 28 U.S.C. § 1331](#) ... 4

[28 U.S.C. § 2412\(d\)\(1\)\(A\)](#) ... 5

[31 U.S.C. §§ 3729\(a\)\(1\)-\(2\)](#) ... 4, 13

Other Authorities

Cong. Ref. 93-649 (1997) ... 9

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at [United States v. Pecore](#), 664 F.3d 1125 (7th Cir. 2011) and reprinted in app.1a. The order denying the petitioner's petition for rehearing *en banc* is unreported but is reprinted in app.39a. The order of the United States for Eastern District of Wisconsin is unreported but is available at [2008 WL 2273285 \(E.D. Wis. 2008\)](#) and reprinted in app.20a.

JURISDICTIONAL STATEMENT

On April 3, 2007, the plaintiff-respondent filed a civil suit against the defendants-appellants under the False Claims Act. [31 U.S.C. §§ 3729-33](#). The United States District Court for the Eastern District of Wisconsin, Green Bay Division, exercised subject-matter jurisdiction pursuant to [28 U.S.C. § 1331](#). On October 29, 2009, the district court entered final judgment in favor of the defendants-petitioners.

On February 1, 2010, the defendants-petitioners filed a motion for attorney fees pursuant to the Equal Access to Justice Act, [28 U.S.C. § 2412\(d\)\(1\)\(A\)](#). On June 15, 2010, [*vii](#) the district court entered an order denying the defendants-petitioners' motion. The defendants-petitioners appealed the district court's order denying EAJA attorney fees to the Seventh Circuit Court of Appeals.

The Seventh Circuit exercised jurisdiction under [28 U.S.C. § 1291](#).

On December 30, 2011, a panel of the Seventh Circuit entered judgment affirming the district court's order. On March 26, 2010, the Seventh Circuit Court of Appeals denied rehearing *en banc*. This Court has jurisdiction pursuant to [28 U.S.C. § 1254\(1\)](#).

*1 STATEMENT OF THE CASE

I. INTRODUCTION

On April 3, 2007, following seven years of investigation, the United States Government filed a civil False Claims Act suit against the Menominee Tribal Enterprises (“MTE”), the principal business arm of the Menominee Indian Tribe of Wisconsin, and two of its key employees Marshall Pecore and Conrad Waniger (“Defendants”), Menominee's Forest Manager and Fire Management Officer respectively. (App.1a-2a).

The Government alleged that, in 2000 and 2001, MTE and the Defendants created “false records” to support “false” claims to the Government. The Government claimed that the defendants had bill the Government under self-determination grants for fire prevention work in the Menominee forest that “was never done” or “inadequately performed.” (App.3a). The individual Defendants filed an answer and counterclaim alleging that substantial fire prevention work was done according to the same standards that Menominee had followed for decades. *See id.*

In June 2008, Menominee and the Defendants filed motions to dismiss on the grounds, that neither the tribe nor its representatives acting in their official capacities was a “person” under the False Claims Act and were immune from suit. (App.5a). The district court dismissed Menominee on the grounds that a tribal entity was not a “person” within the meaning of the Act, but denied the Defendants' parallel motion on the grounds that the Government

was not suing them in their “official capacities.” (App.4a-5a).

*2 All parties also filed separate summary judgment motions based on the merits of the case. *Id.* In spite of photographic, forensic, physical and testimonial evidence produced by the Defendants proving that extensive fire prevention work was done to justify the invoices submitted to the Government, the district court denied all summary judgment motions and the case proceeded to trial. *Id.*

At the conclusion of a nine-day trial in October 2009, the jury returned a unanimous verdict in favor of Defendants after deliberating less than three hours. (App.6a). The jury rejected 24 potential findings of “false records” and 24 potential findings of “false claims” for each Defendant. *Id.*

As the prevailing party, Defendants moved for attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A). *Id.* The district court denied the motion on the grounds that the Government was legitimately confused by the Menomonee billing practices and did not act in bad faith, and because it had previously denied Defendants' Motion for Summary Judgment and Motion to Dismiss at the close of the Government's case. (App.15a). This effectively relieved the Government from its burden of proof.

The Defendants appealed the district court's denial of fees to the Seventh Circuit Court of Appeals. (App.6a). The Defendants argued that the district court had misapplied the standard of “substantial justification” and inappropriately shifted the burden of persuasion from the government to the defendants. (App.15a). The Defendants noted that they had provided uncontested proof at trial that the defendants had not lied on any of the submitted invoices and that the Tribe had performed substantial work to more than justify the expenses claimed. (App.8a). The defendant asked the Court of Appeals to review the district *3 court's legal conclusion that the government had a sound legal basis to sue the defendants acting within the scope of their

employment for a tribe that was dismissed on grounds of sovereign immunity. *Id.*

Like the district court, the Seventh Circuit questioned the wisdom of the Government's case against the Defendants and expressed “discomfort over what looks like government overreaching.” (App.2a). Nonetheless, the Court affirmed the district court's denial of EAJA attorney fees under the abuse of discretion standard. *Id.*

The Seventh Circuit found the Government's position to be substantially justified despite the fact that the Government had never proved a “lie” at trial. *Id.* Since the Government offered some testimony that would have supported its theory, “a legitimate factual dispute ... existed through the litigation.” (App.13a). The panel concluded that, “the intense nature of [the trial's] debate suggests ... that either party's position could be accepted by a reasonable person.” (App.14a).

Similarly, the Seventh Circuit found that the district court had not erred in creating a presumption of substantial justification from its denial of summary judgment. (App.15a). The panel noted that, under Seventh Circuit precedent, a district court's denial of a claimant's motion for judgment as a matter of law is “objective evidence” that the government's position was substantially justified. *Id.*

Finally, the Seventh Circuit refused to address the sovereign immunity issue the defendants had raised in its motion to dismiss. (App.8a n.4). The court concluded that the defendants had “waived” the sovereign immunity question by not rebriefing the issue in their motion for *4 EAJA attorney fees. *Id.* The defendants petitioned the Seventh Circuit for a rehearing which was denied. (App.39a).

II. FACTUAL BACKGROUND

A. Origins of the Menominee

Several times throughout the course of these proceedings, the district court questioned the wisdom of the Government's case:

During the course of this case, I have also acknowledged that the government's case against Pecore and Waniger may not be a wise use of government resources - spending nearly a decade of time and effort to attempt to prove false claims totaling only a few thousands of dollars.

The history between the Bureau of Indian Affairs ("BIA") and the Menominee Tribe begins to shed some light on the court's quandary. The Menominee Tribe have lived in Wisconsin from "time immemorial," and in 1854 obtained a 230,000 acre reservation "for a home, to be held as Indian lands are held.... [A] reservation for their way of life." *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 (1968). The Menominee land and its forests were to be "governed by them according to the customs, laws, rules, and regulations of the tribe without any outside interference by state or anyone else." *Menominee v. United States*, 388 F.2d 998, 1001 (1967).

For the next 120 years, the Tribe struggled to maintain their sovereign rights in the face of outside political and economic forces which sought to exploit and control their forest resources. In the 1890s, the BIA *5 advocated clear-cutting, which resulted in the destruction of the vast sections of the forest. Slash piles left after clearcuts dried out and burned caused catastrophic fires and huge losses. *Menominee v. United States*, 91 F.Supp. 917, 919 (Ct.Cl. 1950).

This dark period led to the passage of the LaFollette Act of 1908, which sought to preserve the forest resources in perpetuity for the Menominee people. But two years after the Act passed, the BIA again promoted clear-cutting of the forest resources, which, between 1910 and 1922, caused massive deforestation, catastrophic fires and severe damage to the forest resources. *Id.* at 921-926. The Court of Claims ultimately awarded the Tribe an \$8.5 million judgment for the Government's breach of trust responsibility and total disregard to the sustained yield concepts embodied in the LaFollette Act. Congress approved the settlement, but termin-

ated the Menominee as a "recognized" tribe as a condition of payment. Cong. Ref. 93-649 (1997).

The Tribe was restored to federal status in 1974 and created a business arm - Menominee Tribal Enterprises. Unlike other Wisconsin tribes, Menominee lands had never been divided and privatized under the General Allotment Act of 1887. The profitability of the Tribe's sawmill was a big factor in this outcome.

B. Misunderstanding Between the Parties

This case began as a simple misunderstanding of how the Menominee Tribe handled fire prevention work in its reservation.

In 1992, the State of Wisconsin transferred to the Tribe the responsibility for fire prevention in its own *6 reservation. (App.2a). MTE, the business arm of the Tribe and one of the original defendants, took charge of the fire prevention work. Marshall Pecore and Conrad Waniger, as heads of MTE's Forestry and Fire Departments, respectively, assumed key roles in MTE's work. *Id.*

Prior to 1992, the Tribe had received grants from the BIA to do some of its own fire prevention work. (App.11a). In accord with federal policies of tribal self-determination, the Tribe had always had utmost flexibility in deciding how handle the work the BIA funded. *Id.*

Once it assumed responsibility for the reservation's fire prevention, MTE sought new grants from the BIA. (App.35a). The new arrangement preserved the Tribe's flexibility. MTE would apply for a grant by submitting a fire prevention proposal, perform the work at its own cost, and then send the BIA invoices for reimbursement. *See id.* This reimbursement practice was the exact same that MTE had used in its previous interactions with the BIA. *See id.*

MTE had always used the same system to report its work to the BIA. *Id.* MTE's invoices always reflected the *actual cost* MTE incurred for fire prevention

work. (App.23a). As a separate matter, MTE provided the BIA with maps that showed the *actual work* MTE performed on the reservation. (App.14a). These maps were required by the grants. *Id.* MTE used them merely to facilitate securing future grants. *Id.*

In 1999, Mr. Waniger submitted a grant proposal. As usual, the proposal provided that MTE would perform fire prevention work for a specific number of miles in the reservation. (App.2a). In 2000, the federal government started a new fire prevention program. With the BIA's encouragement, Mr. Waniger submitted the same grant *7 proposal he had submitted in 1999 to apply for a grant under the new program. *Id.* After MTE secured the grant, work on the reservation began between December 2000 and January 2001. *Id.*

Once work began, Mr. Waniger met with David Congos, a forester who represented the BIA before the Tribe, to discuss MTE's reimbursement. (App.3a). The two agreed that MTE's invoices would be for \$480.00 per mile of work performed. *Id.* This amount was Mr. Waniger's estimation of the *actual cost* MTE would incur to perform the work he had proposed for the grant. *Id.*

However, Mr. Waniger soon realized MTE's cost would be higher than \$480.00 per mile. *Id.* The work required two phases: clearing roads with heavy machinery, and “redoing” the roads to clean what the machinery had left behind. (App.17a). Accordingly, Mr. Waniger opted to bill the BIA for *miles worked*, rather than *miles completed*. In other words, for every mile that was both cleared and “redone,” MTE's invoice would show one mile for the first \$480.00 of costs incurred - and whatever fraction of another mile was necessary to cover the balance of costs actually incurred. *This would reflect the actual costs MTE incurred* - which MTE's invoices had always done. Ultimately, the BIA would reimburse MTE for actual expenses incurred. This is true regardless of how many miles MTE had to “redo” to meet the standards of its grant proposal. (App.3a).

C. Political Dispute and Investigation

Between 2000 and 2001, Mr. Congos, the BIA representative who worked with Mr. Waniger, became involved in a tribal political dispute. (App.6a). The dispute was over a proposal to have the Tribe's sawmill pay tribal *8 members the fair market value of logs sold on the open market. Mr. Congos supported the proposal; Mr. Pecore was one of many who opposed it. As of that point, Mr. Congos began to advocate for Mr. Pecore's removal from his position with MTE. *Id.*

By August 2002, several tribal members and MTE employees had become outraged with Mr. Congos' political involvement. *Id.* MTE advised Mr. Congos that, should he not cease his political involvement, MTE would seek a new BIA representative. As of this point, Mr. Congos' relationship with the Tribe changed dramatically. Mr. Congos began investigating MTE and the Defendants for fraud. Evidence introduced at trial showed that Mr. Congos launched the investigation because he wanted to remove the “thugs” from MTE. *Id.*

At the start of his investigation, Mr. Congos requested MTE to submit maps showing how many miles of fire prevention work MTE had done under the new program. (App.3a). As previously noted, these maps had never been used as the basis for the invoices: they reflected work performed, while the invoices reflected costs incurred. Nonetheless, Mr. Congos related to the BIA regional office that MTE and the Defendants had engaged in fraud by submitting invoices that reflected more mileage of work than MTE actually performed. *Id.*

Mr. Congos continued his investigation despite the Defendants' effort to explain MTE's invoice system. (App.4a). At the beginning of the investigation, the Defendants met with Mr. Congos to explain the difference in mileage between the invoices and the maps. (App.3a). By the end of this meeting, Mr. Congos had agreed to allow MTE's future invoices to reflect cost rather than work performed. *See id.*

*9 Nonetheless, after the meeting, Mr. Congos began a second round of investigation without notifying MTE or the Defendants. (App.4a). Mr. Congos convinced the BIA, the Office of the Inspector General and the Department of Justice to join his investigation. *Id.* Ultimately, the Government's investigation lasted for seven years. (App.1a). The Government never accepted the Defendants' offers to explain MTE's invoices. (App.4a-5a).

III. PROCEDURAL HISTORY

A. Motions for Judgment as a Matter of Law

On April 3, 2007, the United States brought a 38-page Complaint against MTE and the Defendants. *See* (App.15a). The Complaint alleged that MTE and the Defendants knowingly used "false records and statements" to support "false or fraudulent claims" to the United States, in violation of the False Claims Act, 31 U.S.C. §§ 3729(a)(1) and (2). (App.4a-5a). The Government alleged that MTE's invoices reflected either work that MTE had "not performed," or two to three times as much work as MTE had actually performed. (App.3a). Essentially, the Government accused MTE and the Defendants of lying. (App.11a).

MTE and the Defendants moved to dismiss on sovereign immunity grounds. (App.5a). They argued that an Indian tribe is not a "person" under the False Claims Act. The district court dismissed the case against the Tribe, but not the case against the Defendants. *Id.* The district court concluded that Tribe's immunity did not extend to the Defendants because the Government had sued them in their individual rather than official capacities. *Id.*

*10 Subsequently, the Defendants moved for summary judgment. (App.15a). They provided extensive evidence that, contrary to the Government's allegations, MTE's invoices reflected actual costs - not "false records" to support "false claims." (App.25a). More importantly, they noted that this had always been MTE's practice - and that the Government should have known as much. *Id.*

The district court denied the motion for summary judgment. (App.33a). The court considered the Government's argument that MTE had "draft[ed] invoices for phony miles" was "a strong one." (App.36a). Despite extensive evidence that explained MTE's cost-based invoices, the court concluded that the Government could prove "a *complete lack of performance* that would fail under any standard." (emphasis added). (See app.31a).

B. Exculpatory Evidence

During discovery, the defense compiled overwhelming evidence that MTE had performed work that justified its cost-based invoices. (App.5a). The defense had videotape evidence showing that MTE had performed the work the Government claimed MTE had not performed at all. *See id.* The defense also had time sheets that showed exactly what work employees had performed, as well as how this work correlated with the invoices. (See app.28a). The defense offered the Government an opportunity to talk about this evidence to clarify any misunderstanding over how MTE billed its work. (App.4a). The Government refused. *Id.*

A jury trial started on October 19, 2009. (See app.17a). During its opening statement, the Government stated it had evidence that MTE had billed the Government for work that it had *not performed, or performed so poorly to* *11 *fail to meet any standard.* (See app.12a). The Government's own evidence would show otherwise; and the Government's theory would change dramatically. *See id.*

The Government failed to introduce any evidence that MTE or the Defendants had lied to the Government. *Id.* The Government's own witnesses confirmed that the Government would have reimbursed MTE for its cost incurred - regardless of how many miles it worked on, or how many times it had to "redo" each mile of work. (See app.24a).

Once it became clear that MTE's methods of billing were legitimate and compatible with the intended reimbursement, the Government began pursuing the

theory that MTE's work was insufficient to actually prevent fires. (App.28a). However, even that theory soon fell apart: the Government's own fire prevention experts disagreed amongst themselves over the appropriate fire prevention standard. *Id.*

Ultimately, the only thing the Government's witnesses agreed upon was that BIA should have communicated better with MTE. (*See* app.13a). One Government witness testified that it is imperative for BIA personnel to visit fire prevention work sites to ensure both sides agree on what the fire prevention work will entail. (*See* app.23a). Another Government witness testified that, whenever a concern over work performance arises, the BIA protocol is to open a dialogue to resolve the impasse. *See id.* Yet the BIA and the Government had refused to accept the Defendants' offers to clarify their practices at all stages of the proceedings. (App.4a).

Not coincidentally, the Government's theory during closing arguments was completely different from the theory *12 the Government had said the evidence would support in its opening statement. (*See* app.28a). During closing arguments, the Government admitted that, "there's *no question* they were out there working." *See id.* However, the Government's theory was now that "the cutting ... appeared to be for a different purpose [and] not the type of cutting that would have been consistent with the project proposal." (*See* app.3a).

Unsurprisingly, the jury returned a verdict for the Defendants. (App.3a). The jury rejected 24 counts of "false records" and 24 counts of "false claims" for each one of the two defendants. *Id.* The trial had lasted nine days; the jury deliberations lasted less than three hours. *See id.*

C. EAJA Attorney Fees Litigation

The trial made clear that the Government should never have pursued this case. Even the district court had repeatedly questioned the wisdom of the Government's case. As the district court put it: During the course of this case, I have also acknow-

ledged that the government's case against Pecore and Waniger may not be a wise use of government resources - spending nearly a decade of time and effort to attempt to prove false claims totaling only a few thousands of dollars.... [T]he government's exercise of prosecutorial discretion was questionable.

Given the weakness of the Government's case, the Defendants moved the district court for attorney fees pursuant to the Equal Access to Justice Act. 28 U.S.C. § 2412(d)(1)(A). (App.2a).

*13 The district court denied the Defendants' motion. (App.21a). The court concluded that the Government's position was substantially justified - thus precluding an award. *See id.* The court offered two main reasons to support its conclusion. First, the Government had acted in "good faith" in light of MTE's "confusing billing practices." (App.32a). Second, denying summary judgment had created a "presumption" of substantial justification - even though the court denied summary judgment because it thought the Government could prove "a *complete lack of performance* that would *fail under any standard.*" *Id.*

D. Appeal to the Seventh Circuit

The Defendants appealed the district court's denial of fees to the Seventh Circuit Court of Appeals. (App.2a). The Defendants argued that the district court had abused its discretion in several ways - three of which are key to this petition. First, it incorrectly concluded the Government had substantial justification despite overwhelming evidence that MTE's invoices were legitimate. (App.6a-7a). Second, it impermissibly relieved the Government's burden to show substantial justification by creating a "presumption" from its summary judgment decision. *Id.* Third, it erroneously refused to extend sovereign immunity to the Defendants when the defendants were acting within their official MTE capacities. (App.8a n.4).

Like the district court, the Seventh Circuit panel opined that the Government should not have pur-

sued its case against MTE and the Defendants. (App.2a). The Seventh Circuit expressed specific “discomfort over what looks like government overreaching.” *Id.* Nonetheless, the panel still affirmed the district court's denial of EAJA attorney fees. *Id.*

***14** The Seventh Circuit panel found the Government's position to be substantially justified despite the fact that the Government's theory had collapsed at trial. (App.12a). According to the panel, because the Government offered some testimony that would have supported its theory, “a legitimate factual dispute ... existed through the litigation.” (App.13a). The panel concluded that, “the intense nature of [the trial's] debate suggests ... that either party's position could be accepted by a reasonable person.” (App.14a).

Similarly, the Seventh Circuit panel found that the district court had not erred in creating a presumption of substantial justification from its denial of summary judgment. (App.15a). The panel noted that, under Seventh Circuit precedent, a district court's denial of a claimant's motion for judgment as a matter of law is “objective evidence” that the government's position was substantially justified. *Id.*

Finally, the Seventh Circuit panel also refused to address the sovereign immunity issue the Defendants had raised. (App.8a n.4). In a footnote, the panel recognized that the Defendants had raised the sovereign immunity issue in their motion for summary judgment. *Id.* Nonetheless, the court concluded that the defendants had “waived” the sovereign immunity issue by not including it in their original motion for EAJA attorney fees to the district court. *Id.*

The Defendants petitioned the Seventh Circuit for a rehearing *en banc*. (See app.39a). In their petition, the Defendants raised two primary issues. First, the panel's decision to “waive” an issue raised in summary judgment conflicted with previous Seventh Circuit decisions. Second, the district court's decision on the sovereign immunity issue, which the

panel had “waived,” created a circuit split. ***15** The Seventh Circuit denied the petition for rehearing *en banc* without an opinion. *Id.*

REASONS FOR GRANTING THE WRIT

The Equal Access to Justice Act provides, in relevant part:

“Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses ... incurred by that party in any civil action ... brought by or against the United States ... unless the court finds that the position of the United States was substantially justified.”

[28 U.S.C. § 2412\(d\)\(1\)\(A\)](#).

The Supreme Court has held that “substantially justified” means “justified in substance or in the main - that is, justified to a degree that could satisfy a reasonable person.” [Pierce v. Underwood](#), 487 U.S. 552, 565 (1988). In other words, the position of the United States is substantially justified if it has “reasonable basis in both law and fact.” *Id.*

The intent of *Pierce* was to “implement [the Court's] view that a request for attorney's fees should not result in a second major litigation.” *Id.* at 563 (internal quotation marks omitted). However, at that time, the substantial justification issue was still a “novel question.” *Id.* at 562. Accordingly, this Court was “reluctant either to fix or sanction narrow guidelines for the district courts to follow.” *Id.*

***16** Over twenty years have passed, and better guidelines are now necessary. Lower courts have struggled to apply the substantial justification standard. See [Saysana v. Gillen](#), 614 F.3d 1, 5 (1st Cir. 2010). As the First Circuit noted, “determining whether the government's position is substantially justified ... has proved to be an issue of considerable conceptual and practical difficulty.” *Id.* Application of the standard has varied from circuit to circuit and from case to case - leading to divergent

results in similar cases. The result has been exactly that *Pierce* meant to avoid: EAJA attorney fees have become a major cause of second litigation.

I. Review is necessary to clarify the meaning of “substantial justification.”

A. Circuits have split over how to interpret substantial justification.

The Seventh Circuit in a recent case has struggled with the definition of “substantial justification”. It is something more than “frivolous” but how much more? In *United States v. Thouvenot*, Judge Posner lamented as follows:

The key statutory term, “substantially justified,” is neither defined nor self-evident. If it just meant not frivolous, there would be no problem because usually it's pretty easy to distinguish a frivolous from a nonfrivolous case. But the courts have not taken that road. The title of the statute--Equal Access to Justice Act - and the fact that eligibility for an award is limited to persons and organizations of limited financial means ... suggest that Congress's concern was not limited to frivolous cases--that it wanted the government to take care *17 before deploying its formidable litigation resources against a weak opponent. The Equal Access to Justice Act has thus been called an “anti-bully” law. Between frivolous and meritorious lie cases that are “justified in substance or in the main--that is, justified to a degree that could satisfy a reasonable person” [and hence has a] reasonable basis both in law and fact. The case must have sufficient merit to negate an inference that the government was coming down on its small opponent in a careless and oppressive fashion.

596 F.3d 378, 381-382 (7th Cir. 2010) (citations omitted).

This confusion runs throughout the circuits which are having “considerable conceptual and practical difficulty” in defining “substantial justification”. *Saysana*, 614 F.3d at 5. The most evident consequence has been circuit splits.

First, the circuits have split over what test to apply. See, e.g., *Davidson v. Veneman*, 317 F.3d 503, 506 n.1 (5th Cir. 2003). The First, Third, Sixth, Seventh, Eighth and Tenth Circuits have adopted a three-part test: (1) reasonable basis in truth for the facts alleged; (2) reasonable basis in law for the theory advanced; and (3) reasonable connection between the facts alleged and the theory advanced. See, e.g., *Cruz v. Comm'r of Soc. Sec.*, 630 F.3d 321, 324 (3d Cir. 2010). Other circuits have not added the third element of “reasonable connection.” See, e.g., *Davidson*, 317 F.3d at 506 n.1. The Fifth Circuit has even explicitly rejected to do so. *Id.*

Second, the circuits have split over what evidentiary standard to apply. The Second Circuit has required the Government to make a “strong showing” of substantial *18 justification. E.g., *Healey v. Leavitt*, 485 F.3d 63, 67 (2d Cir. 2007). Conversely, the First Circuit has required the Government to show substantial justification by preponderance of the evidence. *Saysana*, 614 F.3d at 5. And the Seventh Circuit has only required the Government to “negate an inference that the government was coming down on its small opponent in a careless and oppressive fashion.” *Thouvenot*, 596 F.3d at 381-82.

B. This Court should adopt a “reasonable lawyer” standard for substantial justification inquiries.

Underlying the circuits' “conceptual and practical difficulty” in handling the “substantial justification” issue is the difficulty in interpreting *Pierce's* “reasonable person” standard. Lower courts have often resorted to the familiar “average person” or “reasonable juror” standards. However, these standards are often incompatible with the substantial justification inquiry.

Therefore, this Court should take this opportunity to adopt a “reasonable lawyer” standard to give guidance to lower courts on the meaning of “substantial justification” within the meaning of EAJA - leading to less EAJA attorney fees litigation.

Adopting a “reasonable lawyer” standard would be consistent with the statutory purpose of the EAJA which is to allow litigants with limited resources to challenge unreasonable governmental action in court. *Comm'r, INS v. Jean*, 496 U.S. 154, 164 (1990). The fee-shifting provisions of the Act encourage the Government to “investigate, prepare and pursue litigation against private parties in a professional and appropriate manner.” *United States v. Hallmark Const. Co.*, 200 F.3d 1076, 1080 (7th Cir. 2000).

*19 Ultimately, it is a lawyer who ensures that the Government acts reasonably, professionally and appropriately. It is a lawyer who decides whether the Government should start, settle, dismiss or appeal a case. And a reasonable lawyer would not make these decisions in the same way an average person or a reasonable juror.

Unlike the average person, the reasonable lawyer knows the law and how it applies to the facts. The reasonable government lawyer may see no merit in a case that the reasonable “government” investigator thinks is rock solid. Thus the district court excused the governments “missteps” because the government actors believed they were being billed for work that was “never done” when in fact that was not the case. To ensure the Government's *legal and factual position* is reasonable, the law must require the Government's *legal professional* to be reasonable.

The “genuine dispute” rationale the Seventh Circuit's panel espoused in this case highlights the differences between interpreting “reasonable person” to apply to a juror instead of a lawyer. Not all disputes that seem genuine to the reasonable juror are actually genuine. The Government can always present abundant evidence with little weight or credibility to create the appearance of a genuine dispute. Although the jury may ultimately discount the deficient evidence, it may nonetheless interpret the Government's insistence as genuine belief in a given position. Therefore, the reasonable juror may see a genuine dispute where the reasonable lawyer

would see frivolous stonewalling.

This case shows some of the problems with using a “reasonable juror” standard instead of a “reasonable lawyer” standard. Both the district court and the Seventh Circuit panel denied Defendants' motion for fees despite *20 recognizing that the Government's lawyers acted unreasonably. Ultimately, both courts allowed the Government's lawyers to bring a case in which the defendants had to prove that the government was wrong simply because the average person *could* have found that the government actors believed in good faith that there were lies in the invoices.

Both courts made clear that the Government's lawyers should not have pursued this case. The district court repeatedly stated that the Government's case was “not a wise use of government resources,” and that “the government's exercise of prosecutorial discretion was questionable.” The appellate panel made a point of mentioning that it thought the Government's case “looks like government overreaching.” In essence, the courts thought the Government had, at best, wasted money; at worst, abused its power.

Yet, reliance on a “reasonable juror” standard led both courts to deny the Defendants request for EAJA attorney fees. The district court gave two primary reasons for denying the Defendants' motion for fees. The first reason was that the court had denied the Defendants' motion for summary judgment. The court reasoned that, since the Government had enough evidence to submit its case to the jury, its case was “substantially justified.” This is in essence a “reasonable juror” standard: the court thought a reasonable juror could side with the Government, so it held the Government had substantial justification.

The second reason was that the Government had acted in “good faith” in light of the Defendants' “confusing” billing practices. The court reasoned that, since investigators had been legitimately suspicious of the Defendants' practices, the Govern-

ment's case was "substantially justified." This is essence an "average *21 person" standard: the court thought an average investigator could find reasonableness in the Government's case, so it held the Government had substantial justification. The Seventh Circuit affirmed - but not without making specific note that it reviewed the district court's decision for abuse of discretion.

These analyses highlight the problem with not adopting a "reasonable lawyer" standard. The lower courts found that the Government's lawyers had wasted government resources to overreach the government's authority. In other words, they found that the Government's lawyers had not acted reasonably. However, because the "reasonable juror" would have seen some justification in the Government's case, both courts denied the Defendants EAJA attorney fees.

This result creates two problems. First, it defeats the purpose of the EAJA which is to curb governmental "overreaching." See *Jean*, 496 U.S. at 164. The statute cannot allow the Government's lawyers to act unreasonably simply because the average person or reasonable juror could rule in their favor. To ensure the Government acts reasonably, the statute must require the Government's lawyer to act reasonably. And the only way to do so is to require the Government's case to be substantial enough to satisfy the reasonable *government lawyer*.

Second, it directly contradicts the definition of "position of the United States" under the statute. This Court has held that the "position of the United States" encompasses the Government's position both before and during litigation. *Jean*, 496 U.S. at 158-159. Accordingly, a "single finding that the Government's position lacks substantial justification ... operates as a one-time threshold for fee eligibility." *Id.* at 161-62. All circuits have followed suit. *E.g.*, *22 *Dantran, Inc. v. U.S. Department of Labor*, 246 F.3d 36, 40 (1st Cir. 2001); *Bah v. Cangemi*, 548 F.3d 680, 684 (8th Cir. 2008). Ultimately, this Court and lower courts have held that the "reasonable basis in law" element depends on

"what the Government was substantially justified in believing [the law] to have been" when initiating an action. *Pierce*, 487 U.S. at 561.

Evaluating the "position of the United States" from the perspective of the "reasonable juror" departs from this principle. Part of the district court's reason for denying EAJA attorney fees was that the Government had been legitimately "confused" by the Defendants' billing practices. That may have justified the Government's pre-litigation position - but it does not justify the Government's position during litigation.

Throughout litigation, the Government refused to abandon its clearly unreasonable position that the Defendants were "lying" and that work on the forest roads was "never done." Throughout the litigation, the Defendants proved that the work was done and the invoices were modest requests for only portions of the expenses that MTE incurred. Yet, the Government stood by its falsification theory. All the way through its opening statement, the Government insisted that the Defendants had submitting "false records and claims" for work that was "not performed" at all.

But the trial revealed that this position was completely unreasonable. The Government's own witnesses testified that the Defendants' cost-based invoices were consistent with the government's plan of reimbursement. By the time of closing arguments, the Government admitted that there was "no question" that work had been performed. As the Government's own witnesses noted, the Government should have sought a dialogue with the Defendants to clarify the situation. While the Government *23 might have suspected the Defendants' practices before litigation, its position during litigation lost all its footing at trial.

Finally, a "reasonable lawyer" standard would be far easier for lower courts to apply. Courts are used to evaluating whether a lawyer acted reasonably: they do so frequently in the context of sanctions. If lower courts were to evaluate substantial justifica-

tion inquiry to their inquiry under [Rule 11 of the Federal Rules of Civil Procedure](#), they would reach easier, more consistent results - and have to face less EAJA litigation.

This Court has already held that a [Rule 11](#) analysis is analogous to a substantial justification analysis. See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403 (1990). The Court did recognize that the two standards were not perfectly analogous. *Id.* (quoting *Pierce*, 487 U.S. at 565 (“substantially justified means ... more than merely undeserving of sanctions for frivolousness”) (internal quotation marks omitted)). Nonetheless, *Cooter* held that both [Rule 11](#) and the EAJA require an inquiry into whether a case is “well grounded in fact and legally tenable.” *Id.* Accordingly, *Cooter* held that the EAJA standard of review extended to the [Rule 11](#) context.

The opposite is just as true. It is clear that, should the Government's position be one that warrants [Rule 11](#) sanctions, that position will lack substantial justification. This alone could already provide the lower courts with some guidance. But an inquiry into the behavior of the Government's attorney would also provide guidance. Given the purpose of the EAJA, part of the substantial justification inquiry accounts for the reasonableness of the Government lawyer's behavior before the court and opposing parties. This behavior forms the cornerstone of [*24 Rule 11](#) assessments - and could provide valuable guidance and reduce EAJA litigation.

II. Review is necessary to clarify that the government has the burden of proof to show both a factual and a legal justification.

The Seventh Circuit has created a “rebuttable presumption” that the Government's case is substantially justified if it survives motions for summary judgment. *Thouvenot*, 596 F.3d at 382. To overcome this presumption, the district court must find that “the trial ... revealed profound weaknesses in the government's case that, had [the court] known about earlier, would have moved [it] to grant one of

[the] dispositive motions.” *Id.* Underlying this rule is the assumption that “a case that is allowed to go all the way to trial is likely to be a toss-up.” *Id.*

A. The Seventh Circuit's presumption radically departs from this Court's precedent and creates a circuit split.

The Seventh Circuit's presumption directly contradicts binding precedent from this Court. In *Pierce*, this Court recognized that decisions on judgment as a matter of law are “objective indicia” of the strength of the Government's case. 487 U.S. at 568. However, *Pierce* held that these indicia were not reliable to determine substantial justification. *Id.* As *Pierce* noted, “the Government could take a position that is not substantially justified, yet win.” 487 U.S. at 569. And if a position that lacks substantial justification can win a whole case, it can certainly win a motion for dismissal or summary judgment.

Likewise, the Seventh Circuit's presumption directly contradicts decisions from other circuits. Citing *Pierce*, [*25](#) other circuits have held that decisions on judgment as a matter of law do not make the Government's case “substantially justified”. See, e.g., *S.E.C. v. Zahareas*, 374 F.3d 624, 626 (8th Cir. 2004) (“[t]he government ... is not exempt from liability under the EAJA merely because it prevailed at some interim point in the process); see also *Dantran*, 246 F.3d at 40. The Seventh Circuit's stands alone on the wrong side of this circuit split.

B. Rebutting the Seventh Circuit's presumption requires the same showing necessary to win summary judgment.

The Seventh Circuit's presumption improperly equates the substantial justification inquiry with the summary judgment standard. Rebutting the presumption requires the victorious defendants to prove to the district court that there is something new in the facts or the law to show that the government was wrong to bring the case in the first place. *Thouvenot*, 596 F.3d at 382. In other words, the district court must find that no reasonable juror could

have ruled in the Government's favor.

This result also directly contradicts binding precedent from this Court. *Pierce* made clear that whether a jury would rule for or against the Government is no indication of substantial justification. 487 U.S. at 569 (“the Government could take a position that is not substantially justified, yet win”). Once again, if a position that lacks substantial justification can win a whole jury, it can certainly win a single, reasonable juror.

C. The Seventh Circuit's presumption impermissibly shifts the burden to prove substantial justification.

*26 There is unanimous agreement that the Government bears the burden to prove its case was “substantially justified.” This Court has held that substantial justification is a defense the Government must prove; not a hurdle the claimant must overcome. See *Jean*, 496 U.S. at 160. Accordingly, every single circuit has held that the Government bears the sole burden to prove substantial justification. See, e.g., *Saysana*, 614 F.3d at 5; see also *E.E.O.C. v. Great Steaks, Inc.*, 667 F.3d 510, 520 (4th Cir. 2012); *United States v. Hurt*, 676 F.3d 649, 652 (8th Cir. 2012). The Seventh Circuit is no different. See *Tchemkou v. Mukasey*, 517 F.3d 506, 509 (7th Cir. 2008).

But the Seventh Circuit's “rebuttable presumption” does precisely the opposite: it effectively relieves the Government from having to make any showing of substantial justification on the facts or the law. Once the Government survives a motion for summary judgment, all it has to do is avoiding giving the court a reason to regret its decision. *Thouvenot*, 596 F.3d at 382. When faced with a motion for fees, the Government can sit idle: it is up to the district court to look for something that, “had [it] known about earlier, would have moved [it] to grant one of [the] dispositive motions” against the Government. *Id.*

In this case, the Seventh Circuit insisted that “

Thouvenot only construes a motion to dismiss or summary judgment victory as objective and perhaps compelling evidence of substantive justification.” But this defies logic. By definition, the party that benefits from a rebuttable presumption has no burden of production or persuasion. Once the presumption arises, the burden shifts to the winning litigant to disprove “substantial justification” of law and fact. The Government will only have to defend its position. This was not the original intent of EAJA. The Government no longer bears the burden to prove that it had *27 a good reason to sue two citizens on a case it could not prove.

III. Review is necessary to determine whether an EAJA claimant can waive an issue negating substantial justification when the district court decided that issue.

The Seventh Circuit held that the Defendants waived the sovereign immunity issue by not raising it again in the original EAJA motion to the district court. In a footnote, the panel wrote: Although the defendants made a similar sovereign immunity argument in their merits brief supporting summary judgment ... the defendants did not raise this issue in their post-trial brief for EAJA attorney's fees. Accordingly, the defendants waived this argument as to EAJA attorney's fees, and we will not consider it.

Id.

This holding puts the burden on the defendants to disprove a factual and legal basis underlying the Government's case. It also directly contradicts decisions from other circuits and the Seventh Circuit. First, both the Seventh Circuit and other circuits have held that a party preserves for appeal any issue it raises a motion for judgment as a matter of law. *Houskins v. Sheahan*, 549 F.3d 480, 488 (7th Cir. 2008) (motion for summary judgment preserves legal issues for appeal); *Wilson v. Williams*, 182 F.3d 562, 566 (7th Cir. 2007) (conclusive pre-trial ruling preserves an issue for appeal). Other circuits have held the same. See, e.g., *Vencor, Inc. v.*

Std. Life & Accident Ins. Co., 317 F.3d 629, 641 n.11 (6th Cir. 2003).

*28 Second, other circuits have held that this “waiver” is inconsistent with the Government's burden to show substantial justification. *Gomez-Beleno v. Holder*, 644 F.3d 139, 146 (2d Cir. 2011) (“we reject the Government's contention that this aspect of the [Government's case] was somehow rendered substantially justified by the [claimant's] failure to bring the misquotation to our attention”); *Goad v. Barnhart*, 398 F.3d 1021, 1025 (8th Cir. 2005) (“because it was the [Government's] burden to prove substantial justification, [the claimant] was under no duty to supplement the record.... Accordingly, his failure to do so cannot serve as a waiver”).

CONCLUSION

For the foregoing reasons, petitioners respectfully request this Court to grant their petition.

Pecore v. United States of America
2012 WL 3724730 (U.S.) (Appellate Petition, Motion and Filing)

END OF DOCUMENT