No. 12-250

In the Supreme Court of the United States

MARSHALL PECORE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion when it concluded that petitioners were not entitled to attorney's fees under the Equal Access to Justice Act because the government's position was substantially justified.

2. Whether the court of appeals correctly declined to consider an argument in support of petitioners' request for attorney's fees because petitioners had raised the argument for the first time on appeal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 664 F.3d 1125. The opinion of the district court (Pet. App. 21a-39a) is not published in the *Federal Supplement* but is available at 2010 WL 2465505.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2011. A petition for rehearing was denied on March 26, 2012 (Pet. App. 40a). The petition for a writ of certiorari was filed on June 25, 2012 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, Tit. II, 94 Stat. 2325, to enable "certain prevailing parties to recover an award of

attorney fees, expert witness fees and other expenses against the United States" in appropriate cases. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 6 (1980). EAJA authorizes the district court in a civil action to "award to a prevailing party other than the United States fees and other expenses * * * incurred by that party" if the position of the United States is not "substantially justified" and no special circumstances would make an award unjust. 28 U.S.C. 2412(d)(1)(A). The "position of the United States" includes both "the position taken by the United States in the civil action" and "the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. 2412(d)(2)(D).

2. Petitioners are a current and former employee of Menominee Tribal Enterprises (MTE), the business arm of the Menominee Indian Tribe of Wisconsin. Pet. App. 2a. In 2000 and 2001, petitioners applied for and received federal funding from the Bureau of Indian Affairs (BIA) to fund fire-prevention work on tribal forestland under the Hazardous Fuels Reduction (HFR) program. *Ibid.* In order to obtain HFR funding, petitioners submitted a proposal for MTE's planned fire reduction programs, and they later submitted invoices requesting reimbursement for incurred project costs. *Id.* at 2a-3a.

In June 2001, several MTE staff members informed Dave Congos, a BIA forester assigned to the Menominee Tribe, that HFR funds were being diverted to close a budget shortfall in another department of MTE. Pet. App. 3a. Congos and Thomas Magnuson, another BIA forester, then inspected the forest roads that petitioners had claimed to have cleared of potentially flammable brush—work for which petitioners had already submitted invoices to the BIA. *Id.* at 2a-3a. Both foresters concluded that the MTE invoices and accompanying

maps had overstated the work that had been performed. *Id.* at 3a. Congos also believed that some of the work actually performed had increased the risk of fire. *Ibid.* The foresters met with petitioners to discuss their findings, after which petitioner Waniger submitted new invoices and maps purporting to reflect the work that MTE had completed. *Ibid.* Congos conducted a new inspection of the relevant area and again concluded that petitioners either had not completed the work for which they had submitted invoices or had not completed it in accordance with HFR standards. *Id.* at 3a-4a.

In July 2002, the foresters contacted the Department of the Interior's Office of Inspector General (OIG), which commenced an investigation. Pet. App. 4a. After interviewing MTE employees and reviewing subpoenaed records, OIG identified what it believed were falsified employee timecards. *Ibid.* OIG believed that MTE management had required some employees to represent on their time cards that they had spent time doing fire-reduction work when they had in fact been working on unrelated projects. *Ibid.* In 2005, OIG formally contacted MTE to discuss its findings, and extensive settlement negotiations ensued. *Ibid.* When negotiations stalled in 2006, the United States filed suit against MTE, Pecore, and Waniger, alleging violations of the False Claims Act (FCA), 31 U.S.C. 3729-3733. Pet. App. 5a.

3. Before trial, the district court dismissed all claims against MTE, holding that the Tribe is not a "person" within the meaning of the FCA. Pet. App. 5a; see 31 U.S.C. 3729 (stating that a "person" shall be civilly liable to the United States for submitting a false claim). Petitioners (the remaining defendants) moved for summary judgment, arguing that the government's evidence did

not establish that petitioners had submitted invoices for work that had not been performed. See Pet. App. 25a-29a. The district court denied the motion, and the case went to trial. *Id.* at 5a.

During the trial, factual disputes emerged about MTE's billing methods, its internal time-reporting requirements, and the standard the government had employed to assess whether MTE had complied with HFR fire-prevention protocols. Pet. App. 5a. Petitioners submitted a 2009 expert report purporting to show that MTE had completed extensive fire-prevention work between 2000 and 2002, *id.* at 5a-6a, but Congos testified that the limited cutting petitioners' expert had photographed was either not fire-prevention work or was not related to the HFR program, *id.* at 6a. Throughout the trial, petitioners insisted that the government had simply misunderstood its records and invoices. *Id.* at 5a. At the close of the government's evidence, petitioners filed a motion for judgment as a matter of law, which the district court denied. *Id.* at 6a. The jury ultimately found in favor of petitioners. *Ibid.*

4. Petitioners filed a motion for attorney's fees under EAJA or, alternatively, for sanctions under Federal Rule of Civil Procedure 37. Pet. App. 6a. The district court denied the motions. *Ibid.* As relevant here, the court concluded that petitioners were not entitled to attorney's fees under EAJA because "the government's action was substantially justified." *Id.* at 33a; see *id.* at 21a-39a. Noting that the government bears the burden of establishing that its position was substantially justified, the district court found that there was "ample confusion about the method MTE was using for billing," and that MTE's confusing practices "rather than any untoward exercise of federal power" had prompted the gov-

ernment's lawsuit. *Id.* at 22a, 26a. Borrowing from the Seventh Circuit's decision in *Conrad* v. *Barnhart*, 434 F.3d 987 (2006), the district court applied a three-part analysis under which the government was required to show "(1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the theory propounded." Pet. App. 22a (quoting *Conrad*, 434 F.3d at 990). The court concluded that the government had satisfied each element, considering "the entire civil action" as a whole. *Id.* at 22a-23a; see *id.* at 23a-33a.

As "an independent reason" to support its conclusion, the district court also stated that "there is a presumption that a government case strong enough to survive both a motion to dismiss and a motion for summary judgment is substantially justified." Pet. App. 33a (quoting *United States* v. *Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378, 382 (7th Cir. 2010)). The court noted that, during the underlying merits case, it had denied petitioners' motion for summary judgment, their motion for a directed verdict, and several motions to dismiss. *Id.* at 35a. The court explained that those rulings reflected its "view at the time that the government had presented enough evidence to allow a jury to rule in its favor," and "strongly suggest[ed] that the government had at least a reasonable basis for bringing and litigating this case." *Ibid.*

5. The court of appeals affirmed. Pet. App. 1a-20a. Recognizing that "[t]he government bears the burden of proving that its position was substantially justified," *id.* at 7a, the court of appeals concluded that the district court had not abused its discretion in declining to award attorney's fees under EAJA because the government's

position was "reasonably based on the law," "reasonably based on the facts," and "properly investigated," *id.* at 8a, 11a, 16a (capitalization omitted).*

First, the court of appeals concluded that the government's position was substantially justified as a legal matter. Pet. App. 8a-11a. The court rejected petitioners' argument that the government had violated internal BIA guidelines requiring consultation with the Tribe before filing suit. *Id.* at 9a-10a. The court also rejected petitioners' contention that the district court had "failed to recognize that the government's suit was more akin to a breach-of-contract action than an FCA action." *Id.* at 10a-11a. The court of appeals noted that "a case involving contract performance does not necessarily foreclose FCA liability." *Id.* at 11a.

Second, the court of appeals found that the government's position was reasonably based on the facts because a "legitimate factual dispute" about petitioners' motives and billing practices "existed throughout the litigation," such that "either party's position could be accepted as true by a reasonable person." Pet. App. 13a, 15a; see *id.* at 11a-16a. While acknowledging that the jury had ultimately believed petitioners' version of events, the court also noted both that "the substantial justification standard does not require the government to have won at trial," and that "the government's position need not even be correct" to be substantially justified. *Id.* at 12a (citing *Pierce* v. *Underwood*, 487 U.S. 552, 566 n.2 (1988)).

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* Petitioners also appealed the district court's denial of sanctions pursuant to Federal Rule of Civil Procedure 37. Pet. App. 6a-7a. The court of appeals affirmed that ruling, *id.* at 18a-19a, and petitioners do not challenge that holding in their petition for a writ of certiorari.

The court of appeals also stated that petitioners had "ignore[d] the objective, although not necessarily conclusive, evidence that the government's complaint survived both a motion to dismiss and a motion for summary judgment." Pet. App. 15a. The court found that such "objective evidence combined with the intensity of the factual disputes between the parties illustrates that the government had a substantial fact-based justification for bringing suit." *Ibid.* The court of appeals rejected petitioners' argument that its earlier decision in *Thouvenot*, 596 F.3d at 382—which applied a rebuttable presumption that "a government case strong enough to survive both a motion to dismiss and a motion for summary judgment is substantially justified"—had improperly shifted the burden of proof from the government. Pet. App. 15a & n.6. The court interpreted *Thouvenot* as merely "construe[ing] a motion to dismiss or summary judgment victory as objective and perhaps compelling evidence of substantial justification." *Id.* at 15a n.6. The court noted that "*Thouvenot* left the door open for an attorney's fees award in those cases where something emerges at trial proving that the government never had a case or in those cases where the district court judge has new evidence to show that she 'erred grievously in refusing to grant the defendant's motion to dismiss or motion for summary judgment.'" *Ibid.* (quoting *Thouvenot*, 596 F.3d at 382). The court of appeals further explained, however, that "even if *Thouvenot* did not exist, the government's position was still substantially justified." *Ibid.*

Finally, the court of appeals rejected petitioners' argument that the government had not adequately investigated the billing dispute because it had relied on what petitioners viewed as "stale" inspection reports by for-

ester Congos. Pet. App. 16a-18a. Petitioners argued that the government should have "give[n] greater deference" to petitioners' expert because his report was completed closer to trial. *Id.* at 17a. The court of appeals disagreed, concluding that a reasonable person could have found Congos's reports to be more reliable because they were prepared closer in time to when the disputed work was purportedly done. *Ibid.* The court found that the battle of experts that ensued at trial "show[ed] that a reasonable person could have been satisfied by either party's theory." *Ibid.*

The court of appeals also noted that petitioners had argued "for the first time" on appeal "that sovereign immunity protects tribal employees such as [petitioners] from FCA suits, and as such, the government's position lacked substantial legal justification." Pet. App. 8a n.4. The court explained that "[a]lthough [petitioners] had made a similar sovereign immunity argument in their merits brief supporting summary judgment, which the district court rejected, [petitioners] did not raise this issue in their post-trial brief for EAJA attorney's fees." *Ibid.* The court concluded on that basis that petitioners had "waived this argument as to EAJA attorney's fees," and the court declined to consider it. *Ibid.*

ARGUMENT

Petitioners argue (Pet. 16-27) that the district court abused its discretion in declining to award attorney's fees pursuant to EAJA. The court of appeals' decision, which affirmed the district court's denial of fees, is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The court of appeals correctly held that the district court had not abused its discretion in declining to

award attorney's fees pursuant to EAJA. The court of appeals' decision reflects a straightforward application of settled legal principles. EAJA authorizes the payment of attorney's fees to certain prevailing parties "other than the United States" unless the position taken by the United States before and during litigation was "substantially justified." 28 U.S.C. 2412(d)(1)(A). In *Pierce* v. *Underwood*, 487 U.S. 552, 565 (1988), this Court held that a legal position is "substantially justified" under EAJA if it has a "reasonable basis both in law and fact." The Court made clear that "a position can be justified even though it is not correct," and it explained that, for purposes of EAJA, a position is "substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct." *Id.* at 566 n.2. Since that time, courts of appeals have uniformly applied the definition of "substantially justified" announced in *Pierce*. See, *e.g.*, *United States* v. *One Parcel of Real Prop.*, 960 F.2d 200, 208 (1st Cir. 1992); *Healey* v. *Leavitt*, 485 F.3d 63, 67 (2d Cir. 2007); *Williams* v. *Astrue*, 600 F.3d 299, 301-302 (3d Cir. 2009); *United States* v. *Cox*, 575 F.3d 352, 355 (4th Cir. 2009); *Davidson* v. *Veneman*, 317 F.3d 503, 506 (5th Cir. 2003); *Howard* v. *Barnhart*, 376 F.3d 551, 553-554 (6th Cir. 2004); *Kholyavskiy* v. *Holder*, 561 F.3d 689, 691 (7th Cir. 2009); *Bale Chevrolet Co.* v. *United States*, 620 F.3d 868, 872 (8th Cir. 2010); *Kenney* v. *United States*, 458 F.3d 1025, 1032 (9th Cir. 2006); *Koch* v. *United States Dep't of the Interior*, 47 F.3d 1015, 1021 (10th Cir.), cert. denied, 516 U.S. 915 (1995); *United States* v. *Douglas*, 55 F.3d 584, 588 (11th Cir. 1995); *Hill* v. *Gould*, 555 F.3d 1003, 1007-1008 (D.C. Cir. 2009); *White* v. *Nicholson*, 412 F.3d 1314, 1316 (Fed. Cir. 2005), cert. denied, 547 U.S. 1018 (2006).

a. Petitioners' primary argument (Pet. 18-24) is that this Court should abandon the "reasonable person" standard discussed in *Pierce* and replace it with a "reasonable lawyer" standard. For at least three reasons, that argument does not warrant this Court's review.

First, petitioners waived the argument by failing to raise it in either the district court or the court of appeals. See *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001) (noting that the Court will not entertain "new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it"). Second, petitioners do not identify any court of appeals decision that has adopted the standard they advocate, and the government is not aware of any such decision. Third, petitioners identify no sound reason to suppose that the courts below would have awarded EAJA fees if they had applied a "reasonable lawyer" standard. Petitioners assert that the courts below "denied [petitioners'] motion for fees despite recognizing that the Government's lawyers acted unreasonably," Pet. 19-20, but they identify no ruling in which either court characterized the government's behavior as "unreasonable." Neither the fact that the district court questioned whether the underlying FCA suit was "a wise use of government resources" (see Pet. 4), nor the court of appeals' statement in passing that the suit "looks like government overreaching" (Pet. App. 2a), suggests that those courts viewed the government's litigation conduct as the work of "unreasonable lawyers." To the contrary, the court of appeals specifically concluded that the government's position was reasonably based on both the law and the facts. See *id.* at 8a-16a.

b. There is also no merit to petitioners' contention (Pet. 24-27) that the court of appeals improperly removed from the government the burden to prove that its position was substantially justified by employing a "rebuttable presumption" that the government's case is substantially justified if it survives a motion to dismiss and a motion for summary judgment.

First, the rebuttable presumption adopted by the Seventh Circuit in *United States* v. *Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378, 382 (2010), does not relieve the government of its burden of establishing that its position was substantially justified. Rather, the Seventh Circuit merely viewed such interlocutory rulings as objective, probative evidence that the government's position was substantially justified even though the government did not ultimately prevail at trial. *Ibid.* The court in *Thouvenot* concluded that, in light of this Court's "insistence in its recent" decisions in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 559-563 (2007), and *Ashcroft* v. *Iqbal*, 556 U.S. 662, 677-683 (2009), "that a case must be dismissed if the complaint does not appear to have a substantial basis, and given that summary judgment resolves cases that though not frivolous would not persuade a reasonable jury, a case that is allowed to go all the way to trial is likely to be a toss-up." 596 F.3d at 382 (internal citations omitted). Under that approach, interlocutory merits rulings favorable to the government do not relieve the government of its burden of proving substantial justification, but simply suggest that this burden is likely to be satisfied.

That approach is eminently sensible. A district court's denial of a defendant's motion for summary judgment reflects the court's conclusion that a reasonable jury, correctly instructed on the applicable law,

could find in the plaintiff's favor. See, *e.g.*, *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (explaining that "summary judgment will not lie * * * if the evidence is such that a reasonable jury could return a verdict for the nonmoving party"). An interlocutory determination to that effect tends to establish substantial justification under EAJA, since a position is "substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct." *Pierce*, 487 U.S. at 566 n.2. In the present case, the court of appeals and the district court both recognized that "[t]he government bears the burden of proving that its position was substantially justified." Pet. App. 7a; *id.* at 22a-23a. And, as the court of appeals noted, "*Thouvenot* left the door open for an attorney's fees award in those cases where something emerges at trial proving that the government never had a case or in those cases where the district court judge has new evidence to show that she 'erred grievously in refusing to grant the defendant's motion to dismiss or motion for summary judgment.'" *Id.* at 15a n.6 (quoting *Thouvenot*, 596 F.3d at 382).

In any event, the court of appeals explained that, "even if *Thouvenot* did not exist, the government's position was still substantially justified." Pet. App. 15a n.6. This case therefore would be an unsuitable vehicle for determining the soundness of the *Thouvenot* presumption.

2. Petitioners also argue (Pet. 16-18) that review by this Court is necessary to resolve a disagreement among the circuits about how to determine when the government's position was substantially justified under EAJA. No such division exists.

a. Petitioners first contend (Pet. 17) that "the circuits have split over what test to apply" to determine

whether the government's position was substantially justified. Petitioners are incorrect. Rather, every court of appeals applies the same test (the test this Court articulated in *Pierce*), inquiring whether the government's position was "justified to a degree that could satisfy a reasonable person." *Pierce*, 487 U.S. at 565; see p. 9, *supra*.

As petitioners note (Pet. 17-18), different courts of appeals have used somewhat different words to describe the reasonableness inquiry. Most (including the court of appeals in this case) have articulated a three-part test that inquires whether the government had a "(1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory it propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced." Pet. App. 7a (quoting *Conrad* v. *Barnhart*, 434 F.3d 987, 990 (7th Cir. 2006)); see, *e.g.*, *Cruz* v. *Commissioner of Soc. Sec.*, 630 F.3d 321, 324-325 (3d Cir. 2010); see also, *e.g.*, *Gatson* v. *Bowen*, 854 F.2d 379, 380 (10th Cir. 1988). Those courts have also explained that the government's position is substantially justified if it has a "reasonable basis in both law and fact." *Cruz*, 630 F.3d at 325; *Conrad*, 434 F.3d at 990; *Gatson*, 854 F.2d at 380. The Fifth Circuit has opted not to describe *Pierce*'s reasonableness inquiry as a "formal three-step system." *Davidson* v. *Veneman*, 317 F.3d 503, 506 n.1 (2003). Like every other circuit, however, it applies *Pierce*, inquiring whether the government's position had a reasonable basis both in law and in fact. *Id.* at 506. The existence of slight differences in different courts' articulations of an established test does not reflect substantive disagreement regarding the appropriate inquiry. Petitioners make no effort to show that the outcome of this case would have been different if the

court of appeals had declined to employ the three-part test.

b. Petitioners also contend that courts of appeals are divided about "what evidentiary standard to apply." Pet. 17. Petitioners assert that, while the First Circuit requires the government to show substantial justification by a preponderance of the evidence, see Pet. 18 (citing *Saysana* v. *Gillen*, 614 F.3d 1, 5 (2010)), the Second Circuit has established a higher bar by requiring the government to make a "strong showing" of substantial justification, see Pet. 17-18 (citing *Healey*, 485 F.3d at 67), and the Seventh Circuit has established a lower bar, requiring the government only to "negate an inference that the government was coming down on its small opponent in a careless and oppressive fashion," Pet. 18 (quoting *Thouvenot*, 596 F.3d at 381-382). Petitioners are mistaken.

This Court in *Pierce* held that, in order to defeat a motion for fees under EAJA, the government must demonstrate that its position was "justified to a degree that could satisfy a reasonable person." 487 U.S. at 565. Neither the decision in *Pierce* nor the statutory text specifies the standard of proof that should apply to the government's showing. This Court has held that, when Congress does not prescribe the appropriate standard of proof for a particular civil proceeding, courts ordinarily should adopt "the preponderance-of-the-evidence standard generally applicable in civil actions." *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 390 (1983).

In keeping with that guidance, courts of appeals have generally applied a preponderance-of-the-evidence standard in evaluating whether the government has demonstrated substantial justification under EAJA. See *Saysana*, 614 F.3d at 5; *Dantran, Inc.* v. *United States*

Dep't of Labor, 246 F.3d 36, 41 (1st Cir. 2001); *United States* v. *Truesdale*, 211 F.3d 898, 908 (5th Cir. 2000). Although many courts of appeals have not explicitly articulated a burden of proof under EAJA, there is no reason to believe, as petitioners contend, that any court of appeals applies a standard other than preponderance of the evidence.

The Second Circuit's statement that the government "must make a strong showing that its action was justified to a degree that could satisfy a reasonable person," *Healey*, 485 F.3d at 67 (internal quotation marks omitted), does not suggest a departure from the usual preponderance-of-the-evidence standard. That statement is more naturally read to refer to EAJA's substantive reasonableness standard rather than to the applicable standard of proof. The Second Circuit has more recently clarified that, "[t]o the extent our recent decision in *Healey v. Leavitt* indicates that the government must make a 'strong showing' to satisfy its burden under [EAJA], * * * we do not understand that case to impose a standard higher than that set forth in *Pierce v. Underwood*." *Ericksson* v. *Commissioner of Soc. Sec.*, 557 F.3d 79, 82 n.1 (2009).

The Seventh Circuit's statement that the government's 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," *Thouvenot*, 596 F.3d at 381-382, is also more naturally understood as describing EAJA's substantive standard rather than the applicable standard of proof. Read in context, that statement simply reflects the Seventh Circuit's understanding that EAJA's substantial-justification standard requires the government to show more than simply that its position was not frivolous. See

id. at 381 ("Between frivolous and meritorious lie cases that are 'justified in substance or in the main.'") (quoting *Pierce*, 487 U.S. at 565). Nor is there any indication that the Seventh Circuit applied a lower evidentiary standard in this case than any other circuit has applied in another EAJA case.

4. Petitioners argued in the court of appeals that the government's position was not substantially justified because petitioners were immune from FCA liability by virtue of their status as employees of the Menominee Tribe. The court below declined to consider that argument because petitioners had not raised it during the fee proceedings in the district court. See Pet. App. 8a n.4. Petitioners argue (Pet. 27-28) that the court of appeals erred in treating their sovereign-immunity argument as waived. Petitioners are mistaken.

In their brief supporting summary judgment on the merits, petitioners argued as a defense to liability that sovereign immunity protects tribal employees from FCA suits. See Pet. App. 8a n.4. The district court rejected the argument, the case proceeded to trial, and the jury ultimately found for petitioners. See *ibid.* In their subsequent motion for attorney's fees under EAJA, petitioners did not argue that their purported immunity was a basis for concluding that the government's position was not substantially justified. See *id.* at 23a-33a. When petitioners raised that argument on appeal from the district court's denial of fees, the court of appeals correctly declined to consider it. *Id.* at 8a n.4 (citing *Fednav Int'l, Ltd.* v. *Continental Ins. Co.*, 624 F.3d 834, 841 (7th Cir. 2010) ("[A] party who fails to adequately present an issue to the district court has waived the issue for purposes of appeal.")).

Petitioners now contend that the court of appeals' refusal to consider this argument "directly contradicts decisions from other circuits and the Seventh Circuit * * * [holding] that a party preserves for appeal any issue it raises [in] a motion for judgment as a matter of law." Pet. 27. Petitioners are incorrect. As the cases on which petitioner relies (*ibid.*) make clear, that rule applies to direct merits appeals. See *Houskins* v. *Sheahan*, 549 F.3d 480, 488-489 (7th Cir. 2008) (raising a legal issue in a motion for summary judgment preserves that issue for court of appeals review on direct appeal); *Wilson* v. *Williams*, 182 F.3d 562, 566 (7th Cir. 1999) (a definitive ruling is sufficient to preserve the litigant's position for direct appeal); *Vencor, Inc.* v. *Standard Life & Accident Ins. Co.*, 317 F.3d 629, 641 n.11 (6th Cir. 2003) (right to appeal a claim has not been waived if it was raised in party's opposition to motion for summary judgment). Thus, if petitioners had lost on the merits at trial and had appealed that loss, they would have been entitled to raise their immunity argument in that appeal.

The appeal that petitioners actually took, however, was not from the district court's judgment on the merits (which was favorable to petitioners), but from the court's subsequent adverse ruling in this collateral fee proceeding. It has long been understood that "a request for attorney's fees * * * raises legal issues collateral to the main cause of action." *White* v. *New Hampshire Dept. of Emp't Sec.*, 455 U.S. 445, 451 (1982). To the extent petitioners' immunity argument may have been relevant to their contention that the government's litigating position was not substantially justified, petitioners were required to assert that argument in the fee proceedings in the district court. See *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 469 (2000) ("It is * * * the

general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts.").

Petitioners' obligation to raise their current argument during the fee proceedings is particularly clear because the immunity issue at the summary judgment stage of the merits case was significantly different from the issue that petitioners seek to raise now. During the merits case, the pertinent question was whether petitioners were *actually* immune from suit under the FCA. Under EAJA, by contrast, the question is whether the government was substantially justified in arguing that petitioners could be held liable. Petitioners did not attempt in the district court, in either the merits case or the later fee proceeding, to show that the government's position on sovereign immunity lacked substantial justification.

By refusing to consider an argument petitioners had waived, the court of appeals did not "put[] the burden on the defendants to disprove a factual and legal basis underlying the Government's case." Pet. 27. Petitioners were not required to disprove anything; they were merely required to raise any relevant arguments at the appropriate time in order to preserve them for appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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