No. 2020-1354

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROBERT L. SMITH,
Claimant-Appellant,

v.

ROBERT L. WILKIE, Secretary of Veterans Affairs,
Respondent-Appellee.

On Appeal from the United States Court of Appeals
for Veterans Claims, No. 17-4391, Judge Amanda L. Meredith

BRIEF OF AMICI CURIAE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, NATIONAL VETERANS LEGAL SERVICES PROGRAM, AND PUBLIC CITIZEN FOUNDATION IN SUPPORT OF APPELLANT AND REVERSAL

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June 5, 2020

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FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Robert L. Smith **v.** Robert Wilkie, Secretary of Veterans Affairs

Case No. 2020-1354

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ■ (amicus) ☐ (name of party)

Judge David L. Bazelon Center for Mental Health Law, National Veterans Legal Services Program, and Public Citizen Foundation

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Judge David L. Bazelon Center for Mental Health Law	Judge David L. Bazelon Center for Mental Health Law	None
National Veterans Legal Services Program	National Veterans Legal Services Program	None
Public Citizen Foundation	Public Citizen Foundation	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

None

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

None

6/5/2020
Date

s/ Allison M. Zieve
Signature of counsel

Please Note: All questions must be answered

Allison M. Zieve
Printed name of counsel

cc: All counsel of record

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INTEREST OF AMICI CURIAE[1]

Amici are three non-profit organizations that support fee shifting to ensure access to justice for their clients and members. Amici engage in appellate litigation that requires counsel to review records developed in lower courts or before administrative agencies, and they rely on fee-shifting statutes to support their efforts to promote enforcement of the law. Amici are concerned that the decision below, if affirmed, would have a negative impact on the clients of public-interest legal organizations that engage in appellate litigation, or challenge agency action or inaction, and that rely on fee-shifting statutes because they do not bill their clients. Amici are well qualified to address the substantial public interest served by fee-shifting statutes and the effect of such statutes on access to justice.

Judge David L. Bazelon Center for Mental Health Law is a national non-profit advocacy organization that provides legal assistance to individuals with mental disabilities. Through litigation, public policy advocacy, education, and training, the Bazelon Center works to advance

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than the amici curiae and their counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

the rights and dignity of individuals with mental disabilities in all aspects of life, including employment, education, health care, housing, voting, and parental and family rights. The Bazelon Center relies on the recovery of attorneys' fees under fee-shifting statutes to fund its work. The Bazelon Center serves as counsel or amici in appellate litigation, in which review of a lower-court or administrative record is required.

The National Veterans Legal Services Program (NVLSP) is an independent, non-profit organization that has worked since 1981 to ensure that the nation's 22 million veterans and active duty personnel receive the government benefits to which they are entitled because of disabilities resulting from their military service to our country. NVLSP provided critical leadership in supporting the Veterans' Judicial Review Act, Pub. L. No. 100–-87, 102 Stat. 4105 (1988), which repealed the statutory bar to federal court review, created the U.S. Court of Appeals for Veterans Claims (CAVC) and bestowed upon it the authority to review final Board of Veterans' Appeals (BVA) decisions denying claims of benefits. NVLSP has directly represented thousands of veterans in individual appeals to CAVC and other federal courts. NVLSP also

publishes the *Veterans Benefits Manual*, an exhaustive guide for advocates who help veterans and their families obtain benefits from the Department of Veterans Affairs.

Public Citizen Foundation is a consumer-advocacy organization that works for the enactment and enforcement of laws protecting consumers, workers, and the general public. Through its Litigation Group, Public Citizen Foundation often serves as counsel in appellate and administrative law litigation, in which review of a lower-court record or administrative record is required. It has also represented plaintiffs and amici in appellate and Supreme Court cases concerning the scope of federal fee-shifting statutes.

INTRODUCTION

After losing some of his claims for veterans' benefits before the BVA, appellant Robert L. Smith retained counsel from the Veterans Legal Advocacy Group to pursue his appeal to the CAVC. To evaluate the bases for Mr. Smith's appeal, his new attorney reviewed the full Record Before the Agency (RBA) and identified seven issues for appeal. He raised all seven before the CAVC and, after prevailing on one, sought an award of attorneys' fees under the Equal Access to Justice Act (EAJA). The fee

application sought no compensation for the time devoted to the unsuccessful claims, but it did seek fees for the 18 hours spent reviewing the RBA. Appellee, the Secretary of Veterans Affairs, conceded that Mr. Smith was entitled to an award of attorneys' fees with respect to the claim on which he prevailed and that "it is sensible for attorneys in all cases to review the entirety of the record." Secretary's Response at 7. Nevertheless, the Secretary argued that because Mr. Smith prevailed on only one of seven claims, the Court should reduce the fees awarded for reviewing the RBA to make them proportionate to Mr. Smith's partial success. The CAVC agreed and awarded fees for only one-third of the time Mr. Smith's counsel spent reviewing the RBA. Order at 4.

As explained in Appellant's Brief, the CAVC erred in reducing the record-review time for partial success because Mr. Smith's appellate counsel would have had to review the entire record even if Mr. Smith had limited his appeal to the successful claim. Although time devoted exclusively to unsuccessful claims should be excluded, *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983), appellant counsel's time reviewing the record is not time spent on unsuccessful claims. Rather, that time is indispensable to prosecution of the appeal regardless of the degree of its

success. *See Chemical Mfrs. Ass'n v. EPA*, 885 F.2d 1276, 1282–83 (5th Cir. 1989) (holding that record-review time should not be discounted for partial success where it was indispensable to prosecution of the successful claims); *Ustrak v. Fairman*, 851 F.2d 983, 988–89 (7th Cir. 1988) (holding that a partially prevailing plaintiff should be compensated for the time that would have been reasonably required even if the case had been confined to the successful claim).

Amici submit this brief to draw the Court's attention to issues that are of particular importance to public-interest organizations that engage in appellate litigation and their clients, and to encourage the Court to reiterate that all hours reasonably spent reviewing the record are presumptively compensable where the party prevails on any claim. To hold otherwise would be contrary to the policies on which fee shifting is based, disadvantage people unable to afford the services of private attorneys, and impede the development of the law.

ARGUMENT

I. Appellate counsel must review the entire record to provide competent representation on appeal.

Review of the record by appellate counsel is necessary to provide competent representation. As the Supreme Court explained in *McCoy v. Court of Appeals of Wisconsin, District 1*, 486 U.S. 429, 438 (1988), "[e]very advocate has essentially the same professional responsibility whether he or she accepted a retainer from a paying client or an appointment from a court." Thus, regardless of whether the appellate lawyer represents a paying client, the lawyer "must master the trial record, thoroughly research the law, and exercise judgment in identifying the arguments that may be advanced on appeal." *Id.* Emphasizing the lawyer's responsibility, the Supreme Court advises arguing counsel: "Know the record, especially the procedural history of the case." Supreme Court of the United States, Guide for Counsel 6 (2019).

Review of the record is an essential step at the outset of an appellate representation. "If an appeal is to be taken, the record must be reviewed for error." D. Franklin Arey, III, *Competent Appellate Advocacy and Continuing Legal Education: Fitting the Means to the End,* 2 J. of

App. Prac. & Proc. 27, 34 (2000). Indeed, not performing "basic appellate functions" such as "securing and reviewing the record in the lower court" amounts to failure to provide effective counsel. Lissa Griffin, *The Right to Effective Assistance of Appellate Counsel*, 97 W.Va. L. Rev. 1, 4 (1994). Thus, "[b]efore filing the [appellate] brief, appellate counsel should ordinarily examine the docket sheet, all transcripts, trial exhibits and record documents, not just those designated by another lawyer or the client." ABA, Standards for Crim. Just. 4-9.3(d) (2015).

A thorough review of the record is particularly important in veterans' benefits cases because most veterans pursue their claims before the BVA either pro se or with the non-lawyer assistance of a veterans' service organization (VSO). *See* Steven Reiss & Matthew Tenner*, Effects of Representation by Attorneys in Cases before VA*, 1 Veterans L.R. 2, 17 (2009); Connie Vogelmann, Admin. Conf. of the United States*, Self-Represented Parties in Administrative Hearings* 30 (Oct. 28, 2016) (stating that more than 75 percent of veterans who appeared before the BVA in 2015 were represented by VSOs or State Service Organizations). As this Court has recognized, although VSOs "provide invaluable assistance to claimants seeking to find their way through the

labyrinthine corridors of the veterans' adjudicatory system, they are not generally trained or licensed in the practice of law." *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009) (citation and internal quotation marks omitted). Therefore, when appellate counsel is retained, a thorough review of the record is critical to avoid waiving potentially meritorious claims.[2]

In short, providing competent appellate representation requires review of the full record. The CAVC's holding that record-review time should be discounted where the plaintiff achieves only partial success runs counter to the Supreme Court's admonition that fee-shifting statutes are intended to provide "reasonable compensation, in light of all the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, *no more and no less*." *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989) (emphasis added). Because review of the record below is a reasonable and necessary condition of a successful appeal, such time

[2] *See also* Fed. Cir. Rule 11 ("If any portion of the record in the trial court is subject to a protective order and a notice of appeal has been filed, each party must promptly review the record to determine whether protected portions need to remain protected on appeal.").

should be fully compensated regardless of whether the appellant succeeds on some or all of the grounds asserted.

II. Discounting record-review time for partial success undermines the policies on which fee shifting is based.

A. Fee shifting is intended to allow litigants to retain competent counsel to vindicate their individual rights.

EAJA and other fee-shifting statutes encourage citizens to vindicate their individual rights. *See* Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 44 La. L. Rev. 217, 222 (1994). Indeed, "[t]he primary purpose of the [EAJA] was and still is to ensure that certain individuals … will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved in securing the vindication of their rights." H.R. Rep. No. 98-992, at 4 (1984); *see* S. Rep. No. 98-586, at 9 (1984) ("The primary concern of Congress in enacting the EAJA was to provide an incentive for parties, aggrieved by unreasonable governmental action, to undertake litigation to vindicate their rights, as well as to deter arbitrary or unjustified agency action."). As President Reagan noted when signing EAJA into law, this "important program" "helps small businesses and

individual citizens fight faulty government actions by paying attorneys' fees in court cases or adversarial agency proceedings where the small business [or] individual citizen has prevailed and where the government action or position in the litigation was not substantially justified." Statement on Signing the Bill Extending the Equal Access to Justice Act, 21 Weekly Comp. Pres. Doc. 32 (Aug. 12, 1985), at 967.

EAJA, like fee-shifting statutes more generally, serves the interests of justice by remedying the market failure that occurs when the costs of contesting unlawful action exceed the amount at stake, leaving the injured citizen with "no realistic choice and no effective remedy." S. Rep. No. 98-586, at 6 (1984). In passing the EAJA, Congress sought to "eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." *Commissioner v. Jean*, 496 U.S. 154, 163 (1990). And in this regard, EAJA is a tremendous success: In fiscal year 2019, fee awards under EAJA helped to fund more than 8,334 claims to remedy violations committed by more than 15 different agencies.[3] *See* Matthew L. Wiener, Admin. Conf. of the United States,

[3] The vast majority of these claims were brought against the Social Security Administration.

Equal Access to Justice Act Awards Report to Congress Fiscal Year 2019 (Mar. 2020).

Fee shifting is particularly important for indigent people and the public-interest legal organizations that serve them. Without the possibility of shifting the cost of legal services from the prevailing party to the defendant, many impecunious clients would be unable to secure legal representation and many nonprofit providers of legal services would struggle to remain viable. Without access to representation, both the quality and quantity of claims on behalf of indigent individuals would likely decrease. *See* Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 Hastings L.J. 197 (1997) (describing the reluctance of attorneys to take cases seeking only injunctive relief and where the clients were not capable of paying a fee in the event statutory fees were unavailable). "It is important to recognize that the fee-shifting provisions indicate not only that Congress wanted aggrieved persons to pursue certain categories of cases, but also that Congress wanted lawyers to represent the plaintiffs in those cases." Kathryn A. Sabbeth, *What's Money Got to Do with It?: Public Interest Lawyering and Profit,* 91 Denv. U.L. Rev. 441, 467 (2014).

The involvement of competent counsel is good for the judicial system, too. A 2016 report by the Administrative Conference of the United States found that "the presence of self-represented parties can cause delay at a systemic level, and self-represented parties may place significantly more demands on court and staff resources when compared to attorneys." Connie Vogelmann, *Self-Represented Parties in Administrative Hearings, supra*, at 5. Moreover, representation makes a meaningful difference in the outcome of these cases: A 2016 review of dozens of empirical studies found that the overwhelming majority showed that representation in governmental and administrative hearings had a positive impact. *See* Emily S. Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 Pepp. L. Rev. 881, 910 (2016).

The CAVC's holding, however, by denying fees for the bulk of the hours spent reviewing the record, denies fees for time reasonably expended to prevail in the case. And by denying fees for time reasonably expended to prevail, the CAVC's holding, if affirmed, would make it more difficult for litigants to retain competent counsel to vindicate their

individual rights. Such a result is directly contrary to the intent of Congress in enacting EAJA.

B. Fee shifting is intended to encourage socially beneficial litigation.

Fee shifting is also intended to encourage citizens to act as private attorneys general to enforce important public policies. "Congress generally authorizes fee shifting where private actions serve to effectuate important public objectives and where private plaintiffs cannot ordinarily be expected to bring actions on their own." Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 L. & Contemp. Probs. 233, 241 (1984). Fee shifting "remove[s] some of the disincentive facing public interest litigants, thus increasing access to the courts for groups who otherwise might be unrepresented or underrepresented." *Id.* Indeed, "[a]ttorney's fees are the fuel that drive the private attorney general engine." Pamela S. Karlan, *Disarming the Private Attorney General*, 1 U. Ill. L. Rev. 183, 205 (2003). As explained in one of the first fee-shifting cases to reach the Supreme Court, "[i]f successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance

the public interest by invoking the injunctive powers of the federal courts." *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 (1968).

"In enacting [fee-shifting statutes], Congress rejected the traditional assumption that private choices whether to litigate, compromise, or forgo a potential claim will yield a socially desirable level of enforcement." *Hensley*, 461 U.S. at 444 (Brennan, J., concurring). Congress instead recognized the "public good problem that arises when no one individual has sufficient incentive to enforce rights that nevertheless would significantly benefit society as a whole" if enforced. Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. Rev. 1087, 1095 (2007). "By overcoming these structural challenges, fee-shifting provisions help preserve a decentralized enforcement scheme without undermining incentives to enforce statutes that benefit the public interest." *Id.* at 1095–96.

In passing EAJA and other fee-shifting statutes, Congress recognized that "unprofitable cases" are where the government's interest in incentivizing litigation is at its highest and market incentives at their lowest. *See* Robert V. Percival, *The Role of Attorney Fee Shifting in Public*

Interest Litigation, *supra*, at 241. Congress's decision to fund successful litigation in such cases reflects its recognition that, "[w]here parties are serving a public purpose, it is unfair to ask them to finance, through their tax dollars, unreasonable government action and also bear the costs of vindicating their rights." S. Rep. 98-586, at 6 (1984). Fee shifting "rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy. An adjudication or civil action provides a concrete, adversarial test of Government regulation and thereby ensures the legitimacy and fairness of the law." *Id*. In this way, fee shifting is not only an essential tool to ensure access to counsel and the courts, without which many statutory and constitutional rights would become mere hollow pronouncements, but also a tool to improve our overall quality of governance.

Public-interest lawyers in particular "provide the specialization, freedom from conflicts with private clients, readiness to take on unpopular cases, and willingness to carry the cost of protracted cases that is indispensable" to fulfilling this purpose. *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1521 (D.C. Cir. 1988) (en banc)

(citation omitted)). Fee awards enable public-interest organizations to pursue important public policies through private enforcement. *See also* Catherine R. Albiston & Laura Beth Nielsen, *Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change*, 39 Law & Soc. Inquiry 62, 76, 83, 91 (2014). For many public-interest organizations, attorneys' fees are the only opportunity for compensation and represent a significant source of funding. *See id*. at 76, 81 (explaining survey data suggesting that many public interest groups rely on fee shifting for significant portions of their annual budgets).

Fee shifting is an important mechanism for providing necessary and valuable services that might otherwise be unavailable. This system, however, is undermined if attorneys are unable to recoup the full cost of time necessarily spent on successful claims, such as the time competent counsel must spend reviewing the RBA. Such a result is at odds with fee shifting's purpose of incentivizing socially beneficial litigation.

III. Discounting record-review time for partial success operates to the disadvantage of those challenging the government and impedes development of the law.

In addition to undermining the purposes of fee-shifting statutes, the decision of the CAVC denying full compensation for appellate counsel's review of the record encourages appellate counsel to skimp on this essential task. Without a complete review, however, potential claims will likely be missed, and the briefing of claims that are brought may fail to identify all the relevant material facts and arguments. Government attorneys, meanwhile, being unaffected by the limitation on recovery of attorneys' fees, will not be similarly limited and surely, as competent appellate lawyers, will take the time to review the complete record of the proceedings below. The result will advantage one side of the case over the other and skew the briefing before the courts.

In addition, the CAVC's decision threatens to impede the development of the law by discouraging counsel from pursuing potentially precedent-setting legal theories, lest otherwise compensable record-review time be discounted if an appellant pursues an unsuccessful claim. *Cf. Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (describing the "constitutional stagnation" that occurs if courts avoid reaching issues

that would have established meaningful precedent). The CAVC's approach incentivizes counsel to bring only the most clearly established claims. This outcome will undermine the administrative process by failing to alert agencies to novel or underexplored problems that might have come to light in more thorough litigation. Furthermore, government officials will be denied the benefit of court decisions that would have clarified the scope of permissible practices.

In short, competent counsel is not only essential for a litigant pursuing justice, but also invaluable to courts and the development of the law. The CAVC's approach to fee shifting under EAJA, however, denies appellate counsel fees for time spent on a task that competent counsel would and should perform. This Court should reject that approach.

CONCLUSION

For the foregoing reasons and those set forth in Appellants' Brief, this Court should vacate the order of the CAVC and hold that all hours reasonably spent reviewing a record are presumptively compensable where the party prevails on any claim.

Respectfully submitted,

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June 5, 2020

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Circuit Rule 32(a). The brief contains 3,449 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

/s/ Allison M. Zieve
Allison M. Zieve

CERTIFICATE OF SERVICE

I certify that on June 5, 2020, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in the case.

/s/ Allison M. Zieve
Allison M. Zieve