NO. 06-1717

IN THE
Supreme Court of the United States

RICHLIN SECURITY SERVICE COMPANY,
Petitioner,

v.

MICHAEL CHERTOFF,
SECRETARY OF HOMELAND SECURITY,
Respondent.

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

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PETITIONER'S BRIEF

BRIAN WOLFMAN
(*Counsel of Record*)
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, D.C. 20009
(202) 588-1000

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QUESTION PRESENTED

Under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A), may a prevailing party be awarded attorney fees for paralegal services at the market rate for such services, or does EAJA limit reimbursement for paralegal services to cost only?

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The opinion of the United States Court of Appeals for the Federal Circuit is reported at 472 F.3d 1370 (2006), and is reproduced in the appendix to the petition for a writ of certiorari at 1a. The opinion of the Department of Transportation Board of Contract Appeals is reported at 2005 WL 1635099 (2005), and is reproduced at Pet. App. 25a. The Federal Circuit's supplemental opinion issued in response to petitioner's petition for rehearing is reported at 482 F.3d 1358 (2007), and is reproduced at Pet. App. 54a. The Federal Circuit's unreported order denying rehearing and rehearing en banc is reproduced at Pet. App. 57a.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on December 26, 2006. Pet. App. 1a. Petitioner filed a timely petition for rehearing en banc on January 8, 2007, which the Federal Circuit treated as a petition for panel rehearing and rehearing en banc and denied on April 3, 2007. Pet. App. 57a. The petition for a writ of certiorari was filed on June 25, 2007, and was granted on November 13, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Equal Access to Justice Act (EAJA) authorizes an award of fees and other expenses to certain parties who prevail against the United States in court or in adversary administrative proceedings.

5 U.S.C. § 504, the portion of EAJA that applies to adversary administrative proceedings, provides in relevant part:

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

* * *

(b)(1) For the purposes of this section –

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees. (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an

increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.)[1]

STATEMENT OF THE CASE

The Equal Access to Justice Act provides that certain parties that prevail against the federal government in court and adversary administrative proceedings are entitled to an award of fees and other expenses. Petitioner Richlin Security Service Company, a sole proprietorship, prevailed in administrative and judicial proceedings against the federal government and was awarded attorney fees and other expenses under EAJA by the Department of Transportation Board of Contract Appeals (the Board). The question presented is whether such an award may include compensation for paralegal services at rates that clients generally pay for paralegal services in the relevant legal market, as this Court held was appropriate under 42 U.S.C. § 1988 in *Missouri v. Jenkins*, 491 U.S. 274, 284-89 (1989), or whether, as the Federal Circuit held, those services may only be

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[1]The nearly identical portions of EAJA applicable to recovery of fees and other expenses incurred in court proceedings are codified at 28 U.S.C. §§ 2412(d)(1)(A), (d)(2)(A). Petitioner's fee application at issue here sought recovery for fees incurred in adversary proceedings before the Department of Transportation's Board of Contract Appeals and, thus, was filed under 5 U.S.C. § 504. In general, citations in this brief to provisions of section 504 are accompanied by citations to the corresponding provisions of section 2412(d). The relevant portions of section 2412(d) are contained in an addendum to this brief.

compensated at the cost to the attorney, regardless of how the marketplace values them.

A. The Equal Access To Justice Act

EAJA was first enacted in 1980 for a three-year period beginning on October 1, 1981 based on Congress's express finding that individuals, small businesses, and non-profit organizations "may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings." Pub. L. No. 96-481, § 202(a), 94 Stat. 2321, 2325 (1980); *see also id.* at §§ 202(b), (c)(1), 94 Stat. at 2325 (noting government's "greater resources" and that EAJA's purpose was "to diminish the deterrent effect of seeking review of, or defending against, governmental action."); *Comm'r, INS v. Jean*, 496 U.S. 154, 163 (1990) ("The specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions."). In addition, Congress wanted to "encourag[e] private parties to vindicate their rights and [thereby to] 'curb[] excessive regulation and the unreasonable exercise of Government authority.'" *Id.* at 164-65 (quoting H.R. Rep. No. 96-1418, at 12 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4991). In 1985, Congress reenacted EAJA and made it permanent. Pub. L. No. 99-80, 99 Stat. 183 (1985).

EAJA provides that "fees and other expenses" shall be awarded to eligible parties who have prevailed in adversary administrative proceedings or in court against the federal government, unless the agency adjudicator or court finds that the position of the

United States "was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(d)(1)(A). An individual is eligible for fees if his or her net worth does not exceed $2 million, while a business is eligible if its net worth does not exceed $7 million and it had 500 or fewer employees when the action was commenced. 5 U.S.C. § 504(b)(1)(B); 28 U.S.C. § 2412(d)(2)(B). Certain charitable organizations and cooperatives are eligible regardless of size or net worth. *Id.*; 5 U.S.C. § 504(b)(1)(B).[2]

"Fees and other expenses" are defined to include "reasonable attorney or agent fees." 28 U.S.C. § 504(b)(1)(A); *see also* 28 U.S.C. § 2412(d)(2)(A) (defining "fees and other expenses" to include "reasonable attorney fees"). EAJA does not leave the amount of fees to the broad discretion of the court or agency adjudicator, but states that the amount of fees "shall be based upon prevailing market rates," subject to a dollar-per-hour cap on attorney fees that may be adjusted in certain circumstances. 5 U.S.C. § 504(b)(1)(A)(ii); 28 U.S.C. § 2412(d)(2)(A). At the time of EAJA's enactment, the adjustable cap was $75 per hour.[3]

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[2]Originally, the net-worth limits for individuals and businesses were $1 million and $5 million, respectively. *See* Pub. L. No. 96-481, §§ 203(a)(1), 204(a), 94 Stat. at 2326, 2328. The current limits were set in 1985. Pub. L. No. 99-80, §§ 1, 2, 99 Stat. at 185.

[3]In 1996, Congress raised the cap to $125 per hour, effective March 29, 1996. Pub. L. No. 104-121, §§ 231-233, 110 Stat. 847, 862-64 (1996). The 1996 hike from $75 per hour to $125 per hour

(continued...)

As noted above, the cap is not absolute, but may be adjusted upward on two bases. First, any court, or an administrative tribunal authorized by regulation to do so, may award fees above the statutory cap if "an increase in the cost of living … justifies a higher fee." 5 U.S.C. § 504(b)(1)(A); 28 U.S.C. § 2412(d)(2)(A). Courts and authorized administrative tribunals generally award cost-of-living adjustments as a matter or course when market rates exceed the unadjusted statutory cap. *See, e.g., Meyer v. Sullivan*, 958 F.2d 1029, 1033-35 (11th Cir. 1992); *Johnson v. Sullivan*, 919 F.2d 503, 504-05 (8th Cir. 1990) (citing cases); *see also Pierce v. Underwood*, 487 U.S. 552, 571-72 (1988) (suggesting that cost-of-living increases are automatic by referring repeatedly to fee cap as "$75 per hour (adjusted for inflation)"). The cap is adjusted upward by measuring the increase in the cost of living between the date of enactment of the statutory cap and the date the relevant legal services were rendered, typically by using the Bureau of Labor Statistics "all-items" index, a general measure of inflation. *See, e.g., Dewalt v. Sullivan*, 963 F.2d 27, 29-30 (3d Cir. 1992); *Johnson*, 919 F.2d at 504. Courts have held that the fee cap may not be adjusted based on inflation in the cost of legal services, *see, e.g.*, *Harris v. Sullivan*, 968 F.2d 263 (2d

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[3](...continued)
reflected the increase in the cost of living between EAJA's original October 1, 1981, effective date and the hike's March 1996 effective date. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, Consumer Price Index, All Urban Consumers, available at ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt (showing 66.7% cost-of-living increase from October 1981 through March 1996).

Cir. 1992); *Dewalt*, 963 F.2d at 29-30, and, thus, the fee cap, even when adjusted for inflation, has failed to keep up in recent years with the hyper-inflation in the legal services market. The current inflation-adjusted cap is approximately $168 per hour.

Second, courts and authorized administrative tribunals may award fees above the cap — whether inflation-adjusted or not — based on the presence of any "special factor," one of which is mentioned in the statute: "the limited availability of qualified attorneys for the proceedings involved." 5 U.S.C. 504(b)(1)(A); 28 U.S.C. § 2412(d)(2)(A). This Court has held that this statutory formulation refers to "attorneys having some distinctive knowledge or specialized skill needful for the litigation in question — as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation." *Pierce*, 487 U.S. at 572. The Court cited patent law and foreign law as examples of distinctive knowledge that would justify an award above the cap, *id.*, and, although this basis for enhancement has been allowed only rarely post-*Pierce*, the lower courts have identified other examples. *See, e.g., David v. Sullivan*, 777 F. Supp. 212, 219-21 (E.D.N.Y. 1991) (Medicare law).[4]

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[4]As noted, administrative tribunals must be authorized by regulation to adjust the cap. Some tribunals have been authorized to exceed the cap, *see, e.g.,* 5 C.F.R. §§ 2430.4, .5 (Federal Labor Relations Authority); 29 C.F.R. §§ 2704.107, .201(b) (Federal Mine Safety and Health Review Commission); some, including the tribunal below, have not. *See* Pet. App. 38a.

B. Proceedings On The Merits

The merits of this litigation can be summarized briefly. Mistakes in contracts between petitioner Richlin Security Service Company and what was then the Immigration and Naturalization Service (and is now part of the Department of Homeland Security) resulted in the substantial underpayment of Richlin's employees. *See Richlin Sec. Serv. Co. v. Chertoff*, 437 F.3d 1296, 1297 (Fed. Cir. 2006). The underpayments were of such magnitude to a small business like Richlin that, before it won this litigation, Richlin had been unable to pay its employees what it owed them. *Id.* at 1298 (citing *Richlin Sec. Serv. Co. v. Rooney*, 18 F. App'x 843, 844-45 (Fed. Cir. 2001)). In lengthy proceedings before both the Board and the Court of Appeals for the Federal Circuit, the government contended that Richlin was required by law to suffer the consequences of the contractual mistakes. The Federal Circuit rejected that position as inconsistent with the terms of the contract and controlling case law, *see Meissner v. Richlin Sec. Serv. Co.*, 1998 WL 228175, *4 (Fed. Cir. 1998), and, on remand from a later appeal, the Board eventually awarded Richlin the amount of the additional wages, payroll taxes, and workers' compensation premiums that Richlin was required to pay as a result of the mistakes. Pet. App. 3a.

C. Fee Proceedings

After prevailing on the merits, Richlin sought an award of fees and other expenses under EAJA for the time spent over nearly nine years by its lawyers and paralegals before the Board. The Board found that Richlin met EAJA's size and net-worth limitations, 5

U.S.C. § 504(b)(1)(B), that it was a prevailing party, *see id.* § 504(a)(1), and that the government's position on the merits was not "substantially justified." *See id.* The Board awarded Richlin approximately $50,000 for work done by the company's lawyers. *See* Pet. App. 5a.

The Board did not, however, award Richlin fees at the $50 to $95 per hour market rates for paralegal services charged to Richlin over the course of the proceedings. It noted that EAJA does not "expressly provide for the reimbursement of paralegal services at the market rate," *id.* at 6a, and thus held that paralegal services are reimbursable only at *the attorney's* cost, even where, as is the case here, paralegal time is billed to *the client* at hourly market rates in the relevant legal market and not at the attorney's cost as an out-of-pocket expense. The Board took judicial notice of paralegal salaries in the Washington, D.C. area "as reflected on the internet" and awarded Richlin $35 per hour as the "reasonable cost to the [law] firm." *Id.* (quoting Board decision). The Board awarded approximately $10,600, representing roughly 300 hours of compensable paralegal time. *See id.*

A divided panel of the Federal Circuit affirmed. The panel majority acknowledged this Court's ruling in *Missouri v. Jenkins*, 491 U.S. 274, 284-89 (1989), that, under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, paralegal services are a component of "attorney's fees" compensable at market rates, as long as those services are separately billed in the relevant market. The majority further acknowledged the Court's repeated admonition that "fee-shifting statutes' similar language is a 'strong

indication' that they are to be interpreted alike." Pet. App. 13a (quoting *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989)). The majority nevertheless distinguished EAJA from section 1988, largely on the ground that the former contemplates an award of "expenses," which purportedly includes the cost to law firms of paralegals, while the latter does not. Pet. App. 15a, 19a. The court of appeals also relied on EAJA's per-hour rate cap for attorney fees as justification for limiting recovery for paralegal services, noting that "it seem[ed] unlikely" that Congress would have capped paralegal and attorney services at the same level. Pet. App. 16a. In so holding, the court of appeals acknowledged that its ruling was at odds with an Eleventh Circuit decision, *Jean v. Nelson*, 863 F.2d 759, 778 (1988), *aff'd on other issue, Comm'r, INS v. Jean*, 496 U.S. 154 (1990), which held that fees for paralegal services are compensable at market rates under EAJA.

Senior Circuit Judge Plager dissented on the ground that "the panel's position is at variance with established Supreme Court law," Pet. App. 20a-21a, relying on this Court's statement in *Jenkins* that a "'reasonable attorney's fee' cannot have been meant to compensate only work performed personally by members of the bar," but was also intended to compensate the work of "others whose labor contributes to the work product for which an attorney bills her client." *Id.* at 21a (quoting *Jenkins*, 491 U.S. at 285).

Richlin petitioned for rehearing en banc, explaining that, in addition to the acknowledged conflict with the

Eleventh Circuit, the Federal Circuit's ruling had opened a conflict with decisions of three other circuits. The petition also noted that a Senate committee report that the panel majority had relied on did not, in fact, support its ruling, and that, in any event, the report was not genuine legislative history because it had accompanied a 1984 version of EAJA that was vetoed by President Reagan, not the 1985 version that was actually enacted.

The panel responded to the rehearing petition in a supplemental opinion. *See* Pet. App. 54a. With respect to the purported legislative history, the court of appeals acknowledged its earlier reliance on a committee report that accompanied vetoed legislation, but held that because the President's veto related to issues other than the compensability of paralegal services, the "earlier legislative history" drafted by a different Congress in 1984 was "pertinent to the 1985 enactment on the issue presented here." *Id.* at 56a n.2. Senior Judge Plager dissented again "on the basis of his dissent from the original panel opinion." *Id.* In an order accompanying its supplemental opinion, the Federal Circuit denied rehearing and rehearing en banc. Pet. App. 57a.

SUMMARY OF ARGUMENT

A. Fees incurred for paralegal services are compensable at market rates under EAJA. In *Missouri v. Jenkins*, 491 U.S. at 285, the Court held, first, that paralegal services are "attorney's fees" under 42 U.S.C. § 1988 because that term logically includes charges not only for the work of members of the bar, but also for other law firm personnel whose services contribute to the lawyer's work product. *Jenkins* also held that

paralegal services are compensable at market rates under section 1988 if they are billed separately on that basis in the relevant legal community, and that separate paralegal billing encourages efficient delivery of legal services. On the second question addressed in *Jenkins* — how to value paralegal services if they are statutory attorney fees — EAJA provides its own answer because all compensable fees, including attorney fees, must be awarded at "prevailing market rates." 5 U.S.C. § 504(b)(1); 28 U.S.C. § 2412(d)(1)(A). Thus, under EAJA, if paralegal services are "attorney fees," as they were held to be in *Jenkins*, they are indisputably compensable at market rates.

Jenkins's determination that section 1988 fees include paralegal services applies to EAJA. "Attorney's fees" under section 1988 and "attorney fees" under EAJA are nearly identical terms, and, ordinarily, Congress's use of the same or similar terms should be accorded the same meaning statute to statute. The Court has applied that principle of statutory construction with special force to federal fee-shifting statutes in light of their generally similar purposes, and it should be applied here. At the time of EAJA's enactment, courts already had interpreted section 1988 and other fee-shifting statutes to require that fees, *including fees incurred for paralegal services*, be awarded at market rates. If anything, the Congress that enacted EAJA, and expressly required that fees be awarded at "prevailing market rates," would have been more likely than the Congress that enacted section 1988, and required only that fees be "reasonable," to have provided compensation for paralegal services in a manner that mimics the market.

B. The Federal Circuit erred in maintaining that *Jenkins* is inapplicable here in light of EAJA's adjustable dollar-per-hour cap on attorney rates. The Federal Circuit stated that if fees for paralegal services were "attorney fees," in light of the cap, law firm charges for paralegal services would be fully recoverable while charges for attorney services would not, leading to the supposed overuse of paralegals and undermining *Jenkins*'s efficiency rationale. The Federal Circuit's view is misguided for a host of reasons, not least of which is that it conflicts with reality. When EAJA was enacted and reenacted in 1980 and 1985, respectively — the relevant vantage points from which to assess Congress's intent and, thus, the Federal Circuit's "overuse" argument — market rates for most or all lawyers practicing in most locations were at or below the EAJA cap. Therefore, Congress would not have expected market-rate recovery for paralegal services to result in "overuse" of paralegals in comparison to the higher-priced lawyers for whom they work. In any event, limiting reimbursement for paralegal services to the law firm's cost, as the Federal Circuit held EAJA requires, would improperly drive up the cost of litigation for clients — the people that EAJA was intended to benefit.

C. The Federal Circuit's holding that paralegal services are compensable at the *cost* of those services to the *lawyer* is doubly wrong. Treating paralegal services as an item awardable at cost is at odds with the judicial understanding of EAJA, under which cost-based awards generally are for out-of-pocket expenses charged by third-party vendors. These expenses include items such as travel costs and long-distance

phone calls, not the work of in-firm personnel (which is billed separately by the firm at market rates or recovered as overhead through the attorneys' rates).

Even if it were appropriate under EAJA to reimburse paralegal expenses at "cost," reimbursement should be based on the cost incurred by the *client*, not the *lawyer*. It is clients (not lawyers) whose interests EAJA seeks to protect, and basing the client's reimbursement for paralegal services on what it costs the lawyer to employ the paralegal leaves the client with a loss that bears no rational relationship to the costs faced by the client or EAJA's purposes. After all, EAJA provides an award of fees and other expenses to the "prevailing *party*," 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(d)(1)(A), not that party's lawyer. Awarding paralegal expenses based on the cost incurred by the *client* would avoid that irrationality; and because doing so reflects market reality, it also underscores why paralegal services are "attorney fees" under EAJA that should be awarded at "prevailing market rates."

ARGUMENT

A. Paralegal Services Are Compensable At Market Rates Under This Court's Decision In *Missouri v. Jenkins* And The Text And Structure Of EAJA.

The reasoning of this Court's decisions, together with the statutory text, demonstrate that "attorney fees" under EAJA includes paralegal services. Accordingly, the Federal Circuit's decision must be reversed because the "amount of fees awarded under" EAJA "shall be based upon prevailing market rates for the kind and quality of the services furnished." 5 U.S.C. § 504(b)(1)(A)(ii); 28 U.S.C. § 2412(d)(2)(A).

1. In *Missouri v. Jenkins*, 491 U.S. 274, the Court considered whether and on what basis fees incurred for paralegal services are awardable as "attorney's fees" under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. The Court first held that, in using the term "attorney's fee," Congress must have meant to compensate not only the work of members of the bar, but the work of others, including paralegals, whose services contribute to the lawyer's work product. *Jenkins*, 491 U.S. at 285. As the Court put it:

> Clearly, a "reasonable attorney's fee" cannot have been meant to compensate only work performed personally by members of the bar. Rather, the term must refer to a reasonable fee for the work product of an attorney. Thus, the fee must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit. The parties have suggested no reason why the work of paralegals should not be similarly compensated, nor can we think of any. We thus take as our starting point the self-evident proposition that the "reasonable attorney's fee" provided for by statute should compensate the work of paralegals, as well as that of attorneys.

Id.

The Court then turned to what it termed the "more difficult" question of how paralegal services should be "valuated." *Id.* Relying on its prior fee-shifting precedents holding that attorney fees are to be

compensated at "market rate," *see id.* at 285-86 (citing, *e.g.*, *Blum v. Stenson*, 465 U.S. 886, 895 & n.11 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 447 (1983)), the Court explained that

> the prevailing 'market rate' for attorney time is not independent of the manner in which paralegal time is accounted for. Thus, if the prevailing practice in a given community were to bill paralegal time separately at market rates, fees awarded the attorney at market rates for attorney time would not be fully compensatory if the court refused to compensate hours billed by paralegals or did so only at "cost."

Id. at 286-87 (footnote omitted). Moreover, the Court explained, "encouraging the use of lower cost paralegals rather than attorneys wherever possible, … 'encourages cost-effective delivery of legal services.'" *Id.* at 288 (quoting *Cameo Convalescent Ctr., Inc. v. Senn*, 738 F.2d 836, 846 (7th Cir. 1984)).

2. Under EAJA, we are not faced with what *Jenkins* called the "more difficult" question; if paralegal services are "attorney fees" under EAJA, they are necessarily compensable at "prevailing market rates." *See* 5 U.S.C. § 504(b)(1)(A); *accord* 28 U.S.C. § 2412(d)(2)(A). In other words, if *Jenkins*'s holding that "attorney's fees" under 42 U.S.C. § 1988 includes paralegal services — what *Jenkins* called a "self-evident proposition," 491 U.S. at 285 — applies to EAJA, the decision below must be reversed.

Jenkins applies with full force to EAJA. To begin with, the statutory term "attorney fees" used in EAJA is nearly identical to the term "attorney's fee"

construed in *Jenkins*. And, under ordinary principles of statutory construction, the Court generally accords the same meaning it has given Congress's use of a term in one statute to Congress's use of the same or a similar term in another statute. *See, e.g., Trans World Airlines, Inc. v. Morales*, 504 U.S. 374, 383-84 (1992).

That principle of construction applies with special potency to federal fee-shifting statutes, such as section 1988 and EAJA, for two reasons. First, "there are over 100 separate [federal] statutes providing for the award of attorney's fees." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 562 (1986); *see also Marek v. Chesny*, 473 U.S. 1, 43 (1985) (Brennan, J., dissenting) ("Congress has enacted well over 100 fee-shifting statutes."). It makes no sense, absent compelling circumstances to the contrary, to ascribe to Congress an unexpressed intent to define the same or similar terms differently. Rational legislators would not create disparate definitions for dozens of the same or similar statutory terms in dozens of statutes because doing so would cause chaos for litigants, lawyers, and courts trying to discern their meaning. Thus, in the case of federal fee-shifting statutes, according the same meaning to the same or similar statutory texts marries fidelity to congressional intent with the practical needs of the bar, the judiciary, and the members of the public that fee-shifting statutes are intended to benefit. For that reason, whether the issue is the parameters of a "reasonable" fee, *see City of Burlington v. Dague*, 505 U.S. 557, 562 (1992), who is a "prevailing party," *see Hensley*, 461 U.S. at 433 & n.7, or, as here, what is encompassed by the term "attorney fees," courts generally should resolve the

issue consistently across the range of federal fee-shifting statutes.

Second, this principle of statutory construction is especially applicable in the fee-shifting context in light of the common purposes of most, if not all, federal fee-shifting provisions, including section 1988 and EAJA. Those provisions are intended to encourage vindication of federal rights by reducing the cost of challenging unlawful conduct and, in turn, inducing future compliance with federal law. *See supra* at 4 (discussing these dual purposes of EAJA); *Delaware Valley Citizens' Council*, 478 U.S. at 559-60 (same with respect to section 1988); *Hensley*, 461 U.S. at 429 (same); *see also, e.g., New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980) (same purposes of fee-shifting provision of Title VII of the Civil Rights Act of 1964).

The Court made this point in *Northcross v. Board of Education*, 412 U.S. 427 (1973) (per curiam), where it gave the fee-shifting provision of one civil rights statute the same meaning it had earlier given to the fee-shifting provision of another civil rights statute. The Court noted that the "similarity of language" in the two provisions "is, of course, a strong indication that the two statutes should be interpreted *pari passu*." *Id.* at 428. It then went on to explain that "'the two provisions share the same *raison d'être*'" — to vindicate federal rights and to encourage individuals to seek judicial relief." *Id.* (quoting *Johnson v. Combs*, 471 F. 2d 84, 86 (5th Cir. 1972), relying on *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)); *see also Delaware County Citizens' Council*, 478 U.S. at 560 ("Given the common purpose of §

304(d) [of the Clean Air Act] and § 1988 to promote citizen enforcement of important federal policies, we find no reason not to interpret both provisions governing attorney's fees in the same manner.").

For the foregoing reasons, the Court has accorded uniform application to the same or similar terms in fee-shifting statutes more frequently, more consistently, and more forcefully than in any other context of which we are aware. In light of the "similar" language of "many … federal fee-shifting statutes," the Court has noted that "our case law construing what is a 'reasonable' fee applies uniformly to all of them." *Dague*, 505 U.S. at 562; *see also, e.g., Zipes*, 491 U.S. at 754 n.2 ("We have stated in the past that fee-shifting statutes' similar language is a 'strong indication' that they are to be interpreted alike.") (quoting *Northcross*, 412 U.S. at 428); Pet. App. 13a n.7 ("The Supreme Court has repeatedly made clear that the various federal attorney's fees statutes should be construed to reach a uniform result.") (quoting *Sacco v. United States*, 452 F.3d 1305, 1310 (Fed. Cir. 2006)). And, in an EAJA case, *Sullivan v. Hudson*, 490 U.S. 877, 888-90 (1989), the Court interpreted the term "civil action" under 28 U.S.C. § 2412(d)(1)(A) to include fees incurred in certain administrative proceedings, in significant part because of this Court's construction of similar terms in *Delaware Valley Citizens' Council*, 478 U.S. at 558, and *New York Gas Light*, 447 U.S. at 60. Indeed, this principle of statutory construction is so powerful with respect to fee-shifting statutes that, in *Hensley*, the Court applied it *prospectively*, holding, in a section 1988 case, that "[t]he standards set forth in this opinion are generally applicable in all cases in

which Congress has authorized an award of fees to a 'prevailing party.'" 461 U.S. at 433 n.7.

3. EAJA's textual demand for market-based fees, which makes explicit a policy that is only implicit in section 1988, provides strong confirmation that the two statutes should be treated similarly with regard to the compensability of paralegal services. In 1976, Congress enacted 42 U.S.C. § 1988 to overrule *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which held that courts in civil rights cases generally did not have the power to award fees to the prevailing party absent statutory authorization. Thereafter, in a series of decisions, the Court made clear that a "reasonable attorney's fee" under section 1988 was one based on how the private market valued legal services, and the standard for the award of attorney fees became one of commercial reasonableness. Thus, in *Hensley*, 461 U.S. at 433, the Court, adopting the primary billing method in commercial law firms, held that the starting point for fee calculation is the product of a reasonable number of hours spent on the litigation and the lawyer's reasonable hourly rate. Similarly, *Blum v. Stenson*, 465 U.S. at 895, held that the "reasonable hourly rate" is to be calculated based on "prevailing market rates in the relevant community." And *Jenkins*, 491 U.S. at 285-87, as discussed above, held that paralegal services, like services performed by lawyers themselves, are compensable on the same basis on which they are charged to paying clients in the relevant legal community.

Under EAJA, however, the courts were not required to construe a general concept such as reasonableness in determining how fees should be calculated. EAJA is

specific on this point, providing that "[t]he amount of fees awarded" "shall be based upon *prevailing market rates* for the kind and quality of the services furnished." 5 U.S.C. § 504(b)(1)(A) (emphasis added); 28 U.S.C. § 2412(d)(2)(A) (same). To be sure, the statutory provisions requiring a market-rate award do not by themselves specify what *types* of services are included in the term "attorney fees," and, thus, do not on their own definitively resolve the question presented here. But they go a long way in that direction. The statutory command that fees be awarded based on "prevailing market rates" is strong evidence of Congress's intent that courts and administrative agencies use a market-based approach when awarding compensation under EAJA. And a market-based approach should, as *Jenkins* explained, provide compensation for paralegal services in the manner dictated by the market. Put another way, if there is any distinction to be drawn between EAJA and section 1988, the Congress that enacted EAJA, and explicitly required use of "prevailing market rates," would have been more, not less, likely to have intended that compensation for paralegal services track the market than the Congress that enacted section 1988 and required only that a fee be "reasonable."

Moreover, in enacting EAJA and its requirement that fees be based on "prevailing market rates," Congress was aware of existing fee-shifting legislation, including section 1988 and fee-shifting provisions of other federal civil rights laws. *See* H.R. Rep. No. 96-1418, at 8 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4987; S. Rep. No. 96-253, 96th, Cong., 1st Sess. 4 (1979). Under those statutes, courts generally awarded fees at

market rates. *See generally Blum*, 465 U.S. at 893-96 (discussing practice under statutes on which section 1988 was patterned). Indeed, under section 1988, in the years leading up to EAJA's enactment, courts that considered whether and on what basis to award fees for paralegal services generally awarded them on a market-rate basis. *See, e.g., Northcross v. Bd. of Educ.*, 611 F.2d 624, 638 (6th Cir. 1979); *Francia v. White*, 594 F.2d 778, 781 (10th Cir. 1979); *Skehan v. Bd. of Trs.*, 501 F. Supp. 1360, 1370, 1374 (M.D. Pa. 1980); *Selzer v. Berkowitz*, 477 F. Supp. 686, 690 & n.3 (E.D.N.Y. 1979).[5] Thus, the legal background against which Congress enacted EAJA in 1980 was one in which the market dictated compensability of attorney fees, *including paralegal services*.

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[5] *Accord, e.g., Keith v. Volpe*, 501 F. Supp. 403, 413-14 (C.D. Cal. 1980); *Coalition to Preserve Houston & Houston Indep. School Dist. v. Interim Bd. of Trs.*, 494 F. Supp. 738, 745, 747 (S.D. Tex. 1980); *Burchett v. Bower*, 470 F. Supp. 1170, 1173 (D. Ariz. 1979); *Mid-Hudson Legal Servs. v. G & U, Inc.*, 465 F. Supp. 261, 274 nn.15-16 (S.D.N.Y. 1978); *Aumiller v. Univ. of Delaware*, 455 F. Supp. 676, 682 & n.13 (D. Del. 1978); *Neely v. City of Grenada,* 77 F.R.D. 484, 487 (N.D. Miss. 1978); *Pennsylvania v. O'Neill*, 431 F. Supp. 700, 711 (E.D. Pa. 1977). In the years prior to EAJA's enactment, courts also awarded fees for paralegal services at market rates under fee-shifting statutes other than section 1988. *See, e.g., Todd Shipyards Corp. v. Dir., Office of Workers' Compensation Programs*, 545 F.2d 1176, 1182 (9th Cir. 1976) (Longshoremen's and Harbor Workers' Compensation Act); *Swicker v. William Armstrong & Sons, Inc.*, 484 F. Supp. 762, 773 (E.D. Pa. 1980) (Title VII); *Sherrill v. J.P. Stevens & Co., Inc.*, 441 F. Supp. 846, 848-49 (W.D.N.C. 1977) (same); *see also In re Chicken Antitrust Litig.*, 560 F. Supp. 963, 972, 977-78 (N.D. Ga. 1980) (federal antitrust settlement).

4. The Court's decision in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), strongly supports the view that paralegal services are a part of "attorney fees" under EAJA and, thus, compensable at market rates. First, *Casey* makes clear that *Jenkins* was not, as the Federal Circuit suggested, motivated by an extratextual policy concern that if paralegal services were not shoehorned into "attorney's fees," there would be no basis under 42 U.S.C. § 1988 for recovering them at all because section 1988 does not refer to "expenses." *See* Pet. App. 15a. To the contrary, in holding that expert witness fees were not compensable "attorney's fees" under section 1988, *Casey* rejected the plaintiff's assertion that *Jenkins* was an instance where the Court "permit[ted the] … perception of the 'policy' of the statute to overcome its 'plain language.'" *Casey*, 499 U.S. at 99. The Court explained that *Jenkins* was not a freewheeling exposition of section 1988's policy, but a straightforward interpretation of the term "attorney's fees," which, the Court held, included law clerk and paralegal services because they "had traditionally been included in calculation of the lawyers' hourly rates." *Id.* As explained in detail above, that textual reading of the term "attorney's fees" in section 1988 is equally, if not more, applicable to EAJA.

Second, *Casey* explained that a number of fee-shifting statutes expressly authorize an award of both attorney's fees and expert's fees, thus undermining the claim that section 1988's reference to "attorney's fees" alone authorized an award of expert fees. The Court contrasted that situation with the paralegal services question decided in *Jenkins* on the ground that fee-

shifting statutes do *not* single-out paralegal services for special treatment, and it took pains to point out that EAJA is no exception:

> We do not know of a single statute that shifts clerk or paralegal fees separately; and even those, *such as the EAJA*, which comprehensively define the assessable "litigation costs" make no separate mention of clerks or paralegals.

Id. at 99-100 (emphasis added). Thus, *Casey* underscores that paralegal services are a part of "attorney fees" compensable at "prevailing market rates" under EAJA because, just like other fee-shifting statutes, EAJA "make[s] no separate mention of clerks or paralegals." *Id.*[6]

5. The Federal Circuit shunned the follow-the-market approach endorsed in *Jenkins* and in EAJA's plain text based in part on a Senate committee report that cited as an example of an "expense" paralegal time "billed at cost." *See* Pet. App. 19a (quoting S. Rep. No. 98-586, 98th Cong., 2d Sess. 15 (1984)). That reliance was misplaced for several reasons.

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[6]The Federal Circuit majority acknowledged that, in *Casey*, the Court "reaffirmed its holding in *Jenkins* that paralegal services are included in § 1988's definition of attorney's fees." Pet. App. 11a. The majority quoted virtually all of the *Casey* opinion immediately before and after the blocked quotation reproduced above, *see id.*, but omitted the part most relevant to this case: the sentence that identified EAJA as a statute that, like other fee-shifting statutes, makes no separate mention of paralegal services and thus incorporates those services within the term "attorney fees."

First, contrary to the Federal Circuit's understanding of EAJA, the report's reference to paralegal services as an "expense" tells us nothing about whether those services should be valued at market rate or at the attorney's cost, since all items compensable under EAJA, including attorney fees, are "expenses." *See infra* at 36-38 (discussing the Federal Circuit's misreading of EAJA in this regard). And the report's reference to paralegal time "billed at cost" reflects only that if paralegal time is billed at cost in the marketplace, it should be compensated under EAJA on that basis. *See Jenkins*, 491 U.S. at 288 ("Nothing in § 1988 requires that the work of paralegals invariably be billed separately. If it is the practice in the relevant market not to do so, or to bill the work of paralegals only at cost, that is all that § 1988 requires."). But if paralegal time is billed on an above-cost hourly basis, then the market should control there as well. The Senate report does not address that scenario or purport to preclude that result.[7]

Moreover, the Federal Circuit relied on the committee report selectively. Shortly before the line quoted by the Federal Circuit, the report relied on an interpretation of EAJA issued by the Administrative Conference of the United States (ACUS) that would "permit the award of 'reasonable expenses of the

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[7]In addition, the Federal Circuit assumed that the committee report's reference to an expense award "at cost" meant the *attorney's* cost rather than the *client's* cost. That assumption is not correct because EAJA provides reimbursement for the expenses incurred by the "prevailing party," not the prevailing party's lawyer. *See infra* Part C.

attorney … as a separate item, if the attorney … *ordinarily charges clients for such expenses*.'" S. Rep. No. 98-586, at 14 (quoting ACUS interpretation) (emphasis added). The committee thus endorsed ACUS's position that the market should control the determination of what *types* of services are separately compensable under EAJA. Given that market-based approach, it is unlikely that the same committee believed that the market should be disregarded in *valuing* any of those services, including paralegal services. Indeed, immediately after its reference to ACUS's views, the committee report cited with approval the Sixth Circuit's decision in *Northcross v. Board of Education,* a section 1988 case that took a market-based approach to the award of fees and expenses generally and held that attorney fees for *paralegal services* should be awarded *at market rates*. *See* 611 F.2d at 638. In sum, the committee report taken as a whole bolsters Richlin's view that, under EAJA, paralegal services should be compensated as the market compensates them. In any case, the report hardly provides unambiguous support for the Federal Circuit's ruling.

Finally, the Federal Circuit majority's reliance on the committee report fails for a more fundamental reason: The report is not "legislative history" at all. The Senate report was prepared for a 1984 version of EAJA passed by the 98th Congress but vetoed by the President. *See* H.R. Rep. No. 99-120, pt. 1, at 6 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 134. Thus, the court of appeals erred in its original opinion in stating that "Congress acted to make EAJA permanent in 1984." Pet. App. 19a. In fact, as that court later

acknowledged in its supplemental opinion, *id.* at 56a n.2, EAJA was made permanent not by the *98th* Congress in 1984, but by the *99th* Congress in 1985, and "[n]o Senate Report was submitted with th[at] legislation." 1985 U.S.C.C.A.N. 132. The House committee report that accompanied the bill that was actually enacted in 1985 makes no mention of the treatment of paralegal services. *See id.* at 132-57.

To the extent that legislative history serves as legitimate evidence of congressional intent, it does so only because it is presumed to have been ratified by Congress and the President when the relevant legislation was enacted. *See* Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 Vand. L. Rev. 1457, 1522 (2000); *cf. Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring). That did not occur with respect to the 1984 report cited by the Federal Circuit. That court's assertion that the Senate report is "pertinent" nonetheless because the President's veto reflected concern about a topic other than paralegal services and the enacted 1985 legislation was otherwise "nearly identical" to the failed 1984 legislation, *see* Pet. App. 56a n.2, sidesteps the problem: The Federal Circuit's defense of the 1984 report does not attempt to explain how a committee report produced to accompany legislation voted on by one Congress could have been ratified by *another* Congress that did not produce that report, did not enact the legislation accompanying that report, and never referred to the relevant issue in its own legislative history.

In its opposition to certiorari, the government claimed reliance on the 1984 committee report was

justified even though it accompanied vetoed legislation because this Court endorsed that kind of reliance in a footnote in *United States v. Enmons*, 410 U.S. 396, 404 n.14 (1973). *See* Cert. Opp. 8 n.4. If anything, the *Enmons* footnote underscores that the 1984 report is not a legitimate basis for giving meaning to the 1985 legislation. Over a four-justice dissent, the footnote permitted reliance on floor statements accompanying unenacted legislation only because those statements were repeatedly endorsed in the legislative history accompanying the legislation that was actually enacted. As explained above, the legislative history that accompanied the enacted version of EAJA did not mention paralegal services, let alone endorse the snippet of faux legislative history on which the Federal Circuit relied.

* * *

For all of the reasons addressed above, paralegal services are "attorney fees" that must be awarded at "prevailing market rates" under EAJA.

B. EAJA's Adjustable Rate Cap Provides No Basis For Compensating Paralegal Services At Cost.

As explained above, our view that paralegal services are compensable under EAJA at market rates comports with *Jenkins* and EAJA's text, structure, and purpose. Moreover, as this Court put it in *Jenkins*, "encouraging the use of lower cost paralegals rather than attorneys wherever possible, … 'encourages cost-effective delivery of legal services.'" 491 U.S. at 288 (quoting *Cameo*, 738 F.2d at 846); Pet. App. 23a (relying on market forces "encourages cost-effective delivery of legal services.") (Plager, J., dissenting); *see*

also Miller v. Alamo, 983 F.2d 856, 862 (8th Cir. 1993) ("Work done by paralegals is compensable if it is work that would have been done by an attorney. If such hours were not compensable, then attorneys may be compelled to perform the duties that could otherwise be fulfilled by paralegals, thereby increasing the overall cost of legal services."); *Jean*, 863 F.2d at 778 (same).[8]

The Federal Circuit, however, maintained that this rationale does not apply here in light of EAJA's adjustable cap on hourly rates. Pet. App. 18a. In its view, if paralegal services were compensable at market rates, there would be an undue incentive to use paralegal services (recovery for which would be largely or entirely uncapped), rather than lawyer services (recovery for which would be limited by the fee cap). *See id.* Thus, the Federal Circuit maintained, paralegals would be "overused," inducing "less efficient performance of legal services." *Id.* This argument is insufficient to overcome *Jenkins*, EAJA's text, and the

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[8]The efficiency rationale for use of paralegals was well understood at the time of EAJA's enactment. *See, e.g., Todd Shipyards*, 545 F.2d at 1182 ("Paralegals can do some of the work that the attorney would have to do anyway and can do it at substantially less cost per hour, resulting in less total cost billed to the employer [client]. Therefore, paralegal time at paralegal rates can reasonably be counted along with the attorney's time as 'attorney fees.'"); *In re Chicken*, 560 F. Supp. at 977 ("The advent and widespread use of the paraprofessional has meant that the cost of effective legal counsel has been reduced and its availability enhanced without impairing the quality or delivery of legal services."); *Mid-Hudson*, 465 F. Supp. at 274 n.16 ("The use of paralegals saves lawyer's time and consequently money. It should be encouraged, not the reverse.").

other evidence of congressional intent discussed in Part A above. Moreover, for the reasons that follow, the argument fails on its own terms.

1. The Federal Circuit's position appears to be based on that court's mistaken belief that, as a general proposition, Congress sought in EAJA to compensate parties for their litigation expenses on a below-market-rate basis. Pet. App. 16a-17a ("It seems unlikely that Congress would have set the fee for paralegals as high as $75 per hour … [,] given the overall desire to cap allowable fees below market rates."). The Federal Circuit erred because it looked at EAJA from today's perspective — where lawyers' hourly rates at large commercial law firms in major metropolitan areas are generally above the EAJA cap — not from the vantage point of EAJA's original enactment in 1980 or its reenactment in 1985. As this Court has put it, however, "[t]o interpret accurately" Congress's intent, a court should not read statutes "as if they were written today, for to do so would inevitably distort their intended meaning." *Goldstein v. California*, 412 U.S. 546, 564 (1973).

EAJA was not conceived as a statute under which most legal work performed by most lawyers would be compensable at below-market rates. To the contrary, EAJA was conceived as a market-rate statute, as its text expressly indicates, albeit one under which some of the costs of legal services were capped (unless the statutory criteria for lifting the cap were met). In 1980, the circumstances in which the hourly-rate ceiling would be below a lawyer's reasonable hourly market were relatively rare. Indeed, in the years leading up to EAJA's enactment, lawyers' market rates were often

below $75 per hour, sometimes well below.[9] Generally, fee rates exceeded $75 per hour only for relatively senior lawyers in large metropolitan law firms.[10] Indeed, even in the period between EAJA's initial enactment in 1980 and its reenactment in 1985, the unadjusted $75 per hour rate cap proved sufficient to

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[9] *See, e.g., Francia*, 594 F.2d at 781 ($32 per hour "and up"); *Skehan*, 501 F. Supp. at 1368-69 ($50-$70 per hour for seven attorneys in practice in Washington, D.C., and $80 per hour for one attorney who graduated law school in 1957 and had practiced for seven years at the Office of the Solicitor General); *Swicker*, 484 F. Supp. at 772-73 (1980 decision citing and discussing wide range of cases in which hourly rates almost invariably were below $75 per hour, referring to 1977 study finding that "mean hourly rate awarded in Title VII cases was $40," and awarding fees of $60 per hour for work of two attorneys and $40 per hour for another); *Kennedy v. Crittendon*, 1980 WL 243, *4 (M.D. Ga. 1980) ($30 to $60 per hour); *Brady v. Washington County*, 509 F. Supp. 538, 543 (E.D. Tenn. 1979) (plaintiff's witness testified in fee proceeding "that the customary charge for legal services in civil matters in the area . . . is $50-an-hour."); *Mid-Hudson*, 465 F. Supp. at 270 (awards ranging from $50 to $80 per hour); *Aumiller*, 455 F. Supp. at 682 ($25 to $75 per hour); *McPherson v. School Dist. No. 186*, 465 F. Supp. 749, 760 (S.D. Ill. 1978) (awarding $25 to $60 per hour and noting that the "current average hourly rate in Springfield for complex federal litigation is $50 per hour for experienced attorneys comparable in ability to" the senior lawyer in the case); *Neely*, 77 F.R.D. at 486 ("prevailing hourly rate" of $35 to $45 per hour).

[10] *See, e.g., Coalition to Preserve Houston*, 494 F. Supp. at 747 ($30 to $75 per hour for three attorneys and $85 to $100 per hour for the senior lawyer); *Selzer*, 477 F. Supp. at 688, 690-91 (court awarded "normal billing rates of approximately $125 per hour for partners' time and between $27.25 to $65 per hour for associates' time" at major New York law firm, noting that fee resulted in an average rate of about $60 per hour).

replicate the market for most or all legal work in most cases.[11]

This point is driven home by the model rules issued by the Administrative Conference of the United States shortly after EAJA's reenactment in 1985. The rules provided that, in determining the compensable market rate, the adjudicator should consider various factors, including the customary fees for similar services and prevailing market rates in the community. 51 Fed. Reg. 16659, 16666 (May 6, 1986). This guidance would have had little value if market rates for legal services were generally expected to exceed the statutory fee cap.

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[11] *See, e.g., Groves v. Heckler,* 599 F. Supp. 830, 834 (M.D. Pa. 1984) ($65 per hour); *Citizens for Responsible Resource Dev. v. Watt,* 579 F. Supp. 431, 449 (D. Ala. 1983) ($70 per hour); *Cable Atlanta, Inc. v. Project, Inc.*, 572 F. Supp. 1113, 1116 (N.D. Ga. 1983) ($60 per hour for one lawyer and $75 per hour for another); *Wallace v. Sec'y of HHS*, 1983 WL 44228, *2 (D. Mass. 1983) ($35 to $60 per hour); *Chee v. Schweiker*, 563 F. Supp. 1362, 1365 (D. Ariz. 1983) ("$50 per hour is a reasonable rate in plaintiff's local area for the type of legal services rendered in this case."); *Kauffman v. Schweiker*, 559 F. Supp. 372, 377 (M.D. Pa. 1983) ($50 per hour); *J.A. Jones Constr. Co. v. Southern Stress Wire Corp.*, 575 F. Supp. 365, 370 (N.D. Ga. 1982) ($60 to $65 per hour for one lawyer and $70 to $75 per hour for another); *Envtl. Defense Fund, Inc. v. Watt*, 554 F. Supp. 36, 42 (E.D.N.Y. 1982) ("The hourly rates requested for each individual appear to be based on prevailing market rates and are at or within the 75 dollar-per-hour limit established by" EAJA.); *Moholland v. Schweiker*, 546 F. Supp. 383, 387 (D.N.H. 1982) ($30 to $50 per hour); *Visser v. Magnarelli*, 542 F. Supp. 1331, 1338 (N.D.N.Y. 1982) (awarding $75 per hour because "it represents the hourly rate in this area normally charged for similar work by attorneys of like skill"); *WATCH v. Harris*, 535 F. Supp. 9, 15-16 (D. Conn. 1981) (awarding fees at $45 to $50 per hour).

We do not intend to suggest that the fee cap in 1980 or 1985 was at or above the prevailing market rates for all lawyers in all markets; as noted earlier, it was not. Rather, our point is only that EAJA was seen primarily as a market-rate-based fee-shifting statute that would, with its potential to adjust rates for increases in the cost of living, provide market-rate compensation for most, albeit not all, compensable legal work. EAJA's drafters could not have foreseen that inflation in legal services would greatly outstrip inflation generally. They would thus have had no reason to believe that the EAJA fee cap would, as a general matter, promote the "overuse" of legal personnel billed at relatively low rates.

2. Even if we were to assume (incorrectly) that EAJA's drafters contemplated a world in which market rates for lawyers generally exceeded EAJA's cap, the Federal Circuit's concern about the fee cap would still be misguided. That concern was necessarily premised on the unstated proposition that EAJA will motivate law firms to shunt work to paralegals incapable of handling that work. But that proposition is implausible because of the strong ethical and economic incentives not to assign work in that manner. The requirement that lawyers provide competent and zealous representation would generally prohibit a lawyer from demanding that a paralegal, say, write an appellate brief, just as law firm partners generally cannot assign the most complex and sensitive matters to a brand-new lawyer, even if doing so would save clients money in the short term. Nor would the market permit such inappropriate use of paralegals. If a law firm were to overuse paralegals in the manner contemplated by the

Federal Circuit, the client would not save in the end, because the quality of legal services would suffer, and the client would demand the proper use of law firm personnel or take its business elsewhere. And, on the other hand, if the EAJA rate cap induces law firms to provide paralegals with additional work that they *are* capable of handling, the client will save money, and *Jenkins*'s efficiency rationale will be served in spades.

In addition, consider what would happen if the Federal Circuit's rule controlled. In cases subject to EAJA, paralegal services would be recoverable only at the cost of those services to law firms — and clients would lose. In cases where fees were recoverable — that is, where the client had prevailed and the government's position was held to be unreasonable — EAJA would reimburse only the law firm's cost in employing the paralegal, even though the client would have incurred fees at full market rate. That result would run counter to a central purpose of EAJA: "to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." *Jean*, 496 U.S. at 163.

3. In any event, the Federal Circuit's concern about the supposed overuse of paralegals proves far too much. The Federal Circuit's concern, though misguided, is, to be sure, premised on a basic truth about the fee cap: EAJA provides less reimbursement, as a percentage of the total fee incurred by the client, the more the law firm uses higher-priced personnel whose market rates exceed the fee cap. As noted, the Federal Circuit claimed that if fees for paralegal services are recoverable at market rates, law firms will assign work to relatively low-priced paralegals whose

market-rate fees are likely to be fully recoverable because they generally fall below the fee cap.

As explained earlier (at 30-33), in EAJA's early years, even in relatively rare instances where some attorney rates in some locations exceeded the cap, the rates of junior and mid-level lawyers did not, and, thus, fees for their work were fully recoverable even if fees for the work of their senior colleagues were not. Today, however, largely because inflation in legal services has outstripped increases in the cost of living generally, the market rates for relatively junior associates as well as their more senior colleagues often exceed even the inflation-adjusted EAJA cap. But even when that occurs, the rates for junior associates and senior partners frequently differ dramatically. *See, e.g., Gautreaux v. Chicago Hous. Auth.*, 491 F.3d 649, 660 (7th Cir. 2007) (rates ranging from $200 to $400 per hour); *Hixon v. City of Golden Valley*, 2007 WL 4373111 (D. Minn. 2007) (same); Laffey Matrix, available at http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_7.html (District of Columbia fee rates ranging from $215 per hour for lawyers with one to three years of experience to $425 per hour for lawyers with more than 20 years of experience).[12] Thus, if the Federal Circuit were correct about the effect of the rate cap, in cases subject to

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[12]The Laffey matrix serves as a benchmark for market-rate fee shifting in federal litigation in the Washington, D.C. area and is updated annually by the office of the U.S. Attorney for the District of Columbia. It has its origins in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 388 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984).

EAJA, *junior lawyers* would be "overused" and inefficiency supposedly would ensue. But no one would suggest that the work of junior associates is not compensable as "attorney fees" under EAJA and that such work may only be reimbursed at the associates' cost to their law firms.

To be sure, junior associates are lawyers and paralegals are not. But the fact that junior lawyers, just as surely as paralegals, would be "overused" under the Federal Circuit's view of EAJA demonstrates that it is recent hyper-inflation in the market for legal services generally, and nothing about the cost of paralegal services in particular or the meaning of the statutory term "attorney fees," that is the true source of the Federal Circuit's concern.

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For all of these reasons, EAJA's fee cap is irrelevant to the question presented and provides no basis for ignoring *Jenkins* and EAJA's requirement that attorney fees be awarded at "prevailing market rates."

C. Paralegal Services Are Not "Other Expenses" Under EAJA, But Even If They Are, They Should Be Awarded At The Cost To The Client Not The Cost To The Lawyer.

1. The question in this case is whether paralegal services are compensable under EAJA at market rates or at the cost of those services to the lawyer, as the government maintains. In taking the latter approach, the Federal Circuit focused on the fact that EAJA authorizes an award of "expenses," claiming in particular that EAJA draws a distinction between "attorney fees," billed at market rates, and "expenses,"

billed at cost. *See, e.g.,* Pet. App. 19a ("[W]e hold that paralegal services are not recoverable as fees, but are only recoverable as expenses at the cost to the attorney."); *id.* at 55a-56a ("[P]ayments for paralegal services under EAJA are not recoverable as 'attorney's fees' but are recoverable as 'expenses,' allowable only at cost."). With that supposed statutory distinction in mind, the court of appeals distinguished *Jenkins* on the ground that, in contrast to EAJA's reference to "expenses," section 1988 refers only to "attorney's fees" and does not mention "expenses." *See id.* at 15a.

The Federal Circuit seriously misread EAJA's plain text. EAJA authorizes an award of "fees and *other* expenses." 5 U.S.C. § 504(a)(1) (emphasis added); *see also* 28 U.S.C. § 2412(d)(1)(A) (same). "Fees and other expenses" are defined to include "reasonable attorney … fees," the amount of which "shall be based upon prevailing market rates for the kind and quality of services furnished …." 5 U.S.C. § 504(b)(1)(A); *see also* 28 U.S.C. § 2412(d)(2)(A) (same). Thus, *all* awards under EAJA are awards of "expenses," including awards of "attorney fees." The Federal Circuit's dichotomy between "expenses" awarded at cost, on the one hand, and "attorney fees" awarded at market rate, on the other, is flatly at odds with the statute.

Put another way, the term "expenses" cannot, as the Federal Circuit contemplated, mean only those items awardable at cost because that term includes fees, which are awardable at market rates. *Cf. Marek*, 473 U.S. at 9 (because section 1988 authorizes award of "attorney's fees *as part of* the costs," such fees are "costs" under that section and Federal Rule of Civil Procedure 68). For that reason, the Federal Circuit's

reliance on the presence in EAJA of the term "expenses" begs the questions — already answered in *Jenkins* — whether the statutory term "attorney fees" includes paralegal services, and whether fees for such services may be awarded at market rates. (And as previously discussed, under EAJA, once it is determined that paralegal services are a component of "attorney fees," further reliance on *Jenkins* is unnecessary because the statute says that "fees" are to be awarded at "prevailing market rates.")[13]

2. The government apparently has recognized the flaw in the Federal Circuit's reasoning and now says that the question presented is whether paralegal services are compensable at market rate as fees, or as "'other expenses' compensable at the rate of cost to the attorney." Cert. Opp. (I). But that new parsing of the statute does not help the government. "Other expenses" under EAJA generally refers to out-of-pocket expenses for services provided by third parties outside of the law firm. Those out-of-pocket expenses can either be paid directly by the client or incurred in the first instance by the lawyer on the client's behalf.

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[13]Moreover, the Federal Circuit's reliance on the absence of an express provision for the award of out-of-pocket "expenses" under section 1988 as a basis for distinguishing *Jenkins* overlooks that section 1988 has long been read to authorize recovery of out-of-pocket expenses. *See, e.g., Casey*, 499 U.S. at 87 n.3 (noting that courts have held that "'reasonable out-of-pocket expenses incurred by the attorney' [are] included in § 1988 'attorney's fee' award") (quoting *Northcross*, 611 F.2d at 639); *Trs. of the Constr. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1257 (9th Cir. 2006); *Dowdell v. City of Apopka, Fla.*, 698 F.2d 1181, 1190-91 (11th Cir. 1983).

Thus, courts have regularly approved reimbursement for "other expenses," such as transportation and other travel costs, postage, long distance telephone calls, and the like paid by the client or the law firm to outside vendors to accomplish the client's objectives in the litigation.[14] In these situations, to be sure, if the lawyer pays the bill to the outside vendor, reimbursement is limited to the lawyer's cost, but only because such reimbursement is also the cost to the *client*. Thus, these "other expenses" are in reality charged at market rates — that is, at the rate that the client is willing to pay for them in the relevant market, whether that is the amount that the phone company charges for long distance calls made on the client's behalf or that an airline charges for a flight taking the lawyer to court. And, that is why, in deciding whether "other expenses" are compensable under EAJA, the courts have generally taken a follow-the-market approach and allowed reimbursement of such expenses when they are ordinarily billed separately to the client in the relevant legal market rather than included in the attorney's overhead. *See, e.g., Int'l Woodworkers*, 792 F.2d at 767; *Adkinson*, 256 F.Supp.2d at 1319.

Awarding expenses at the lawyer's cost — when it is different from the client's cost — runs headlong into this market-based approach to expense recovery and is

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[14] *See, e.g., Kelly v. Bowen*, 862 F.2d 1333, 1335 (8th Cir. 1988); *Int'l Woodworkers of Am. v. Donovan*, 792 F.2d 762,767 (9th Cir. 1985); *Jean*, 863 F.2d at 778; *United States v. Adkinson*, 256 F. Supp. 2d 1297,1319 (N.D. Fla. 2003), *aff'd*, 360 F.3d 1257 (11th Cir. 2004).

an irrational basis for reimbursing a party under a fee-shifting statute. By definition, clients incur paralegal expenses at market rates. The Federal Circuit, however, decided that those services should only be reimbursed at their lawyers' cost. But that was no better than plucking a number out of the air. The cost to the lawyer might be a third, or half, or two-thirds of what the party actually incurred for the paralegal's time, and thus has no relation to the market rate or any other sensible guidepost for the *client's* expense recovery.

Paralegal services are not generally purchased from third-party vendors, but are performed by in-house law firm personnel under the direction of attorneys, which is one reason why it makes sense to view paralegal services as a component of statutory "attorney fees." *See Jenkins*, 491 U.S. at 285 (holding that term "attorney's fees" was meant to compensate work of all personnel "whose labor contributes to the work product for which an attorney bills her client."). But, for the reasons stated above, if the Court rejects our position that paralegal services are a component of EAJA "attorney fees," and agrees with the government that paralegal services are "other expenses," those services should be reimbursed at the *client's* cost, not at the *lawyer's* cost. After all, EAJA authorizes an award of fees and other expenses "to the prevailing *party*," 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(d)(1)(A), not that party's lawyer, and so if paralegal services are to be awarded at cost, that cost should be the party's.

3. The irrationality of the Federal Circuit's decision to award paralegal expenses at the lawyer's cost is underscored by the practical problems it will cause

(and has already caused). As noted earlier, the award to Richlin for paralegal services was based on the Board of Contract Appeals' informal Internet survey of paralegal salaries. But that is not the proper way to assess "the attorney's cost." Pet. App. 19a. The attorney's cost for a paralegal would include not only the paralegal's salary, but the cost of employer-provided fringe benefits and a share of all overhead allocable to the paralegal, including utilities, rent or depreciation, and similar administrative costs. The cost computation would be difficult, and it would differ paralegal to paralegal, firm to firm, and, arguably, season to season. Disputes would arise as to whether this or that cost were properly included in overhead.

These problems are not theoretical. The difficulties of properly assessing the cost to the attorney may be insurmountable, as illustrated by two EAJA cases decided in the wake of the decision below. In *Former Employees of BMC Software, Inc. v. Sec'y of Labor*, ___ F. Supp. 2d ___, 2007 WL 2994605 (C.I.T. 2007), the court noted that "[c]alculating the amount of the award for the paralegal-type work in this case is particularly difficult in light of … *Richlin* …." *Id.* at *38. It explained that although "[p]rior to *Richlin*, EAJA awards had included compensation for paralegal work at market rates …, [now they] are only recoverable as expenses *at the cost to the attorney*." *Id.* (emphasis in original, internal quotation omitted). Because it was "impossible to calculate the [paralegal] fee award in this case" based on the prevailing party's fee application that had been filed prior to the decision below, the applicant was "accorded the opportunity to provide information on the cost to the law firm of any

paralegals and other non-attorneys whose time is reflected in the [fee] Application." *Id.*

But proving actual cost turned out to be too difficult, and "[r]ather than attempt to separately determine the actual cost to the firm for the" paralegals, the prevailing party had to settle for less – the hourly rate that the Federal Circuit had allowed to Richlin, based on paralegal salaries alone. *Former Employees of BMC Software, Inc. v. Sec'y of Labor*, 2007 WL 4181696, *3 (C.I.T. 2007). That result had the virtue of simplicity, but not common sense: The award for paralegal services lacked any connection either to what the party had incurred for paralegal services or to an accurate assessment of the attorney's cost.

Even worse, in *Information Sciences Corp. v. United States*, 78 Fed. Cl. 673, 683 (Fed. Cl. 2007), "[i]n light of the level of proof demanded by *Richlin*," the prevailing plaintiff "withdr[ew] a claim for recovery of paralegal fees," thereby relinquishing $15,875 that it had incurred for paralegal services in opposing unreasonable government conduct — fees to which it would have been entitled had the court based its award on market rates.

* * *

There is a mechanism that avoids the complexity and irrationality of compensating paralegal services at the lawyer's cost. It is called a market, which silently and definitively values legal services. It avoids both the arbitrary loss of deserved compensation, as has occurred as a result of the decision below, and the "second major litigation," *Hensley*, 461 U.S. at 437, that would ensue if litigants were required to ascertain

the value of legal services based on the artificial criterion of the lawyer's cost. It is also the mechanism chosen by Congress when it decided that attorney fees under EAJA should be valued at "prevailing market rates." 5 U.S.C. § 504(b)(1)(A); 28 U.S.C. § 2412(d)(2)(A).

CONCLUSION

The decision below should be reversed and the case remanded for the purpose of setting an award of attorney fees for paralegal services at market rates.

Respectfully submitted,

Brian Wolfman
(Counsel of Record)
Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

January 2008 Counsel for Petitioner

ADDENDUM

28 U.S.C. § 2412

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

* * *

(2) For the purposes of this subsection–

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines

that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.)