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

## PETITIONER'S REPLY

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## PETITIONER'S REPLY

The government argues that the petition should be denied because the circuit split created by the Federal Circuit's decision, while undeniable, is too shallow to warrant review. It also argues that the Federal Circuit's role in EAJA litigation is irrelevant to the petition's cert-worthiness, and that the ruling below properly construed EAJA. None of these assertions is correct, and none undermines the need for review.

### A. The Circuit Split Alone Justifies Review.

**1.** The government grudgingly concedes that the decision below is directly at odds with the Eleventh Circuit's decision in *Jean v. Nelson*, 863 F.2d 759, 778 (11th Cir. 1988), as the Federal Circuit below repeatedly acknowledged. Pet. App. 12a-13a, 55a (on rehearing) ("In our decision, we declined to follow the contrary decision of the Eleventh Circuit in *Jean v. Nelson*."). It then tries, in two ways, to diminish the importance of the circuit split. Neither effort succeeds.

First, the government brazenly adopts the Federal Circuit's statement that "'there is no indication that the paralegal services issue was argued' in *Jean.*" Opp. 13 (quoting Pet. App. 12a). But that statement is patently wrong. The exact opposite is plain on the face of the *Jean* opinion, which describes the contested issue as follows:

> The district court awarded reimbursement for time spent by paralegals and law clerks where the work was that normally done by an attorney. The hourly rate awarded was $40. This is the rate at which the law firm whose paralegals and clerks were involved bills its clients. The government challenges the rate awarded, *and contends that paralegal time is recompensable only at the actual cost to the plaintiffs' counsel*.

*Jean*, 863 F.2d at 778 (emphasis added). Thus, there is no reason to overlook the circuit split on the (manifestly incorrect) ground that the question presented in the petition was not fully

litigated before the Eleventh Circuit in *Jean*.

Second, the government says that there is "no considered conflict" on the question presented because *Jean* did not "explain why, even if paralegal time were recoverable under EAJA, the statute requires that paralegal services be compensated at market rates rather than at cost." Opp. 13. That statement is also flatly incorrect. *Jean* relied on a Title VII case from the Fifth Circuit that had awarded fees for paralegal services. It then held that '[t]he same analysis applies here . . . because excluding reimbursement for such work might encourage attorneys to handle entire cases themselves, thereby achieving the same results at a higher overall cost." *Jean*, 868 F.2d at 778. As explained in the petition (at 7-8), *Jean*'s efficiency rationale is precisely the rationale later adopted by this Court in *Missouri v. Jenkins*, 491 U.S. 274, 288 (1989) (market-rate paralegal fees "makes economic sense. By encouraging the use of lower cost paralegals rather than attorneys wherever possible, permitting market-rate billing of paralegal hours 'encourages cost-effective delivery of legal services[.]'" ) (quoting *Cameo Convalescent Center, Inc. v. Senn*, 738 F.2d 836, 846 (7th Cir. 1984)).

In sum, *Jean* rejected the exact argument that the Federal Circuit accepted below – that paralegal services should be compensated under EAJA at cost, not at market rates – and it did so based on the same reasoning endorsed by this Court in *Jenkins*. The government's attempts to diminish the conflict should be rejected.

**2.** The government is also wrong in claiming that decisions of the D.C., Fourth, and Eighth Circuit do not conflict with the Federal Circuit's ruling. The government's attempt to explain away the D.C. Circuit's decision in *Role Models America, Inc. v. Brownlee*, 353 F.3d 962 (2004), is untenable. The government says that the D.C. Circuit "appeared to assume that

paralegal time was compensable at market rates," Opp. 12, but the *Role Models* opinion shows that the court was operating on more than an assumption. The court there *actually awarded* market-rate fees for paralegal time, but reduced the requested rates by 25% because the plaintiffs had not adequately proved "*the prevailing market rate for law clerks and legal assistants* in the Washington area." 353 F.3d at 970 (emphasis added). Even more damaging to the government's position is that, immediately after noting the government's objection to fees for paralegal services, the court in *Role Models* stated that "[t]his Circuit 'holds that paralegals and law clerks are to be compensated at their *market rates*.'" 353 F.3d at 974 (quoting *In re Donovan*, 877 F.2d 982, 993 n.20 (D.C. Cir. 1989)) (emphasis added). The government's only response is that the quoted language appears "merely in a parenthetical" after a citation to a non-EAJA case. Opp. 12. But why would a court use a parenthetical as *support* for its holding, as the D.C. Circuit did in *Role Models*, if it did not think the parenthetical actually applied to the case before it? Any other interpretation of the language in *Role Models* would be spectacularly odd because, as noted, the court there did exactly what the parenthetical would demand: award fees for paralegal services at market rates.

Turning to the Fourth Circuit's decision in *Hyatt v. Barnhart*, 315 F.3d 239 (2002), the government concedes that "the court used the word 'fees' in connection with paralegal services," but claims that the court "did not consider, much less decide, whether paralegal services are compensable as 'fees' within the meaning of EAJA, or whether recovery should be at market rates rather than at cost." Opp. 11. The first point is simply wrong, while the second is a non sequitur. The very thing that *Hyatt* decided was that paralegal services, which it described as "fees," were compensable under EAJA. 315 F.3d at 255. And, to suggest that the Fourth Circuit's ruling may be

consistent with the decision below – that is, that the Fourth Circuit might have thought that EAJA "fees" are compensable at cost only – is to create a statute that does not exist. Under EAJA, "[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)(ii); 28 U.S.C. § 2412(d)(2)(A). Thus, once it is determined that an applicant is entitled to "fees," they must be awarded at market rates. In any event, any doubt about whether *Hyatt* is at odds with the Federal Circuit's decision is resolved by *Hyatt*'s principal reliance on the Eleventh Circuit's ruling in *Jean*, which held that paralegal services are compensable at market rates under EAJA. *See Hyatt*, 315 F.3d at 255.

For much the same reasons, the government fails to explain away the Eighth Circuit's decision in *Miller v. Alamo*, 983 F.2d 856, 862 (1993). It says that *Miller* was silent about whether paralegal services are "fees" or "other expenses," Opp. 11, but, as explained in the petition (at 9), *Miller* explicitly cited *Jean* and adopted its market-rate rationale, and then awarded paralegal fees "at a *rate* of $40 per hour," 983 F.2d at 862 (emphasis added), which connotes a market-rate award. *See also* Pet. 10 n.3 (explaining that *Miller* involved a market-rate award, which the government does not dispute).

**3.** The government's ultimate basis for resisting review is the last-ditch refrain, often heard when there is an undeniable circuit conflict: that "the issue would benefit from further ventilation in the courts of appeals." Opp. 13. That argument rings hollow here, where five circuits have weighed in on an important question of federal law. Moreover, aside from the circuit split, the government's opposition ignores two other points that underscore the petition's importance: first, that the Federal Circuit has placed itself in conflict with the virtually unanimous practice in the district and Article I courts, which have routinely awarded market-rate EAJA fees for paralegal

services, Pet. 10-11 & n.4; *see also Former Employees of BMC Software, Inc. v. U.S. Dep't of Labor*, 2007 WL 2994605, *38 (C.I.T. Oct. 15, 2007) (court subject to Federal Circuit's appellate jurisdiction explaining that "[p]rior to *Richlin*, EAJA awards had included compensation for paralegal work at market rates"), and, second, that market-rate billing for paralegal services is a nearly universal feature of modern legal practice. *Id.* at 13; *see also* Br. Amici Curiae of Nat'l Assn. of Legal Assistants, et al. ("NALA Br.") 4-7.

But even if the government were correct that the only relevant consideration was the conflict between the Eleventh Circuit's ruling in *Jean* and the Federal Circuit's ruling below, there would be no reason for "further ventilation." In holding that paralegal services are compensable under EAJA at market rates, the Eleventh Circuit expressly rejected the exact argument accepted by the Federal Circuit: that such services are compensable under EAJA only at cost, regardless of how they are billed in the marketplace. The government does not argue – nor could it plausibly argue – that the Eleventh Circuit will overrule *Jean*, which has stood as binding precedent for nearly two decades. The issue is ripe for review, and the Court should review it now.

### B. The Issue Is Important, Particularly Because This Case Arises From The Federal Circuit.

The petition argues that the issue is important, among other reasons, because the decision below denying market-rate fees for paralegal services arose in the Federal Circuit, with its large docket of cases in which EAJA applies. Pet. 11-12; *see also* NALA Br. 14 (noting that Federal Circuit has "outsized role in EAJA cases."). The government says that "[a]lthough a substantial percentage of the Federal Circuit's docket does consist of cases involving the federal government, EAJA cases are heard in significant numbers in every circuit." Opp. 13-14.

That is a strange way of rebutting our point, because the presence of many EAJA cases all over the country supports, not undermines, the need for review. *See also* NALA Br. 13 & n.12 (explaining that EAJA applications "involve a wide variety of subject matters," citing cases nationwide).

In any event, we never claimed that the Federal Circuit hears more cases involving the federal government than do other circuits. What we said is that review is particularly appropriate in this case because it arose from the Federal Circuit, which hears a relatively high number of *EAJA cases* and, unlike the regional courts of appeals, has appellate jurisdiction over Article I tribunals in which EAJA applications are frequently filed. Pet. 11-12. A Westlaw analysis of recent court decisions bears out these contentions. In cases decided between January 1 and October 15, 2007, the term "Equal Access to Justice Act" has appeared 10 times in Federal Circuit cases, while in the Second and Fifth Circuits, two circuits with significant populations, the term has appeared four and two times, respectively. In addition, over the same period, the term has appeared in 80 cases decided by the Court of Appeals for Veterans Claims (one of several Article I tribunals within the Federal Circuit's purview), while it has appeared in 29 cases in all district courts within the Second and Fifth Circuits combined.[1]

In sum, that it is the Federal Circuit that has staked out a position at odds with nearly every other federal precedent heightens the petition's importance.

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[1]On average over the past four years, the Court of Appeals for Veterans Claims has granted more than 1000 EAJA applications. *See* Court of Appeals for Veterans Claims–Annual Reports, available at http://www.vetapp.uscourts.gov/documents/Annual_Reports.pdf.

### C. The Government's Position On The Merits Provides No Reason To Deny Review.

In arguing that the decision below is correct, the government does no more than repeat the reasoning of the Federal Circuit majority below, Opp. 6-10, which we have rebutted in the petition. Suffice it to say that if the Court grants review, there will be time enough to explore the merits in detail. For present purposes, the depth of the parties disagreement on the merits only emphasizes the need for review, particularly because the Federal Circuit's ruling, with its impact on thousands of EAJA applications, stands alone in rejecting the market-rate approach adopted by this Court nearly 20 years ago in *Missouri v. Jenkins*.[2]

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[2]One statement in the government's opposition requires a brief rejoinder. The government claims that it is permissible to rely on a 1984 committee report even though the report accompanied vetoed legislation, because this Court endorsed that practice in a footnote in *United States v. Enmons*, 410 U.S. 396, 404 n.14 (1973). *See* Opp. 8 n.4. We have already explained that this purported legislative history, even if a legitimate authority, does not support the Federal Circuit's ruling. *See* Pet. 19. In any event, the *Enmons* footnote does not aid the government. Over a four-justice dissent, the footnote permitted reliance on floor statements accompanying unenacted legislation because those statements were repeatedly endorsed in the legislative history accompanying the legislation that was actually enacted. As explained in the petition (at 19), 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 government relies.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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