SEP 28 2007

No. 07-2

IN THE

Supreme Court of the United States

JOYCE LIVESTOCK COMPANY &
LU RANCHING COMPANY,

Joint Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

Brief for *Amici Curiae* Washington Cattlemen's Association, Washington Cattle Feeders Association, Montana Farm Bureau Federation, Idaho Farm Bureau Federation, Oregon Livestock Producer Association, Wyoming Farm Bureau Foundation, Montana Stockgrowers Association, and National Federation of Independent Business in Support of Petition for Certiorari

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CONSENT

The parties have consented to the fling of this brief.

INTEREST OF THE AMICI CURIAE

The amici curiae submitting this brief ("**Amici**") represent agriculture and business interests throughout the United States.[1] The Washington Cattlemen's Association is dedicated to promoting and preserving the beef industry, and a major part of its mission is to protect the water and property rights of ranchers, increase international export access for cattle and beef, and eliminate personal property tax on livestock. The Washington Cattle Feeders Association is the legislative and regulatory monitoring arm for the cattle feeding industry in the state of Washington. The Montana Farm Bureau Federation includes farm and ranch families, is an independent, non-governmental, voluntary organization, and is the State's largest agricultural organization. The Montana Stockgrowers Association represents livestock and ranching interests from all across Montana. The Idaho Farm Bureau Federation includes farm and ranch families, and works to improve the quality of life for farm and ranch families. The Oregon Livestock Producers Association is a trade association dedicated to preserving open, competitive livestock markets and property rights in order to ensure the continued profitability and viability of independent Oregon

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

cattle producers. The Wyoming Farm Bureau Federation is a general agricultural organization which represents agricultural producers throughout the state of Wyoming. The Wyoming Farm Bureau is organized to promote and protect the ability of agricultural producers to make an adequate economic return on their agricultural operation. The National Federation of Independent Business Legal Foundation which is a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small-business advocacy association, with offices in Washington, D.C. and all fifty state capitals.

These groups and their members interact extensively with the federal government, especially in the western United States, where public and private lands are often intermingled, and water and property rights are often at issue. Although the relationship between small business, ranchers, and farmers on one hand, and the government on the other hand, is often a mutually beneficial one, Amici are deeply concerned about the protection of their rights, including water rights. The Idaho Supreme Court's decision that is the subject of the petition for writ of certiorari has undermined the protection Congress afforded Amici's rights under the Equal Access to Justice Act ("**EAJA**"). If left to stand, the decision has the potential to negatively impact small businesses, farmers, and livestock producers with water rights and other property rights.

SUMMARY OF THE ARGUMENT

In addition to the reasons set forth in the Petition, which convincingly demonstrate that this case warrants the

Court's attention, the Court should be aware of at least two additional reasons that make this a paradigm case for Supreme Court review. First, when interpreting a statute like the EAJA, it is axiomatic that a court should aim to effectuate Congress' intent. To understand that intent, courts begin by looking to the language Congress has chosen. Of significance to this case, Congress has consistently used the phrase "any court having jurisdiction" – the key phrase at issue in this case – throughout the United States Code when it has intended to use established boundaries of jurisdiction to define the scope of the powers granted or recognized under a statute. Its use of that phrase, both in the EAJA and throughout the United States Code, shows not only that the Idaho Supreme Court erred, but further that if the Court does not take review, the Idaho Supreme Court's opinion has the potential to negatively impact other statutory schemes.

Second, Congress enacted the EAJA to serve as a check on the power of the executive branch of the federal government as it enforces the laws passed by Congress. The EAJA seeks to help level the litigation playing field for small businesses, farmers, and other individuals forced to litigate against the deep pockets of the federal government. As Congress recognized, government officials should not be able to force owners of water and other private property rights to relinquish their rights or face retaliatory litigation without consequence.

None of Congress' goals, however, turn on any distinction between state and federal courts. By limiting the EAJA to federal courts, the Idaho Supreme Court has thus eviscerated the EAJA's salutary purposes, and created an incentive for the executive branch to engage in forum

shopping when subjecting small businesses and individuals to unreasonable governmental action.

Given the broad application of the EAJA to litigation involving the United States, the regulatory effect Congress intended the statute to exert on the executive branch, and that the Idaho Supreme Court has incorrectly resolved this "important question of federal law that has not been, but should be, settled by this Court," the Court should grant the writ of certiorari. Sup. Ct. R. 10.

ARGUMENT

I. By Misconstruing "Any Court Having Jurisdiction" — a Phrase Congress Has Repeatedly Used Throughout the United States Code — the Idaho Supreme Court's Decision Undermines EAJA's Purpose and Threatens to Cause Mischief in Other Federal Statutes

The Idaho Supreme Court's decision to construe the phrase "any court having jurisdiction" in a manner that contravenes Congress' consistent use of this phrase throughout the United States Code shows that the Idaho Supreme Court erred, and that if the Idaho Supreme Court's opinion remains good law, it may cause mischief with other statutory schemes.

A. Congress Has Repeatedly Used the Phrase "Any Court Having Jurisdiction" to Define the Scope of Power Granted Under a Statute

When seeking to construe statutory language, this Court and others frequently look to interpretations of identical language as it appears in other statutes. *See, e.g., Nat'l Fed'n of Fed. Employees, Local 1309 v. Dep't of the*

Interior, 526 U.S. 86, 93 (1999) (interpreting "collective bargaining agreement"); *Overstreet v. North Shore Corp.*, 318 U.S. 125, 128 (1943) (interpreting "engaged in interstate commerce"); *Zoltek Corp. v. United States*, 442 F.3d 1345, 1361-62 (Fed. Cir. 2006) (interpreting "an act of infringement in a foreign country"); *Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.*, 171 F.3d 818, 823-24 (3d Cir. 1999) (interpreting "warranty"); *Preferred Physicians Mut. Risk Retention Group v. Pataki*, 85 F.3d 913, 917-18 (2d Cir. 1996) (interpreting "discrimination"); *United States v. Gibson Specialty Co.*, 507 F.2d 446, 450-51 (9th Cir. 1974) (interpreting "facilitate"). Indeed, this well-recognized tool of statutory construction is consistent with the judicial and legislative objectives of harmonizing statutes and providing fair notice to those who must rely on statutory language to understand their rights and obligations.

Of import to this case, the United States Code includes at least twenty-eight statutes, in addition to the EAJA, that employ the phrase "any court having jurisdiction."[2] These statutes demonstrate that Congress' use of the same language in the EAJA was not intended to exclude state courts. For example, numerous federal statutes authorize a federal officer or entity to initiate legal actions "in any court having jurisdiction." *See, e.g.*, 33 U.S.C. § 591 (authorizing the Secretary of the Army to bring condemnation proceedings "in any court having jurisdiction of such proceedings"); 7 U.S.C. § 1981(b)(5) (authorizing the Secretary of Agriculture to pursue claims "to final collection in any court having jurisdiction"); 42 U.S.C. § 1480(d) (same); 42 U.S.C. § 6239(f)(8)

[2] *See* App. 1 (Table setting forth these other statutes).

(authorizing the initiation of an action for condemnation, in support of the strategic petroleum reserve, "in any court having jurisdiction over the proceedings"); 38 U.S.C. § 8526 (authorizing, in case of doubt as to entitlement to assets of a deceased veteran, initiation of "appropriate proceedings to be instituted in any court having jurisdiction"). By defining where federal officers may initiate certain actions in terms of "any court having jurisdiction," Congress intended to use the concept of "jurisdiction" to define the scope of the power granted; federal actors may thus proceed in state court when the court is a "court having jurisdiction." *See, e.g., In re Estate of Lauer*, 771 N.Y.S.2d 878 (N.Y. Sur. Ct. 2004) (intervention by U.S. Veteran's Administration in probate proceeding in Surrogate's Court of New York City); *United States v. Childers*, 789 N.E.2d 691 (Ohio Ct. App. 2003) (foreclosure action brought by United States in Ohio state court for Farmers Home Administration loan).

The Internal Revenue Code also employs this oft-used phrase to broadly encompass all courts where a matter may properly be heard. *See* 26 U.S.C. § 6324(a)(1) (stating that all of a decedent's gross estate becomes subject to a tax lien except that those portions "used for the payment of charges against the estate and expenses of its administration, allowed by *any court having jurisdiction* thereof, shall be divested of such lien") (emphasis added). Likewise, Section 6314 of the Internal Revenue Code provides for delivery of a receipt to a person who pays an estate tax, and mandates that such a receipt "shall be sufficient evidence of such payment, and shall entitle the executor to be credited and allowed the amount thereof by *any court having jurisdiction* to audit or settle his accounts." 26 U.S.C. § 6314(b) (emphasis added).

In areas under the United States' exclusive jurisdiction, Congress has also used this phrase (and the key concept of "jurisdiction") to ensure state courts fall within a statute's grant or recognition of authority. For example, 16 U.S.C. § 372 establishes that territory within Hot Springs National Park is "under the sole and exclusive jurisdiction of the United States," but clarifies that "[n]othing in this section . . . shall be so construed as to forbid the service within said boundaries of any civil or criminal process of *any court having jurisdiction* in the State of Arkansas." (Emphasis added.) In other words, although federal district courts have jurisdiction in Arkansas, by using the scope-defining phrase "any court having *jurisdiction*," Congress intended to also include the state courts "having jurisdiction in the State of Arkansas." *See also* 16 U.S.C. § 24 (similar provision using similar language that applies within the boundaries of Yellowstone National Park and concerns "service in the park of any civil or criminal process of *any court having jurisdiction* in the States of Idaho, Montana, and Wyoming") (emphasis added).

That is not to say that Congress necessarily uses the phrase "any court having jurisdiction" to always include state courts. To the contrary, Congress understands quite well how to limit jurisdiction, and often provides federal courts, or even certain specified federal courts, with exclusive jurisdiction over certain subject matters, and similarly employs the phrase "any court having jurisdiction" to define certain powers and authorized actions. For example, Congress provided that the original jurisdiction of the federal district courts over copyright cases "shall be exclusive of the courts of the states," 28 U.S.C. § 1338(a), and then specified that "[a]ny court

having jurisdiction of a civil action" arising under the statutes would have authority to grant specific relief, including the issuance of injunctions and temporary restraining orders, 17 U.S.C. §§ 502(a), 911(a). Significantly, however, when Congress uses the "any court having jurisdiction" phrase, it intends the concept of established *jurisdiction* to define the scope of the powers granted or recognized; *any court* having jurisdiction falls within the statutes' scope.

B. The Idaho Supreme Court Opinion's Disregard of the Phrase "Any Court Having Jurisdiction" Undermines Congressional Intent in the EAJA and Threatens to Cause Mischief in Other Federal Statutes

As it has in at least twenty-eight other statutes, Congress used the phrase "any court having jurisdiction" to specify when a court has the power (subject to the other conditions of the EAJA not at issue in this case) to award attorneys' fees against the United States under Subsection (d)(1)(A) of the EAJA: "*a court* shall award to a prevailing party. . . fees and other expenses . . . incurred by that party *in any civil action* . . . brought by or against the United States *in any court having jurisdiction of that action.*" 28 U.S.C. § 2412(d)(1)(A) (emphasis added). As Congress' use of this phrase in this and other statutes demonstrates, Congress used this phrase to make plain that *any* court having jurisdiction over "any civil action" may – and indeed shall – award fees under the EAJA. *Cf. Burkhardt v. Gober*, 232 F.3d 1363, 1367 (Fed. Cir. 2000) ("We hold that the EAJA language in question, 'having jurisdiction of that action,' is plain, clear, and unambiguous. The words 'that action' clearly refer to the

preceding language in the EAJA reciting the 'civil action . . . brought by or against the United States.'") (quoting 28 U.S.C. § 2412(d)(1)(A)).

By disregarding the plain meaning of the scope-defining phrase "any court having jurisdiction" in the EAJA, the Idaho Supreme Court misinterpreted Subsection (d)(1)(A). Moreover, because (1) Congress has used the phrase "any court having jurisdiction" in other statutes, and (2) courts frequently look to interpretations of identical language when seeking to construe statutory language, the Idaho Supreme Court's misinterpretation of this phrase creates the risk that other courts in future cases may misinterpret the phrase in other contexts. That problem aggravates the harmful and far-reaching ramifications of the Idaho Supreme Court's decision with respect to the EAJA itself. (*See* Pet. at 25-26 (noting areas outside water rights litigation where parties frequently litigate with the United States, thus implying the broad impact of the Idaho Supreme Court's opinion).)

C. The Idaho Supreme Court's and United States' Reasons for Deviating From the EAJA's Plain Language Do Not Withstand Scrutiny

Rather than conclude that (1) because the Idaho state district court indisputably had jurisdiction over the action below involving the United States, (2) it follows that the state district court constituted a "court having jurisdiction of that action" under 28 U.S.C. § 2412(d)(1)(A), the Idaho Supreme Court instead focused on the term "court." (Pet. App. 34.) It noted the EAJA provides that the term "'[C]ourt' includes the United States Court of Federal Claims and the United States Court of

Appeals for Veterans Claims," and concluded that "[h]ad the Congress intended that the word 'court' also include state courts, it undoubtedly would have expressly included them." (*Id.* (quoting 28 U.S.C. § 2412(d)(2)(F).)

The Idaho Supreme Court's rationale that inclusion of these courts implies exclusion of state courts is deeply flawed for at least three reasons. First, under long-standing rules of statutory construction, use of the term "include" generally indicates extension or enlargement, rather than exclusion or limitation. *American Surety Co. v. Marotta*, 287 U.S. 513, 517 (1933).

Second, that general rule applies with even greater force here because, as the Petition explains (at 21-22), Congress' decision to specifically "include" certain courts arises from its desire to *expand* the EAJA, not to restrict it. *See Gumport v. Interstate Commerce Comm'n*, 178 B.R. 228, 232 (C.D. Cal. 1995) (explaining that "[t]he fact that § 2412(d)(2)(F) specifically includes the United States Court of Federal Claims and the United States Court of Veterans Appeals within the definition of 'court' does not militate in favor of a narrow definition of 'court'").

Third, when Congress uses the term "courts" more narrowly, it chooses *different* language to do so. *See, e.g., O'Connor v. United States Dep't of Energy*, 942 F.2d 771, 773 (10th Cir. 1991) (explaining that where Congress simply uses term "court" it intends the ordinary meaning because it knows how to "restrict the use of this provision" with limiting language). In particular, Congress has repeatedly used the term "court of the United States" to describe specific federal courts. *See* 28 U.S.C. § 451 (defining the term to include Article III courts); 28 U.S.C. § 1920 (authorizing the taxing of specified costs by a

"judge or clerk of any court of the United States"); 1 U.S.C. § 112 (mandating the publication of treaties and other international agreements of the United States and establishing such publications as legal evidence of the same "in all the courts of the United States . . . ."); 49 U.S.C. § 15904(d)(1) ("In addition to the district courts of the United States, ..."); *see also* 50 U.S.C. § 466(d) ("district court of the United States" is "deemed to include the courts of the United States for the Territories and possessions of the United States"). Given that Congress knows how to limit the term "courts," the fact that it chose not to use the defined term "court of the United States" in the EAJA – and that it instead invoked its well understood phrase "any court having jurisdiction" – confirms Congress did *not* intend to exclude state courts from the EAJA. *See O'Connor*, 942 F.2d at 774 ("had Congress meant to limit jurisdiction under § 2412(d)(1)(A) to 'any court of the United States,' it could have done so. Rather, the plain and unambiguous statutory language" applies to "any court").

The United States argued below that any waiver of sovereign immunity must be express, and that the McCarran Amendment, pursuant to which the United States waived its immunity in water rights litigation, does not provide a clear and unequivocal waiver with respect to attorneys' fees (and indeed specifically bars exaction of "costs"). This argument, however, overlooks that the EAJA specifically states that "*[e]xcept as otherwise specifically provided by statute*, a court shall award" attorneys' fees. 28 U.S.C. § 2412(d)(1)(A) (emphasis added). Because the McCarran Amendment specifically excludes *only* the recovery of costs, *but not attorneys' fees*, the EAJA itself provides the requisite clear and unequivocal waiver; the McCarran Amendment does *not*

include the "otherwise" exclusion necessary to trump the EAJA's rule concerning attorneys' fees.

The United States alternatively argued that a court may not award fees under the EAJA unless it may also award costs. The United States then reasoned that because the McCarran Amendment bars an award of costs, a state court cannot award fees under the EAJA. The EAJA, however, provides that fees shall be awarded "in addition to costs." To say that fees are "in addition to costs" means that the recovery of attorneys' fees will be *added* to the recovery of costs (if any), not that fees shall be awarded *only if* costs are awarded. *See The American Heritage Dictionary of the English Language* (4th ed. 2000) (defining "addition" as "[t]he act or process of adding, especially the process of computing with sets of numbers so as to find their sum"). Stated differently, in this case, any award of attorneys' fees under the EAJA will be "in addition" to the zero award of costs pursuant to the McCarran Amendment. Had Congress intended by the McCarran Amendment to also preclude an award of fees, it would have so stated.

II. The Idaho Supreme Court Opinion Undermines Congress' Indirect Oversight of the Executive Branch, Thereby Exposing Small Businesses and Others to Unjustified Government Action

The Idaho Supreme Court's opinion has exposed small businesses and individuals like Amici's members to an increased risk of unjustified government action, directly contrary to Congress' purpose in enacting the EAJA. As the Petition explains (at 20-24), Congress enacted the EAJA to provide small businesses and individuals a means to combat unreasonable governmental action, and

Congress' concerns were well grounded. When Congress permanently enacted the EAJA it had before it "evidence that small businesses are the target of [governmental] agency action precisely because they do not have the resources to fully litigate the issue." Report of the Committee on the Judiciary of the United States Senate on S. 919, Report 98-586, at 6 (1984).

By enacting the EAJA, Congress thus in effect established a mechanism of indirect oversight over the executive branch by making the United States accountable in cases involving unwarranted government litigation. It further recognized "that the expense of correcting error on the part of the Government should not rest wholly on the party whose willingness to litigate or adjudicate has helped to define the limits of Federal authority." *Id.*

In light of Congress' concerns and goals, the state court/federal court distinction drawn by the Idaho Supreme Court makes no sense. Indeed, it would be utterly irrational for Congress to restrain the Department of Justice in federal courts, while leaving it free to pursue substantially unjustified litigation without penalty in state courts. Such a distinction would guarantee forum shopping, and it cannot be squared with the EAJA's 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." *Id.* Simply put, the basic unfairness the EAJA sought to remedy exists equally in both federal courts *and* state courts.

CONCLUSION

Amici urge the Court to take review and clarify the conflicting decisions concerning the meaning of the phrase

"any court having jurisdiction" in the EAJA. The Idaho Supreme Court's interpretation of the statute has undermined the regulatory function Congress intended the EAJA to exercise over those litigating on the government's behalf, thereby exposing Amici's members and others to unwarranted government action in state courts.

Respectfully submitted,

BY_____

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