No. ____

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

PETITION FOR A WRIT OF CERTIORARI

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

Counsel for Petitioner

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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, as four circuits have held, or does EAJA limit reimbursement for paralegal services to cost only, as the Federal Circuit panel majority below held?

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INTRODUCTION

Petitioner Richlin Security Service Company respectfully petitions this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Federal Circuit. The petition presents the question whether the services provided by paralegals working under the direction of an attorney are compensable as "attorney fees" at market rates under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 and 28 U.S.C. § 2412(d), as four circuits have held, or whether such services are recoverable only at cost, as the Federal Circuit held below.

This Court has held that paralegal services are compensable at market rates under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, if such services are generally billed separately to clients in the relevant legal market. *See Missouri v. Jenkins*, 491 U.S. 274, 285-89 (1989). The Court has also held repeatedly that similar provisions in federal fee-shifting statutes should generally be interpreted the same. *See, e.g., City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989). In light of the division among the courts of appeals, and the Federal Circuit's failure to follow *Jenkins*, the petition should be granted.

OPINIONS BELOW

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 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. 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 in adversary administrative proceedings or in court against the United States.

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

A. The Equal Access To Justice Act

In general, EAJA provides that "fees and other expenses" shall be awarded to eligible parties who have prevailed in adversary administrative adjudications and in litigation 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). "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"). The amount of fees awarded "shall

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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 Richlin's fee application at issue here sought recovery for fees incurred in a proceeding 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 petition to provisions of section 504 are accompanied by citations to the corresponding provisions of section 2412(d).

be based on prevailing market rates," subject to a dollar per-hour cap, adjusted for increases in the cost of living. 5 U.S.C. § 504(b)(1)(A)(ii); 28 U.S.C. § 2412(d)(2)(A). A business is eligible for fees if its net worth does not exceed $7 million and it had 500 or fewer employees at the time that the action was filed. 5 U.S.C. § 504(b)(1)(B); 28 U.S.C. § 2412(d)(2)(B).

B. Administrative Proceedings

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 they were owed. *Id.* at 1298 (citing *Richlin Sec. Serv. Co. v. Rooney*, 18 F. App'x 843, 844-45 (Fed. Cir. 2001)). Following lengthy proceedings before both the Department of Transportation Board of Contract Appeals (the Board) and the Court of Appeals for the Federal Circuit, the Board awarded Richlin the amount of the additional wages, payroll taxes, and workers compensation premiums that Richlin was required to pay. Pet. App. 3a.

After prevailing on the merits, Richlin sought an award of attorney 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 Richlin'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 approximately 300 hours of compensable paralegal time. *See id.*

C. Federal Circuit Proceedings

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, 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 *Zipes*, 491 U.S. at 758 n.2). The majority nevertheless distinguished EAJA from section 1988, largely on the ground that the former contemplates an award of "expenses," which could be said to include 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 Federal Circuit majority expressly rejected the Eleventh Circuit's contrary decision in *Jean v. Nelson*, 863 F.2d 759, 778 (11th Cir. 1988), *aff'd on other issue, Comm'r, INS v. Jean*, 496 U.S. 154 (1990), which held that paralegal time is compensable at market rates under EAJA. *See* Pet. App. 12a-13a; *see also id.* at 55a.

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 also 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); *see also id.* (pointing out that panel majority's rationale "echoes the view of the lone dissenter on this issue in *Jenkins*.").

Richlin petitioned for rehearing en banc. Invoking Federal Rule of Appellate Procedure 35(b)(1)(B), the petition explained that, in addition to the acknowledged conflict with the Eleventh Circuit, the Federal Circuit's ruling had also opened up a conflict with decisions of the Fourth, Eighth, and D.C. Circuits. The petition also noted that a Senate Judiciary 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 petition for rehearing in a supplemental opinion. Pet. App. 54a. The panel majority again acknowledged the direct conflict with the Eleventh Circuit's

decision in *Jean v. Nelson*. *See id.* at 55a. But it played down the significance of the rulings from the three other circuits, saying that although two of them expressly relied on *Jean* and all three referred to recovery for paralegal services "as fees," *id.*, they appeared to be deciding whether paralegal services are compensable at all, not whether they are fees compensable at market rates under EAJA. *Id.* As for the purported legislative history, the supplemental opinion acknowledged that the committee report relied on by the panel majority 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 from the supplemental opinion "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.

REASONS FOR GRANTING THE WRIT

A. The Federal Circuit's Decision Creates A Division Among The Federal Courts Of Appeals On An Important Issue Of Federal Law.

1. The panel majority below acknowledged that its decision directly conflicts with the Eleventh Circuit's decision in *Jean v. Nelson*, which held that EAJA authorizes recovery of market-rate attorney fees for paralegal services. 863 F.2d at 778. In so holding, the Eleventh Circuit expressly rejected the very argument adopted by the Federal Circuit below – the government's contention "that paralegal time is recompensable only at the actual cost to the plaintiffs' counsel." *Id.* Presaging this Court's efficiency rationale in *Missouri v. Jenkins*, the Eleventh Circuit explained that "[t]o hold otherwise would be

counterproductive because excluding reimbursement for such work might encourage attorneys to handle entire cases themselves, thereby achieving the same results at a higher overall cost." *Id.*; *see Jenkins*, 491 U.S. at 288 (compensating paralegal services is "not only permitted by § 1988, but also makes economic sense.").

As noted above, three other circuits – the Fourth, Eighth, and D.C. – have come to the same conclusion as the Eleventh: that paralegal services are compensable at market rates under EAJA. *See Role Models America, Inc. v. Brownlee*, 353 F.3d 962, 974 (D.C. Cir. 2004); *Hyatt v. Barnhart*, 315 F.3d 239, 255 (4th Cir. 2002); *Miller v. Alamo*, 983 F.2d 856, 862 (8th Cir. 1993).[2]

The Federal Circuit's acknowledgment that the Fourth and Eighth Circuit decisions relied on *Jean* and that all three decisions referred to compensable paralegal services as "fees" is sufficient to demonstrate the deeper conflict among the circuits. After all, reliance on *Jean* necessarily embraces the notion that compensation should be based on market rates, since the efficiency created by market-rate recovery of paralegal services was *Jean*'s fundamental rationale. *See Jean*, 863 F.2d at 778. And, by referring to compensation for paralegal

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[2]*Miller* was decided under the Internal Revenue Code's counterpart to EAJA, 26 U.S.C. § 7430, which is analogous to EAJA in all relevant respects. Thus, *Miller* relied on EAJA precedents, *see* 983 F.2d at 861-62, and the Eighth Circuit has subsequently awarded fees for paralegal services under EAJA, as the Federal Circuit acknowledged in its supplemental opinion below. *See* Pet. App. 55a (citing *Stockton v. Shalala*, 36 F.3d 49, 50 (8th Cir. 1994)).

The Seventh Circuit has also stated unambiguously that "[f]ees for work done by paralegals can be awarded under the fee shifting provision of the EAJA," but that statement was dictum because fees were denied in their entirety on other grounds. *See Krecioch v. United States*, 316 F.3d 684, 687 (7th Cir. 2003).

services as "fees," the other three circuits were presumably relying on the part of EAJA that ties the proper method of calculating "fees" to "market rates," *see* 5 U.S.C. § 504(b)(1)(A) ("The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished . . ."), which is directly at odds with the Federal Circuit's basic holding that paralegal services are cost-based "expenses," *not* "fees."

The Federal Circuit majority nevertheless maintained that the decisions of the Fourth, Eighth, and D.C. Circuits stand only for the proposition that paralegal services are compensable on some basis, leaving the possibility that, in those circuits, such services may be compensable at cost only. If it were correct that some or all of these circuits concurred with the Federal Circuit, or had found paralegal services compensable but had not been clear on whether they were "fees," that would mean only that the circuit split was differently configured or more confused, neither of which would be a reason not to resolve it.

But the Federal Circuit was not correct. Analysis of the three circuit court decisions leaves no doubt that they conflict directly with the decision below. In *Miller*, the Eighth Circuit explicitly relied on *Jean*'s market-based rationale and explained that "[w]ork 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." 983 F.2d at 862 (citing *Jean*, 863 F.2d at 778). The court allowed the award "at a *rate* of $40 per hour," *id.* (emphasis added), which is language referring to market-based fees, not to the overhead cost for a paralegal. Likewise, in *Hyatt*, the Fourth Circuit held that "paralegal time" is compensable as "fees" under EAJA, also relying on *Jean*. *See* 315 F.3d at 255. In addition, both *Miller*

and *Hyatt* considered the fee applicant's claim for cost-based out-of-pocket reimbursement in parts of their opinions distinct from their discussions of paralegal services, thus underscoring that such services were considered a part of market-rate "fees," and not merely reimbursable at cost. *See Hyatt*, 315 F.3d at 256; *Miller*, 983 F.2d at 862.[3]

Finally, in *Role Models*, the D.C. Circuit rejected the government's claim that paralegal services are not compensable and expressly 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). Indeed, the court analyzed at some length the "hourly rates" requested "for the non-lawyers, including the legal assistants and the law clerk" and cut those rates by 25% because the fee applicant had failed to provide evidence of "prevailing market rates," *id.* at 969-70, which would have made no sense if the court were treating paralegal services as awardable only at cost. And, as in *Miller* and *Hyatt*, the court analyzed the fee applicant's entitlement to out-of-pocket reimbursement in a portion of the opinion entirely separate from its discussion of paralegal fees. *See id.* at 974-75.

Beyond opening up a 4-to-1 split among the courts of appeals, the Federal Circuit's decision is at odds with dozens of lower court decisions that reflect a general practice throughout

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[3]Moreover, the rate awarded in *Miller* – $40 per hour – and the time and place of the award underscore that *Miller* endorsed market-rate awards for paralegal services. *Miller* involved a dispute in Arkansas before 1991 (when the Eighth Circuit appeal was filed). The $35 per hour "cost" award affirmed by the Federal Circuit here was based on paralegal salaries in 2006 in Washington, D.C. It is not possible that the overhead cost of paralegal services in Arkansas before 1991 was greater than the overhead cost of such services in Washington, D.C. in 2006. Therefore, *Miller* must have involved a market-rate award.

the country: Market-rate EAJA fees are awarded for paralegal services when doing so mirrors billing practices in the relevant legal market.[4]

2. Taken together, the decisions of other federal courts render the Federal Circuit's ruling a distant outlier. Although the presence of one outlier is sometimes properly ignored in assessing whether this Court's review is warranted, this one should not be. Because of the Federal Circuit's caseload and the nature of the tribunals over which the Federal Circuit exercises precedential authority, its EAJA rulings have a very significant impact. The Federal Circuit's docket is weighted heavily toward cases involving the federal government. *See* U.S. Court of Appeals for the Federal Circuit, Adjudications by Merits Panels, by Category, FY 2006, *available at* http://www.fedcir.gov/pdf/ChartAdjudications06.pdf (about 60% of all Federal Circuit merits panel adjudications involve administrative or monetary claims by private parties against the federal government). Thus, not surprisingly, the Federal Circuit has issued reported decisions in literally dozens of EAJA cases involving a wide array of disputes between private parties and

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[4]*See, e.g., Colegrove v. Barnhart*, 435 F. Supp. 2d 218, 220-21 (W.D.N.Y. 2006); *Former Employees of Tyco Electronics, Fiber Optics Div. v. United States*, 350 F. Supp. 2d 1075, 1093-94 (C.I.T. 2004); *Samuel v. Barnhart*, 316 F. Supp. 2d 768, 780-82 (E.D. Wis. 2004); *Sorenson v. Concannon*, 161 F. Supp. 2d 1164, 1176 (D. Or. 2001); *DiGennaro v. Bowen*, 666 F. Supp. 426, 431 (E.D.N.Y. 1987) (noting that "EAJA awards have repeatedly been allowed for services rendered by paid law students, law clerks and paralegals assisting attorneys" and citing six reported cases); *Holden v. Bowen*, 668 F. Supp. 1042, 1048 (N.D. Ohio 1986) (awarding market rates and expressly rejecting argument to limit award to cost); *see also Bullfrog Films, Inc. v. Catto*, 815 F. Supp. 338, 343 n.8 (C.D. Cal. 1993) (noting that paralegal services are "routinely compensated under the EAJA"). *Contra Glick v. U.S. Civil Service Comm'n*, 567 F. Supp. 1483, 1486 n.5 (N.D. Ill. 1983).

the federal government.[5]

The Federal Circuit has appellate jurisdiction over federal administrative tribunals, such as (in this case) agency Boards of Contract Appeals, and over Article I courts, such as the Court of Federal Claims and the Court of Appeals for Veterans Claims (CAVC), which hears veterans' disability claims. *See* 28 U.S.C. § 1295(1)-(14) (listing types of appellate jurisdiction lodged in the Federal Circuit, including appeals from Court of Federal Claims, Merit Systems Protection Board, and agency Boards of Contract Appeals); 38 U.S.C. § 7292 (providing Federal Circuit jurisdiction over appeals from CAVC); *see also* 38 U.S.C. § 502 (providing judicial review in Federal Circuit of Department of Veterans Affairs regulations). Cases from all of those agencies and courts involve the federal government and all are potentially subject to EAJA.

To use one example, in 2006 alone, the CAVC disposed of 1152 EAJA applications, granting 1105 of them. *See* CAVC Annual Reports, *available at* www.vetapp.gov/documents/Annual_Reports.pdf. And, before the decision below, the CAVC regularly awarded fees for paralegal services at market rates – a practice that now will change unless the decision

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[5]*See, e.g., Scarborough v. Principi*, 541 U.S. 401 (2004) (review of Federal Circuit fee decision arising from veteran's disability claim); *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371 (2002) (defining "prevailing party" status in case arising from Board of Contract Appeals); *Jones v. Brown*, 41 F.3d 634 (Fed. Cir. 1994) (concerning authority of Court of Veterans Claims to award EAJA fees); *Essex Electro Engin'rs, Inc. v. United States*, 757 F.2d 247 (Fed. Cir. 1985) (concerning authority of Claims Court to award EAJA fees); *Olsen v. Dep't of Commerce*, 735 F.2d 558 (Fed. Cir. 1984) (concerning authority of Federal Circuit to award fees in Back Pay Act appeals from Merit Systems Protection Board).

below is reversed.[6]

The decision below is significant not only because it was issued by the Federal Circuit, with authority over large dockets of cases in which the federal government is a party, but also because the use of paralegals – billed at hourly market rates – is a nearly ubiquitous feature of modern law practice and has been for some time. *See Jenkins*, 491 U.S. at 289 & n.11 (noting that "[s]uch separate billing appears to be the practice in most communities today" and relying on survey of members of national paralegal association).[7] In sum, the Federal Circuit's decision will affect thousands of EAJA fee proceedings both in that court and in the many courts and administrative tribunals over which the Federal Circuit has appellate authority. Review is therefore warranted.

B. The Federal Circuit's Decision Is At Odds With This Court's Decision In *Missouri v. Jenkins* And The Text And Structure Of EAJA.

1. As explained above, in *Missouri v. Jenkins*, 491 U.S.

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[6]*See, e.g., Scarborough v. Nicholson*, 19 Vet. App. 253, 267 (Vet. App. 2005); *Perry v. West*, 11 Vet. App. 319, 331 (Vet. App. 1998); *Adams v. Gober*, 2000 WL 1784504 (Vet. App. 2000).

[7]*See also, e.g., Jacobs v. Mancuso*, 825 F.2d 559, 563 & n.6 (1st Cir. 1987); *Ramos v. Lamm*, 713 F.2d 546, 558-59 (10th Cir. 1983); Am. Bar Ass'n, *Model Guidelines for the Utilization of Paralegal Services* (2004), Guideline 8 & comment thereto, *available at* http://www.abanet.org/legalservices/paralegals/downloads/modelguidelines.pdf (authorizing lawyers to charge market-rate fees for paralegal services, relying in part on *Jenkins*); U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook – Paralegals and Legal Assistants* (2007), *available at* http://www.bls.gov/oco/pdf/ocos114.pdf (describing extensive use of paralegals in most facets of law practice and noting that employment for paralegals "is projected to grow much faster than the average for all occupations through 2014.").

274, the Court considered the compensability of paralegal services as "attorney's fees" under 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. The Court then turned to the question of how those 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). Therefore, the Court held, "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)).

Jenkins applies with full force to EAJA. First, the statutory term "attorney fees" used in EAJA is nearly identical to the term "attorney's fee" construed in *Jenkins*, and, as noted above, the Court has frequently held that similar or identical language in various fee-shifting statutes should generally be construed the same. *Dague*, 505 U.S. at 562; *Zipes*, 491 U.S. at 758 n.2; *see also* 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)). Moreover, EAJA states 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); *accord* 28 U.S.C. § 2412(d)(2)(A), while 42 U.S.C. § 1988, the statute at issue in *Jenkins*, authorizes only "reasonable" attorney's fees. If anything, then, a Congress that explicitly required the use of "prevailing market rates" would have been more, not less, likely to have intended that compensation for paralegal services track the market than a Congress that desired only that a fee be "reasonable."

To be sure, if paralegal services have been billed at cost, then they should be reimbursed in that manner under EAJA. *See Jenkins*, 491 U.S. at 285. But if they are billed on an hourly, market-rate basis (as they almost invariably are in modern legal practice), they should be compensated at "prevailing market rates," as the statute provides and *Jenkins* instructs. The Federal Circuit's decision, on the other hand, runs headlong into EAJA's "market rate" language and *Jenkins* by providing that paralegal services must invariably be reimbursed at cost only, even when the market treats paralegal services otherwise.

2. The Federal Circuit majority departed from *Jenkins*' approach and focused on the fact that EAJA authorizes an award of "expenses," in particular on the notion 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."); Pet. App. 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."). And, with that purported 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's analysis misreads 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" is 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's 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 rate. *See also Marek v. Chesny*, 473 U.S. 1, 9 (1985) (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" simply begs the questions – questions already answered in *Jenkins* – as to whether the statutory term "attorney fees" includes paralegal services, and, if so, whether fees for such services may be awarded at market rates.[8]

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[8]Moreover, the panel'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., W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 87 n.3 (1991) (noting that courts have

(continued...)

3. The Court's decision in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), strongly supports the position 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. In holding that expert witness fees are not compensable "attorney's fees" under section 1988, *Casey* rejected the plaintiff's reliance on *Jenkins* as 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. Instead, 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.* That textual reading of the term "attorney's fees" in section 1988 is equally 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

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[8](...continued)
held that "'reasonable out-of-pocket expenses incurred by the attorney' [are] included in § 1988 'attorney's fee' award") (quoting *Northcross v. Board of Ed. of Memphis Schools*, 611 F.2d 624, 639 (6th Cir. 1979)); *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, if this Court in *Jenkins* had believed that paralegal expenses should be reimbursed at cost, it would have had ample basis to order them treated similarly to the out-of-pocket expenses routinely awarded as "attorney's fees" under section 1988.

reference to "attorney's fees" alone authorized an award of expert fees even though it did not mention them. 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 noted 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 section 1988, EAJA "make[s] no separate mention of clerks or paralegals." *Id.*[9]

4. The Federal Circuit eschewed *Jenkins*' follow-the-market approach 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.

First, as explained above, the report's reference to paralegal services as an "expense" tells us nothing about whether those services should be valuated at market rates or at cost, since all items compensable under EAJA are "expenses." Moreover, the

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[9]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 section 1988, makes no separate mention of paralegal services and thus incorporates those services within the term "attorney fees."

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.

In any event, the Federal Circuit majority's reliance on supposed "legislative history" fails for a more fundamental reason. 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 acknowledged later in its supplemental opinion, *id.* at 56a n.2, EAJA was made permanent by the 99th Congress in 1985, and "[n]o Senate Report was submitted with th[e] 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.

If legislative history may ever serve as legitimate evidence of congressional intent, it may do 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 plainly did not occur with respect to the 1984

report cited by the majority. The Federal Circuit's assertion that the Senate report is "pertinent" nonetheless because the President's veto reflected concern about a topic other than paralegal services and that the enacted 1985 legislation was otherwise "nearly identical" to the failed 1984 legislation, *see* Pet. App. 56a n.2, is a non sequitur: Its defense of the 1984 report does not attempt to justify 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.

5. Our position comports with *Jenkins*' view that relying on market forces "encourages cost-effective delivery of legal services," as Senior Judge Plager noted in dissent. Pet. App. 23a; *accord Miller*, 983 F.2d at 862; *Jean*, 863 F.2d at 778. The majority below claimed that this rationale does not apply to EAJA in light of EAJA's cap on hourly rates. Pet. App. 18a. In its view, if market rates are awarded for paralegal services, the cap will cause the EAJA rates of paralegals to approach those of lawyers, inducing overuse of paralegals and promoting inefficiency.

This argument founders on multiple fronts. First, the Federal Circuit's approach failed to recognize that the issue before it was one of statutory construction, not economic theory. And "[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). Thus, the efficiency rationale should be evaluated not by asking what would promote perfect competition in today's legal economy, but what Congress meant in requiring use of "prevailing market rates" (subject to a dollar-per-hour cap) when it enacted and

reenacted EAJA in 1980 and 1985, respectively. In those days, market rates for paralegals were far below the EAJA cap – which was then $75 per hour plus adjustments from the date of enactment for increases in the cost of living. *See, e.g., Burt v. Heckler*, 593 F. Supp. 1125, 1133 (D.N.J. 1984) ($25 per hour for paralegal services); *Holden*, 668 F. Supp. at 1048 ($30 per hour); *DiGennaro*, 666 F. Supp. at 433 ($25 per hour and citing similar cases); *In re Chicken Antitrust Litig.*, 560 F. Supp. 963, 972, 975 (N.D. Ga. 1980) ($25 per hour). Thus, there is every reason to think that Congress believed that the use of paralegals was highly efficient and no reason to think that Congress was envisioning a world in which paralegal rates and (capped) lawyer rates had converged.[10]

Second, even today, in much of the country, paralegal rates are well below the EAJA inflation-adjusted cap (now about $160 per hour) at which lawyers' time is generally compensated. *See, e.g., Scarborough*, 19 Vet. App. at 267 (award for paralegal services at $60 per hour and lawyers' services at $133 to $155 per hour).

Finally, the panel majority erred in any event by focusing solely on the supposedly distorted incentives produced by the EAJA cap as opposed to market incentives more generally. Quite apart from EAJA, law firms use paralegals because doing so enables the firms to provide their overall product – legal services – at a lower overall cost to their clients. In cases subject to EAJA, if paralegal services are recoverable only at cost, all other things being equal, firms will be less likely to use paralegals, and more likely to use lawyers, than would be the

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[10]The efficiency rationale for use of paralegals was well understood at the time of EAJA's enactment. *See 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.").

case if paralegal services were compensable at market rates, undermining the efficiency that use of paralegals is intended to achieve. Thus, even if, in light of the cap, EAJA fees do not fully replicate the market, prohibiting market-rate recovery for paralegal services, as did the Federal Circuit, would further distort the market and promote the inefficiency rejected by this Court in *Jenkins*.

CONCLUSION

The petition for a writ of certiorari should be granted.

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

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Counsel for Petitioner