No.

IN THE

Supreme Court of the United States

OSCAR LOPEZ,

Petitioner,

v.

MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL SECURITY

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Dated: October 22, 2007

QUESTION PRESENTED

This case presents a recurring question in suits against the United States in which the prevailing plaintiff seeks to recover attorneys fees under the Equal Access to Justice Act ("EAJA"): whether in adjusting the nationwide hourly-rate cap (now $125) to reflect "an increase in the cost of living," district courts must use the Consumer Price Index for All Urban Consumers ("CPI-U") in their calculations.

The Fifth Circuit has answered the question "no," holding that district courts must instead adjust the rate cap based on factors unique to "the locale" in which the district court sits. This decision conflicts with those of other federal courts, including the Third, Fourth, and Ninth Circuits, as well as the Federal Court of Claims. All of them have held that the CPI-U should be controlling. Petitioner contends that this is the correct interpretation of the EAJA.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Oscar Lopez was the appellant in the Court of Appeals and the prevailing plaintiff in the district court.

Respondent Michael J. Astrue, Commissioner of Social Security, was the appellee in the Court of Appeals and the defendant in the district court.

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Oscar Lopez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The recommendation of the magistrate judge, which is unpublished, is reprinted in Appendix D.

The magistrate's order on reconsideration, which is unpublished, is reprinted in Appendix C.

The district court's order overruling Plaintiff's objection to the magistrate's recommendation, which is unpublished, is reprinted as Appendix B.

The Fifth Circuit's opinion affirming the EAJA award, which is unpublished, is reprinted as Appendix A. It is reported at 236 Fed.Appx. 106, 2007 WL 2114623, and 121 Soc.Sec.Rep.Serv. 207.

JURISDICTION

The Fifth Circuit issued its opinion on July 24, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2412(d)(1)(A) of Title 28 of the United States Code provides, in pertinent part:

> "Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses ...

Section 2412(d)(2)(A) of Title 28 of the United States Code provides, in pertinent part:

> "fees and other expenses" includes ... reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates of the kind and quality of the services furnished, except that ... (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.);"

STATEMENT OF THE CASE

After prevailing on his disability claim against the Social Security Administration, Mr. Lopez moved to

recover his attorney fees under the EAJA. He sought to be reimbursed for 54.9 hours of work by his attorneys at an hourly rate of $156.25. The government conceded that a fee award under the EAJA was appropriate, but objected to the number of hours. The magistrate, however, determined that all of Lopez's requested hours were reasonable except .25 hours, which he eliminated. Neither party complained on appeal about the number of hours awarded.

Because the market rates for Lopez's lawyers were greatly in excess of EAJA's national rate cap of $125 per hour, a point not disputed below, Lopez asked the district court to raise the rate cap to $156.25 due to "an increase in the cost of living." 28 U.S.C. § 2412(d)(2(A)(ii). Lopez did not argue that a "special factor ... justifies a higher fee." *Id.*

Lopez's only inflation evidence consisted of U.S. government data comparing the national Consumer Price Index for All Urban Consumers (the CPI-U) when the national rate ceiling was raised to $125 (March, 1996)[1] to the CPI-U at the time Plaintiff's civil action was commenced. The supporting data were taken from the website of the Bureau of Labor Statistics (BLS). Lopez asked the district court to raise the cap accordingly.

The government put forth no inflation evidence of its own. Nor did it counter Lopez's assertion that the change in the national CPI-U is the proper way to calculate "an increase in the cost of living." In fact, the government did not oppose the hourly-rate re-

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[1] *See Mannino v. West*, 12 Vet.App. 242, 243 (1999) *citing* Pub. L. No. 104-121, §232, 110 Stat. 841, 863 (1996) (codified at 28 U.S.C. §2412(d)(2)(A).

quest in any fashion. This may be due to the fact that the inflation-adjustment methodology Lopez used is the same one the Social Security Administration has successfully advocated in other jurisdictions. *See, e.g., Quint v. Barnhart*, 2006 WL 1495004 (D.Me.) (unpublished) ("I agree with the [C]ommissioner ... that cost-of-living adjustments to attorney fees awarded pursuant to the EAJA should be made with reference to a national index, specifically, the CPI-U-ALL").

In any event, the magistrate recommended a reduction in the requested hourly rate from $156.25 to $140.00 per hour, giving the following explanation:

> [T]his court finds that the appropriate rate in this case in the Abilene Division of the Northern District of Texas "to ensure adequate representation for those who need it and to minimize the costs of the representation to the taxpayers" pursuant to *Baker* is currently $140. This is an increase in the uniform rate that the court has previously determined to be reasonable and appropriate in the San Angelo and Abilene Divisions. The court finds that a further increase in the rate at this time is not necessary to ensure an adequate source of representation.

App. D5-D6.

The City of Abilene, which lies approximately 180 miles due west of Dallas/Fort Worth, has a population of 115,930.[2] Lopez's lawyers both live and work in Dallas. The Bureau of Labor Statistics publishes no cost-of-living data for Abilene. Nor does the magistrate's order cite any cost-of-living statistic, point to

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[2] *See* City of Abilene website, http://www.abilenetx.com/About/index.htm

any evidence relevant to inflation, or offer any further explanation for the $140 figure, which he seems to have chosen arbitrarily.

The magistrate's reference to "*Baker*" denotes *Baker v. Bowen*, 839 F.2d 1075 (5th Cir. 1988), the controlling Fifth Circuit authority on the question of how hourly rates are to be determined under EAJA. *Baker* acknowledges that the rate should usually be increased "if there is a significant difference in the cost of living since 1981 in a particular *locale* that would justify an increase in the fee," 839 F.2d at 1084 (emphasis added), but it endorses no cost-of-living index and makes clear that no index need be followed.

Plaintiff objected to the magistrate's hourly-rate finding. He argued that, given that it was undisputed that the market rate for Lopez's lawyers was far higher than the EAJA's rate cap adjusted for inflation, and given that the magistrate had determined that "an increase in the cost of living" justified a award of above the cap, his failure to award a full inflation adjustment commensurate with the change in the national CPI-U was contrary to § 2412(d)(2)(A). Lopez also pointed out that the $140 rate had no evidentiary support, and that the magistrate's order did not explain how this figure was derived, and pointed to no supporting data that would permit meaningful appellate review.

The district judge overruled the objection and adopted the magistrate's recommendation. App. B. He noted that he was bound to follow *Baker*. He also pointed out that the Fifth Circuit had recently reaffirmed it in a case that originated in his court, approving an even lower hourly rate. App. B2 *citing Yoes v. Barnhart*, 467 F.3d 426 (5th Cir. 2006).

Lopez appealed to the Fifth Circuit, which affirmed. Its opinion is very short, doing little more than reiterating the rule of *Baker* and noting that the Fifth Circuit recently reaffirmed *Baker* in *Yoes*.

Lopez petitions for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THE PLAIN MEANING OF THE EAJA, WITH DECISIONS OF THIS COURT, AND WITH DECISIONS OF AT LEAST FOUR OTHER CIRCUITS AND THE FEDERAL COURT OF CLAIMS.

Section 2412(d)(2)(A)(ii) imposes a uniform $125 cap on hourly rates throughout the nation. The EAJA does not define "cost of living," but the common meaning is well known. "Cost of living is usually measured by the Consumer Price Index (CPI)."[3] The CPI is "[w]idely used to measure changes in [the] cost of maintaining [a] given standard of living."[4] Although there are several CPI statistics, "the media usually focus on the broadest, most comprehensive one: *the Consumer Price Index for All Urban Consumers (CPI-U) for the U.S. City Average for All Items,*

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[3] BLACK'S LAW DICTIONARY (5th Ed. 1979) (defining of "Cost of living clause").

[4] BLACK'S LAW DICTIONARY (5th Ed. 1979) (defining "Consumer Price Index").

"From the time subsection 2412(d) first became effective on October 1, 1981, almost every court that has applied this subsection has held, albeit without debate on the specific issue, that "cost of living" has this ordinary meaning and is properly measured by the Consumer Price Index." *Harris v. Sullivan*, 968 F.2d 263, 265 (2d Cir. 1992) (canvassing cases).

1982-84=100."[5] This is the "Official CPI."[6] The CPI-U "represents about 87 percent of the total U.S. population and is based on the expenditures of all families living in urban areas."[7] Although the BLS also gathers data for several regions and 26 metropolitan areas, it does so less frequently and using smaller samples.[8] The Bureau "strongly recommends that users adopt the U.S. City Average CPI for use in [price-change] escalator clauses."[9] This is because "metropolitan area and other sub-components of the national indexes (regions, size-classes) often exhibit greater volatility than the national index."[10]

A. The Existence of a Circuit Conflict is Judicially Recognized.

"[C]ourts confronting this issue [of quantifying "an increase in the cost of the living" under EAJA] have split on the question whether usage of national, regional or local CPI-U charts is appropriate." *Quint v. Barnhart*, 2006 WL 1495004 (D.Me.) *citing Jawad v. Barnhart*, 370 F.Supp.2d 1077, 1083-85 (S.D.Cal. 2005) (canvassing case law); *see also Mannino v. West*, 12 Vet.App. 242, 243 (Vet.App. 1999) (same).

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[5] Bureau of Labor Statistics, FAQ No. 13, http://www.bls.gov/cpi/cpifaq.htm.

[6] *Id*

[7] *Id.*

[8] Bureau of Labor Statistics, "How to Use the Consumer Price Index for Escalation," http://www.bls.gov/cpi/cpi1998d.htm. (Last Modified Date: October 16, 2001)

[9] Bureau of Labor Statistics, "How To Use The Consumer Price Index For Escalation," http://www.bls.gov/cpi/cpi1998d.htm. (Last Modified Date: October 16, 2001)

[10] *Id.*

The Fifth Circuit in *Yoes* acknowledges the existence of a circuit conflict, but on the ostensible basis that "the Eighth Circuit's reasoning applies in our Circuit with less force," declines "to adopt their rule." *See Yoes,* 467 F.3d at 427. The Eighth Circuit rule, as well as those of other circuits and jurisdictions, are set forth in more detail below.

B. The Fifth Circuit's Locale-Based Approach, Requiring District Courts To "Minimize The Costs of Representation to the Taxpayers," Conflicts With This Court's Decisions in *INS v. Jean.*

In *Baker*, the Fifth Circuit acknowledges that an hourly rate above the cap should "usually" be awarded "if there is a significant difference in the cost of living since 1981 in a particular *locale* that would justify an increase in the fee," 839 F.2d at 1084 (emphasis added). No particular inflation index need be followed, however. *Id.* Instead the district court must conduct an individualized locale-based inquiry in which inflation is simply one factor. The resulting rate must serve what the Fifth Circuit describes as EAJA's "dual purpose: to ensure adequate representation for those who need it and to *minimize* the costs of this representation to taxpayers." 839 F.2d at 1083 (emphasis added). The rate so determined is applied uniformly throughout the locale to all EAJA cases of the same type (e.g., Social Security cases), without regard to whether a particular lawyer's market rate is lower or higher. The choice of hourly-rate "is within the discretion of the district court."

"Minimize" is a strong word meaning "to decrease to the least possible amount."[11] The Fifth Circuit's insistence that "minimiz[ing] the costs of the representation to the taxpayers" is not only a purpose of the EAJA, but one that district courts *must* consider in determining the size of cost-of-living adjustments has no basis in the statute's language. It is also contrary to this Court's unanimous decision in *INS v. Jean*, 496 U.S. 154 (1990), describing EAJA's purpose to be roughly the opposite:

> "The Government's general interest in protecting the federal fisc is subordinate to the specific statutory goals of encouraging private parties to vindicate their rights and "curbing excessive regulation and the unreasonable exercise of Government authority."

Jean, 496 U.S. at 164-65. *Jean* teaches that what is at stake in a case covered by the EAJA is not one individual's injustice, but the validity of the underlying policy, regulation, or ruling being challenged. Congress enacted EAJA to encourage thorough "adversarial" testing in court of such actions by federal agencies, particularly when brought by claimants "for whom cost may be a deterrent to vindicating their rights." H.R.Rep. No. 96-1418, p. 10 (1980), *as quoted in Jean*, 496 U.S. at 165, n. 14.

Inflation adjustments are crucial to furthering EAJA's true purpose, described in *Jean*. The rate cap

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[11] Minimize: "1. to reduce to a minimum; decrease to the least possible amount, degree, etc." WEBSTER'S NEW WORLD COLLEGE DICTIONARY (3rd Ed. 1997).

of $125, established 11 years ago, is low.[12] Because this Court's decision in *Pierce v. Underwood*, 487 U.S. 552 (1988) restricts the "special factor" method for raising the cap to the point that it is essentially no longer available, inflation adjustments are now particularly critical. In *Pierce*, this Court twice refers to the "$75 cap (adjusted for inflation)," however, leading one court to conclude, "[t]he Supreme Court has implied [in *Pierce*] that applying a cost-of-living adjustment under the EAJA is next to automatic." *Meyer v. Sullivan*, 958 F.2d 1029, 1035, at n. 9 (11th Cir. 1992). And, of course, without inflation adjustments, the incentive to challenge suspect government action grows weaker with each passing day.

The *Baker* inflation-adjustment approach, however, gives district court's almost unlimited discretion to make small inflation adjustments or even to deny them altogether. In the decision below, the Fifth Circuit determined that the district court may adjust the cap without giving a specific fact-based rationale, even in contravention of the only cost-of-living evidence in the record and in the absence of government opposition. The *Baker* rule has also led the Fifth Circuit to conclude that, so long as the district court's chosen rate is applied uniformly within its locale, a district court is free to decline to grant *any* cost-of-living adjustment. *See Hall v. Shalala*, 50 F.3d 367 (5th Cir. 1995) (affirming the decision to deny a cost-of-living increase, but "invit[ing] the district judges of the Eastern District of Louisiana to address any lack of uniformity in the district and to address the issue

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[12] $125 is at the low end of the range of rates charged for legal assistants by major Washington D.C. firms, who charge their top paralegals out at rates in excess of $250 per hour.

with a view toward developing the required uniformity.").[13]

C. The Fee Applications Of Veterans Are Also Subjected To A Locale-Based Inflation Adjustment.

The EAJA applications of military veterans are also subject to a local-inflation rule. Although the United States Court of Veterans Appeals[14] once "adopted the CPI-U" approach,[15] it has recently abandoned it in favor of "holding that in determining attorney fees under the EAJA, the local CPI will be applied where one is available or, where not, the regional CPI will be applied, to calculate the rate of inflation over the statutory rate." *Mannino v. West*, 12 Vet.App. 242, 243 (1999). Acknowledging that "there is a split of authority on this question," *id.*, the court concluded that "the national policy underlying the EAJA ... is better served by tying the attorney-fee rate paid more closely to the actual CPI increase where the attorney works." 12 Vet. App. at 243.

The Fifth Circuit's decision in *Baker* is among those *Mannino* purports to follow. *See* 12 Vet.App. at

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[13] Why hourly-rate uniformity is essential inside a city or locale, but not beyond it, is not something the Fifth Circuit has explained. It is a particularly curious matter in Social Security cases, which tend to be handled by lawyers working in multiple cities, districts, and regions. (Lopez's lawyers, for example, live and work in Dallas).

[14] It is now the Court of Veterans Appeals for Veterans Claims. *See Bates v. Nicholson*, 398 F.3d 1355, 1364 (Fed.Cir. 2005).

[15] *Elcyzyn v. Brown*, 7 Vet.App. 170 (1994). The precise question in Elcyzyn was whether the general CPI-U or "the personal services CPI, which includes legal services" should be used. 7 Vet. App. at 179-81.

243. But, in contrast to the Fifth Circuit's approach, the rule in the Veterans' court is both clear and non-discretionary: it insists on "tying" hourly rate to an inflation index and clearly instructs on which one should be used.

D. In Holding That Inflation Adjustments Need Not Be Tied to Any Inflation Index And Must Be Focused On The "Locale," The Fifth Circuit's Decision Conflicts With Those of at Least Four Other Circuits and the Federal Court of Claims.

At least three circuits – the Third, Fourth, and Ninth, together with The Federal Court of Claims – adjust the cap for inflation as measured by the CPI-U. Additionally, the Eighth Circuit, although it does not specifically identify the CPI-U, makes clear that cap adjustments in that region must at least be uniform throughout its multi-state region. All of these cases are in direct conflict with the Fifth Circuit.

The Third Circuit, in *Dewalt v. Sullivan*, 963 F.2d 27, 30 (3rd Cir. 1992), relying in part on this Court's decision in *Pierce*, holds:

> "We conclude that, in awarding fees pursuant to § 2412(d) of the EAJA, the court is required to apply the statutory cap, as affected by general inflation since 1981, and that the CPI-ALL index, rather than the personal-services component of that index, provides an appropriate measure of such inflation."

The "CPI-All" can only be an reference to the "Consumer Price Index for All Urban Consumers for the U.S. City Average for All Items," the most comprehensive measure BLS publishes and the commonly

understood "general inflation" measure more typically abbreviated "CPI-U."

The Fourth Circuit follows a similar rule. In *Sullivan v. Sullivan*, 958 F.2d 574 (4th Cir. 1992), the government "argued that the court was statutorily limited to the use of the CPI for All Urban Consumers (CPI-U)" if it wished to award attorneys fees in excess of the $75 per hour ceiling. 958 F.2d at 575. Purporting to rely on this Court's decision in *Pierce*, the Court sided with the Secretary, stating:

> Accordingly, we hold that section 2412(d)(2)(A) does not permit an attorney fee award above the $75 statutory ceiling based upon increases in the market rate for legal services. Limiting awards to the $75 statutory ceiling, adjusted only for general cost-of-living increases in accordance with the statutory text, effectuates Congress' intent that attorney fees be fixed at $75 per hour in 1981 dollars regardless of the prevailing market rates, yet ensures that the maximum rate will continue to provide adequate compensation notwithstanding inflation.

958 F.2d at 578.

The Eighth Circuit, although it has not endorsed the CPI-U specifically, has declared that "[u]nder ordinary circumstances ... [p]roper proof of an increase in [the] cost of living should result in consistent hourly fee awards in each case, rather than producing disparate fee awards from each court within the district or from different districts within this circuit." *Johnson v. Sullivan*, 919 F.2d 503 (8th Cir. 1990). Thus, EAJA applicants in the Eighth Circuit are free to use either a nationally-focused CPI or a regional variant that applies uniformly to Arkansas, Iowa,

Minnesota, Missouri, Nebraska, and South Dakota. 919 F.2d at 504. This conflicts with the Fifth Circuit's discretionary "locale"-based approach, as the Fifth Circuit itself concluded in *Yoes*, 467 F.3d at 427.

The Ninth Circuit concludes in *Thangaraja v. Gonzales*, 428 F.3d 870 (9th Cir. 2005):

> Appropriate cost-of-living increases are calculated by multiplying the $125 statutory rate by the annual average consumer price index figure for all urban consumers ("CPI-U") for the years in which counsel's work was performed, and then dividing by the CPI-U figure for March 1996, the effective date of EAJA's $125 statutory rate [cap].

The Federal Court of Claims has also repeatedly prescribed the CPI-U as the proper, usual method for raising EAJA's rate cap. *See, e.g., CEMS, Inc. v. United States*, 65 Fed.Cl. 473, 485-486 (2005) ("District courts generally determine the COLA by multiplying the basic EAJA rate of $125 by the current consumer price index for urban consumers (CPI-U), and then dividing the product by 155.7, the CPI-U for March 1996 when the cap was imposed."); *Gonzales v. United States*, 44 Fed.Cl. 764, 770-71 (1999) ("The $125 cap became effective in March, 1996, and the cost of living at that time, as measured by the Consumer Price Index for All Urban Consumers ("CPI-U"), is therefore the proper baseline for determining any increase in the cost of living.")

CONCLUSION

Choosing the appropriate inflation index for use in adjusting the rate cap for "an increase in the cost of living" is an "arcane but important matter." *Quint v.*

Barnhart, 2006 WL 1495004 (D.Me.). It has generated a distressingly large number of fee disputes and much judicial wheel-spinning. This hardly squares with this Court's admonition that fee requests "should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The judicial discord is particularly lamentable with respect to the EAJA, because it "applies to a wide range of awards in which the cost of litigating fee disputes would equal or exceed the cost of litigating the merits of the claim." *INS v. Jean*, 496 U.S. 154, 163-64 (1990). In order to provide the clarity and simplicity that is needed if EAJA is to work as intended, this Court should grant certiorari to resolve the circuit conflict over the proper interpretation of Section 2412(d)(2)(A)(ii).

Respectfully submitted,

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