No. 06-1717

IN THE
Supreme Court of the United States

RICHLIN SECURITY SERVICE COMPANY,
Petitioner,

v.

MICHAEL CHERTOFF,
SECRETARY OF HOMELAND SECURITY,
Respondent.

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

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PETITIONER'S REPLY BRIEF

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The government argues that the text of the Equal Access to Justice Act (EAJA) supports the Federal Circuit's ruling, and that this Court's decision in *Missouri v. Jenkins*, 491 U.S. 274 (1989), which held that paralegal services are "attorney's fees" under 42 U.S.C. § 1988, does not apply to EAJA, even though it, too, provides for an award of "attorney fees." The government argues instead that paralegal services may be reimbursed only as "other expenses" under EAJA, and then only at the cost of such services to the lawyer, not the cost incurred by the client. And it makes the latter argument even though EAJA authorizes an award to the "prevailing party," not to the party's lawyer. None of the government's arguments is correct.

A. Paralegal Services Are Compensable At Market Rates Under EAJA.

1. The Government's Textual Arguments Fail.

The government's textual arguments fail to support its position that paralegal services are "other expenses" and not "attorney fees" under EAJA. First, the government says that Congress's decision to modify "fees" with "attorney," rather than a more general word like "litigation," shows that only the work of a lawyer is compensable as "attorney fees." *See* Gov't Br. 12. That is *exactly* the argument this Court rejected in *Missouri v. Jenkins*, which found "self-evident" the proposition that the statutory term "attorney's fees," as used in 42 U.S.C. § 1988, includes the work of paralegals "and [all] others whose labor contributes to the work product for which an attorney bills her client." 491 U.S. at 285. (And, as we have explained, *Jenkins*'s "more difficult" question—how paralegal services should be "valuated," *id.*—is answered here by EAJA's text, which requires that "attorney fees"

be awarded at "prevailing market rates." *See* Opening Br. 15, 16.)

The problem with the government's textual analysis is illustrated by a hypothetical example involving two law firms, operating when EAJA was enacted in 1980, when some law firms did not bill separately for paralegal services. The firms are identical, except that one charges its clients separately for paralegal services and the other includes them in overhead as part of its lawyers' hourly rates. Firm A bills at $35 to $50 per hour for lawyer time and $20 per hour for paralegal time, while firm B bills at $45 to $60 per hour for lawyer time (which includes the firm's cost for paralegals).[1] Firm A's clients, compared to Firm B's clients, will save money if Firm A sensibly allocates tasks to paralegals. But, under the government's theory, Firm A's clients would be *ineligible* for market-rate reimbursement for paralegal services. Firm B's clients, on the other hand, would be eligible for full EAJA reimbursement, *including for the full cost of paralegal services* because that cost is included in the lawyer's rate. It makes no sense to say as a textual matter (or otherwise), as the government effectively does, that paralegal services are "attorney fees" when they are included in the lawyer's rate, but are not "attorney fees" when billed separately. *See Jenkins*, 491 U.S. at 286-87.

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[1] *Cf. Jenkins*, 491 U.S. at 286 ("All else being equal, the hourly fee charged by an attorney whose rates include paralegal work in her hourly fee, or who bills separately for the work of paralegals at cost, will be higher than the hourly fee charged by an attorney competing in the same market who bills separately for the work of paralegals at 'market rates.'").

The government next maintains that paralegal services are best understood as "other expenses" under EAJA because such services "fit[] comfortably" within dictionary definitions of "expenses." Gov't Br. 12. The government's use of dictionary definitions of the word "expenses" is fundamentally flawed; those definitions cannot distinguish the proper treatment of paralegal work from that of attorney work because, as our opening brief explains (at 25, 36-38), EAJA's plain text denominates *all* compensable items as "expenses." Moreover, the government's argument is wrong on its own terms because the dictionary definitions it cites—*e.g.*, "the charges that are incurred by an employee in connection with the performance of his duties" or "[c]harges incurred while performing one's job," Gov't Br. 12-13—seem to describe out-of-pocket expenses paid to third-party vendors, not charges incurred by clients for a law firm's in-house professional services. And, finally, even if those definitions did properly describe professional services, they would not distinguish work performed by paralegals from work performed by law firm associates.[2]

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[2]The government (at 11) seeks support for its position by claiming that compensable items under EAJA consist solely of "(1) fees and (2) other, non-fee expenses," with the former awarded at market rates and the latter awarded at cost. In making this argument, the government claims that EAJA refers to only three types of "fees": those for experts, attorneys, and agents. Gov't Br. 11. This argument begs the fundamental question here: whether "attorney fees" include paralegal services. Moreover, the argument fails on its own terms because the statute does not set up the government's rigid fee/expense dichotomy, as the statute's treatment of the work of experts shows. The statute authorizes an award for "the reasonable *expenses* of expert witnesses," which are to be calculated at "prevailing market rates." 5 (continued...)

The government (at 24-25) also challenges our reliance on the interpretive canon that generally accords the same meaning this Court has given terms used by Congress in one statute to the same or similar terms used by Congress in another statute. *See* Opening Br. 16-20. We explained that the Court has applied this canon with particular force in the fee-shifting context. *See id.* at 18-20. The government's principal response is to cherry-pick an outlier, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). That case declined to apply to the Copyright Act's fee-shifting provision the general rule of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), that, under fee-shifting statutes enacted to encourage vindication of federal civil rights, prevailing defendants are held to a more stringent fee-recovery standard than are prevailing plaintiffs. *Fogerty* did so for reasons specific to copyright policy and because the purposes of the Copyright Act's fee-shifting provision are altogether different from the "private attorney general" context in which the *Christiansburg* principle was established. *See Fogerty*, 510 U.S. at 522-27. Here, however, as our opening brief explains (at 4, 18), and the government does not contest, the purposes behind section 1988 (at issue in *Jenkins*) and EAJA—providing incentive for plaintiffs to challenge unlawful government

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[2](...continued)
U.S.C. § 504(b)(1)(A) (emphasis added); *see also* 28 U.S.C. § 2412(d)(2)(A). We note that the government attempts to place experts more firmly on the "fees" side of its false dichotomy by inserting the word "fees" in the statute where it does not actually appear. *See* Gov't Br. 11 (referring to the "'reasonable expenses [including fees] of expert witnesses'") (quoting 5 U.S.C. § 504(b)(1)(A)).

conduct and to perpetuate important legal principles—are the same.[3]

2. The Government Is Unable To Distinguish *Jenkins*.

The government (at 19-20) tries to distinguish *Jenkins*'s holding that paralegal services are "attorney's fees" under section 1988 by asserting that, because section 1988 has no express provision for an award of "expenses," if paralegal services were not awarded as market-rate "attorney fees," they could not have been awarded at all. Thus, the government suggests, *Jenkins* represents a policy-based effort to find some "statutory hook for awarding paralegal expenses." Gov't Br. 19. Putting aside the problem that out-of-pocket expenses *are* awardable under section 1988, *see* Opening Br. 38 n.13, the government's argument founders on several fronts.

First, it has no support in *Jenkins* itself, which found it a "self-evident proposition" that paralegal services are statutory "attorney's fees." 491 U.S. at 285. *Jenkins* did not even hint that the Court was striving, as a matter of "policy," to find a "statutory hook" where a legitimate textual basis for the ruling did not exist.

Second, the government's argument was rejected in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), which stated that the Court's decision in

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[3]Contrary to the government's suggestion (at 25 n.10), our description of *Sullivan v. Hudson*, 490 U.S. 877, 888-90 (1989), was precisely correct. *Hudson* construed EAJA's term "civil action" based in part on the Court's earlier interpretations of similar terms in two other fee-shifting statutes. *See* Opening Br. 19. Although *Hudson* did not rely on the interpretive canon expressly, it did so implicitly and with considerable force.

Jenkins was not motivated by an extratextual policy concern that if paralegal services were not held to be "attorney's fees," there would be no basis under section 1988 for recovering them at all. *Id.* at 99-100. To the contrary, *Casey* noted that, in *Jenkins*, paralegal services were held a part of statutory "attorney's fees" because, among other reasons, they "had traditionally been included in calculation of the lawyers' hourly rates." *Id.; see* Opening Br. 23.

Finally, as explained in our opening brief (at 24), the government's argument would only make sense if there were fee-shifting statutes, other than EAJA, that expressly shifted paralegal services, leaving the negative implication that EAJA does not. In that regard, the government ignores the fact that, in reaffirming *Jenkins*'s holding that paralegal services are statutory "attorney's fees" under section 1988, the Court in *Casey* noted that it did not know of a single fee-shifting statute that separately shifts paralegal services, and it specifically observed that EAJA does not mention such services. *Casey*, 499 U.S. at 99-100. *Casey* thus contemplated that paralegal services are attorney fees under EAJA as they are under section 1988.

3. EAJA's Adjustable Rate Cap Has No Bearing On The Issues In This Case.

Having exhausted its text-related attempts to exclude paralegal services from the ambit of "attorney fees," the government (at 9, 14-16) turns to the basis for the Federal Circuit's ruling: that EAJA must implicitly exclude paralegal services from "attorney fees" because otherwise, in light of the hourly-rate cap, a higher percentage of the

client's cost for paralegal services than for lawyer services would be recoverable.

Before addressing specifics, the government makes the general suggestion that the cap evinces an overall congressional desire to provide prevailing parties half a loaf—that is, that the mere existence of the fee cap suggests that paralegal services should be reimbursed at something less than the market rate. *See* Gov't Br. 9, 16. That reading is wrong because it would impermissibly allow one provision of EAJA, which concerns only the maximum rate at which fees may be awarded, to overwhelm the rest of the statute. After all, the cap only limits the *rate* at which fees may be reimbursed and does not purport to limit what the statutory term "fees" *encompasses*—and the latter is the issue here. And, even if one were to focus only on the rate at which fees should be awarded under EAJA, it makes no sense to consider only the *cap* and not the means by which Congress believed rates should be determined. As explained in our opening brief (at 21), if any distinction is to be drawn between EAJA, which expressly requires that fees be reimbursed at "prevailing market rates," and fee-shifting statutes such as section 1988 that require only that fees be "reasonable," the Congress that enacted EAJA would be more likely to have intended that reimbursement for paralegal services track the market.

Turning to the specifics, the government fails to address the two fatal flaws in the Federal Circuit's reasoning. First, if the fee cap is relevant to the analysis here at all, it can only be relevant if it is viewed from the vantage point of those who enacted it. *See* Opening Br. 30. Thus, for the government's argument to gain any traction, reasonable legislators contemplating EAJA's enactment

would have to have viewed the fee cap as imposing the purported distortion in fee recovery that the Federal Circuit identified. That could not have been the case. The government does not contest our long list of fee-shifting cases demonstrating that in the period leading up to EAJA's enactment in 1980, the rate cap was sufficient to meet the market rates of most lawyers in most markets. Opening Br. 30-31 & nn.9-10. Indeed, the government does not cite any cases rebutting our showing that, even in the period between EAJA's enactment and its 1985 reenactment, the cap generally proved sufficient to replicate the market. Opening Br. 31-32 & n.11 (citing cases).

The government's response (at 15 n.6) consists of a selective quotation from Senator DeConcini's 1980 testimony before a House committee to the effect that, in large cities in his state, lawyers' rates could be $75 per hour "or more." Even in isolation, this quotation is not necessarily at odds with our view that the cap was sufficient to reimburse most legal work in most markets. But the quotation is taken out of context: The government omits the beginning of the sentence, in which Senator DeConcini noted that "[w]e have communities in my State that $75 per hour would be almost twice what the going rate is." *Award of Attorneys' Fees Against the Federal Government: Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 32 (1980). Moreover, the government ignores the testimony of the next witness, Assistant Attorney General Alice Daniel, who, in making the Administration's case against EAJA, emphasized that, "[i]n the first place, it is impossible to assess the number of new cases which may be generated,

in part, by the legal profession's expectation of high remuneration—up to $75 per hour." *Id.* at 42. She went on to explain that the legislation "will make sure the taxpayers *pay 100 percent* anytime the Government loses." *Id.* at 44 (emphasis added). Even if the Assistant Attorney General's testimony was somewhat exaggerated, it still underscores our point: Both EAJA's proponents and opponents believed that, with relatively few exceptions, EAJA would provide full reimbursement for the prevailing party's reasonable fees. That being the case, there is no reason to believe that the Congress that enacted EAJA would have wanted to exclude paralegal services from "attorney fees" on the ground posited by the Federal Circuit.

Second, the government does not dispute that even if EAJA is interpreted from today's perspective, in which market rates for the work of lawyers generally exceed the statutory cap, it must be acknowledged that a far higher percentage of the work of junior associates (like the work of paralegals) is compensable under EAJA than is the work of senior partners. *See* Opening Br. 34-36. This fact demonstrates that the Federal Circuit's concern regarding the effect of the fee cap has nothing to do with the proper definition of the statutory term "attorney fees," but is a consequence of hyperinflation in the legal services market since EAJA's enactment. *Cf. Jenkins*, 491 U.S. at 287 (rejecting claim that market-rate recovery for paralegal services creates a "windfall" for law firms, noting that no one "has ever suggested that the hourly rate applied to the work of an associate attorney in a law firm creates a windfall for the firm's partners. … If the [paralegal] fees are consistent with market rates and practices, the

'windfall' argument has no more force with regard to paralegals than it does for associates.").

4. The 1984 Senate Report Does Not Aid The Government.

As explained in our opening brief (at 25-26), the Federal Circuit's reliance on a 1984 Senate committee report was misguided because (i) on its own terms, the report tends to support our position, and (ii) in any event, the report is not genuine legislative history because the legislation it purported to explain was never enacted. The government's effort to rebut those contentions fails.

The most natural reading of the report's reference to the compensability of paralegal time "billed at cost" is 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."). As noted in our opening brief (at 25)—and uncontested in the government's brief—the Senate report does not address, let alone purport to preclude, the propriety of reimbursement at market rate when paralegal services are billed in that manner in the relevant legal market.

The government focuses on our reliance on the report's reference to the Sixth Circuit's decision in *Northcross v. Board of Education*, 611 F.2d 624 (6th Cir. 1979). It claims that *Northcross* held that paralegal fees should be awarded at the lawyer's cost. The government is wrong. Although *Northcross* referred to paralegal services as "expenses," the government otherwise ignores what *Northcross*

actually said: that the "authority granted in section 1988 to award a 'reasonable attorney's fee'" includes all expenses "which are normally charged to a fee-paying client, in the course of providing legal services." *Id.* at 639. That statement is consistent with our position—that paralegal services should be awarded as they would "normally [be] charged to a fee-paying client," that is, as reflected in the marketplace for legal services.

Moreover, the government sidesteps the most relevant portion of *Northcross*. In discussing how lower courts should arrive at "reasonable hourly rate[s]," the court explained "that it is desirable, whenever possible, to vary the hourly rate awarded depending upon the type of service being provided," because the court's "mandate [is] to award fees 'as is traditional with attorneys compensated by a fee-paying client.'" *Id.* at 638. Thus, *Northcross* concluded, "a scale of fees as is used by most law firms is appropriate to use in making fee awards pursuant to Section 1988 …, differentiating between *paralegal services*, in-office services by experienced attorneys and trial service [to arrive at] a fair and equitable fee." *Id.* (emphasis added). In sum, the Senate report's reference to *Northcross* effectively endorses our position, and, more importantly, it certainly does not demonstrate Congress's belief that paralegal services should be reimbursed at the lawyer's cost even when clients in the relevant legal market are billed at above-cost market rates.[4]

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[4]With respect, this Court misspoke in *Jenkins* when, at the beginning of its discussion of the paralegal-services issue, it described the circuit courts' varying views and said that *Northcross* stood for the proposition that paralegal work was recoverable only at the attorney's

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Our opening brief also noted the Senate report's reliance on an EAJA guidance issued by the Administrative Conference of the United States (ACUS), which stated that expenses should be compensable whenever the lawyer "ordinarily charges clients separately for such expenses." 46 Fed. Reg. 32,900, 32,913 (June 25, 1981) (quoted in S. Rep. No. 98-586, 98th Cong., 2d Sess. 15 (1984)). The government responds only by noting that ACUS's model EAJA rules declined to list paralegal time as invariably compensable "because 'practices with respect to charging [clients] for paralegal time … vary' depending on locality and field of practice." Gov't Br. 31 (quoting 46 Fed. Reg. at 32,905). But that statement reflects *our* position, and the rule this Court embraced in *Jenkins*: that compensability of paralegal services should replicate prevailing practices in the relevant market. *Jenkins*, 491 U.S. at 286-87.[5]

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[4](...continued)
cost. 491 U.S. at 285 n.7. Indeed, in the 10-year period between the Sixth Circuit's decision in *Northcross* and this Court's decision in *Jenkins*, the Sixth Circuit and district courts in that circuit approved reimbursement for paralegal services at market rates. *See, e.g.*, *Olga's Kitchen v. Papo*, 1987 WL 36385, *12 n.9 (6th Cir. 1987); *Stewart v. Rhodes*, 656 F.2d 1216, 1217, 1218 (6th Cir. 1981) (applying *Northcross*); *Echols v. Nimmo*, 586 F. Supp. 467, 477 (W.D. Mich. 1984).

[5]ACUS's 1981 decision not to set a hard-and-fast rule for paralegal services made sense because, at that time, separate market-rate billing was not ubiquitous, as it is today. *See* Br. Amici Curiae of Nat'l Ass'n of Legal Assistants (NALA Br.) at 6-7; *compare Jenkins*, 491 U.S. at 289 (noting, in 1989, that separate paralegal billing appeared to be "the practice in most communities today," and citing a NALA survey (continued...)

In any event, as shown in our opening brief (at 26-28), the 1984 Senate report is not legitimate legislative history because it accompanied EAJA legislation passed in one Congress and then vetoed by the President, while *another* Congress passed the bill that actually became law. The government responds (at 32) that the relevant text of the vetoed legislation is the same as the text of the enacted legislation. But that misses the point: Legislative history is legitimate only when it can be said to have been endorsed by the Congress that enacted the legislation it accompanies, *see* Opening Br. 27, and there is no reason for believing that a subsequent Congress has implicitly adopted the legislative history of an earlier Congress when it has not said so in legislative history of its own. *Compare United States v. Enmons*, 410 U.S. 396, 404 n.14 (1973) (relying on legislative history supporting unenacted legislation because that history was expressly referred to in the legislative history accompanying the bill that was actually enacted).

The government correctly notes (at 31-32) that the 1984 Senate report has been cited twice by this Court, but on both occasions, as in *Enmons*, the point for which it was cited was repeated in legislative history that accompanied the EAJA legislation that was enacted in 1985. *See Melkonyan v. Sullivan*, 501 U.S. 89, 96 (1991) (citing for same proposition 1984 report *and* report that accompanied 1985 enactment); *compare Comm'r, INS v. Jean*, 496 U.S. 154, 159 n.7 (1990) (citing 1984 report regarding meaning of "position of the United States" under 28 U.S.C.

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[5](...continued)
showing that 77% of law firms billed separately for paralegal services at hourly rates).

§ 2412(d)(2)(D)), *with* H.R. Rep. No. 99-120, pt. 1, at 11-13 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 139-41 (making same point). Moreover, in *Scarborough v. Principi*, 541 U.S. 401 (2004), the government relied on the 1984 report for the proposition that EAJA's limitations period is "jurisdictional," and it noted the citations to the report in *Melkonyan* and *Jean*. *See* Gov't. Br. 29 & n.7, in *Scarborough*, No. 02-1657 (Dec. 24, 2003). But the petitioner there replied that the 1984 report should be disregarded because it accompanied vetoed legislation. Pet. Reply Br. 4-5, *Scarborough*, No. 02-1657 (Jan. 28, 2004); *see also* Oral Arg. Tr. 23-25, in *Scarborough*, No. 02-1657 (Feb. 23, 2004). A seven-justice majority held that the limitations period was not jurisdictional, *Scarborough*, 541 U.S. at 413-14, and neither the majority nor the dissent cited the 1984 report.

5. Sovereign-Immunity Principles Do Not Aid The Government.

For several reasons, the government is wrong that sovereign-immunity principles support affirmance. First, where Congress has "'waive[d] the Government's immunity from suit in sweeping language,'" *Dolan v. United States Postal Serv.*, 546 U.S. 481, 492 (2006) (citation omitted), as it has in EAJA, *see* 5 U.S.C. § 504(a) (waiving government's fee immunity and "American Rule" in all adversary administrative proceedings); 28 U.S.C. § 2412(d)(1)(A) (same as to all non-tort civil actions not otherwise subject to fee shifting), the Court's task is not to place a thumb on the scales for the government, but to interpret the text and structure of the relevant act—"no less and no more." *Dolan*, 546 U.S. at 492 (citation omitted).

Thus, in EAJA cases, the Court has repeatedly rejected the government's efforts to inject sovereign-immunity principles into the analysis. In *Jean*, 496 U.S. 154, for instance, the Court employed ordinary principles of statutory construction in interpreting the scope of EAJA's substantial justification defense, explaining that "[t]he 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.'" *Id.* at 164 (citations and footnotes omitted). And, recently, in *Scarborough*, 541 U.S. at 419-21, the Court rejected the government's "most strenuous[]" reliance on sovereign immunity and held that ordinary common-law "relation back" principles apply to EAJA's limitations period. In doing so, the Court noted that "in enacting EAJA, Congress expressed its belief that 'at a minimum, the United States should be held to the same standards in litigating as private parties.'" *Id.* at 421 (quoting H.R. Rep. No. 96-1418, at 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4981, 4987).

The government cites *Ardestani v. United States*, 502 U.S. 129 (1991), the Court's only EAJA decision to rely on sovereign-immunity principles, but *Ardestani* supports our position. There, sovereign immunity was relevant only because the issue was whether a certain class of cases was "wholly outside the scope of the EAJA," *id.* at 137—that is, whether Congress's waiver applied at all—and the Court reiterated that ordinary principles of statutory construction apply in deciding the scope of the waiver where, as is the situation here, the case is concededly subject to EAJA. *See id.*

More fundamentally, the government's invocation of sovereign immunity is misplaced because it wrongly assumes that when Congress enacted EAJA—the relevant vantage point for statutory interpretation—market-rate reimbursement for paralegal services would have harmed the public fisc. *See* Gov't Br. 38. As explained above (at 7-9), when Congress enacted EAJA, market rates for most legal services—whether performed by lawyers or paralegals—were at or below the statutory cap. Thus, at that time, market-rate reimbursement for paralegal services would likely have protected the public fisc because, without it, in cases subject to EAJA, lawyers might have done work they would have otherwise assigned to paralegals.

The government's argument based on protecting the public fisc makes no sense for another reason. As noted earlier (at 2), at the time of EAJA's enactment, for law firms that did not separately bill for paralegal services but whose rates were at or below the cap, EAJA provided full reimbursement for paralegal work because the charges for that work were subsumed in the lawyer's fee. That type of award—which the government would concede is proper—is no less a raid on the treasury than an award involving paralegal services that are billed separately.

The government's assertion (at 38) that reversal would "vastly increase[]" the government's liability is, to put it mildly, exaggerated—and not only because the Federal Circuit's decision is at odds with the nearly uniform rule in other courts and administrative tribunals around the country that paralegal services are reimbursed at market rates under EAJA. *See* Cert. Pet. 7-13. Before EAJA's enactment in 1980, the Congressional Budget Office (CBO) predicted that EAJA would cost the taxpayers about $125

million per year by 1984. *See* H.R. Rep. No. 96-1418, at 21, *reprinted in* 1980 U.S.C.C.A.N. at 5000-01. But EAJA's costs proved to be far lower, and the CBO projected only $3 million in annual costs for fiscal year 1986. *See* H.R. Rep. No. 99-120, pt. 2, at 1 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 152; *see also Jean*, 496 U.S. at 161 n. 9, 164 n.13. The fiscal "savings" based on the difference between the market rate for paralegal services—generally less than $90 per hour, NALA Br. 12—and law firms' costs for those services would have a negligible overall impact on the federal fisc.

Affirmance, on the other hand, would have a substantial effect on *clients*, particularly for disability claimants in social security and veterans' cases, which give rise to the majority of EAJA applications. *See Scarborough*, 541 U.S. at 408 n.2 (noting that social security cases "account for the large majority of EAJA awards") (citation omitted); U.S. Court of Appeals for Veterans Claims Annual Reports, available at www.vetapp.gov/documents/Annual_Reports .pdf (in 2006, over 1000 EAJA applications granted in veterans' cases). Federal law requires that the EAJA fee inure to the claimants' benefit in those cases, *see Scarborough*, 541 U.S. at 408 & n.2 (citing relevant statutes), and limiting recovery for paralegal services will diminish those claimants' recoveries "dollar for dollar." *Id.* at 408.

In sum, the government's argument based on sovereign immunity should be rejected.

B. If Paralegal Services Are "Other Expenses," They Are Recoverable At The Cost Incurred By The Client, Not The Attorney's Cost.

If paralegal services are "other expenses" and not "attorney fees," as the government maintains, then those expenses are recoverable under EAJA at the cost incurred by the client, not at the lawyer's cost. *See* Opening Br. 36-43. Our position is based on the statute's plain language, under which an award of expenses is made to the "prevailing party," not to the party's lawyer. 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(d)(1)(A).[6]

Rather than respond to this textual argument, the government misstates it. It claims our position is that paralegal services, even if denominated "other expenses," are nevertheless awardable at market rates. Gov't Br. 39. That is *not* our position. Although the cost incurred by the *client* will often approximate the market rate, the two are not the same. For instance, in this case, the cost incurred by Richlin for paralegal services was $80 per hour in 2002,

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[6]Our alternative argument is fairly included in the question presented. *See* S. Ct. Rule 14.1(a). The question presented is whether EAJA authorizes an award of attorney fees for paralegal services at market rates or whether such an award must be based on "cost only." *See* Cert. Pet. i. That question necessarily includes whether "cost" means the cost incurred by the prevailing party or the cost incurred by that party's lawyer. Moreover, a narrow reading of Rule 14.1(a) should be rejected where, as here, it would allow the Court to arrive at an incorrect construction of a federal statute. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 56 (2006); *see also Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").

while, according to the Laffey matrix, the fee index used by courts in the Washington, D.C. area, the market rate was $100 per hour. *See* www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_2.html.

The government never provides a reasoned explanation for why reasonable "other expenses," such as travel, telephone, and courier expenses, are invariably reimbursable under EAJA at the client's cost, *see, e.g., Kelly v. Bowen*, 862 F.2d 1333, 1335 (8th Cir. 1988), but one, and only one, "other expense"—paralegal expenses—should be reimbursed at the lawyer's cost. The government's only response is to conjure up hypothetical situations having no basis in reality. It claims that our "reasoning would permit reimbursement for charges beyond those paid by attorneys or third-party vendors if the practice in the relevant legal market was to bill clients for the actual cost paid by the firm plus a firm overhead charge," including reimbursement for in-house photocopying with a "profit margin in addition to cost." Gov.'t Br. 43.

The simple answer is that these situations generally would not involve "reasonable" expenses, *see* 5 U.S.C. § 504(b)(1)(A); 28 U.S.C. § 2412(d)(2)(A), because "the practice in the … legal market" is *not* to add "a profit margin" to out-of-pocket expenses; indeed, as to both photocopying and disbursements to third-party vendors, absent a specific lawyer-client agreement, the profession deems a profit component unethical (that is, per se unreasonable). *See* Am. Bar Ass'n Formal Op. 93-379

(Dec. 6, 1993).[7] These scenarios are thus a far cry from paralegal services, billed at hourly rates above the law firm's cost, which are an entrenched feature of modern law practice that the profession has specifically endorsed as cost-effective for clients. *See* Am. Bar Ass'n, *Model Guidelines for the Utilization of Paralegal Services* (2004), Guideline 8 & comment thereto, available at www.abanet.org/legalservices/paralegals/downloads/modelguidelines.pdf (authorizing lawyers to charge market-rate fees for paralegal services, relying on *Jenkins*); NALA Br. 8 (similar).

The government's inability to provide any reason why Congress would have wanted to reimburse a *client's* expense at the *lawyer's* cost is illustrated by its failure to rebut our contention that calculating the lawyer's cost for paralegal services will either require a "second major litigation," *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), or force fee applicants to forgo reimbursements to which they are entitled. *See* Opening Br. 41-42; *see also* NALA Br. 15-16 (describing difficulty of determining lawyer's cost). The government's only response is that calculating the lawyer's cost will prove no more "difficult" or "elusive" than "determining the prevailing market rate." Gov't Br. 43. Not so. A law firm's cost for an employee is based on what *that firm* pays the employee, what *that firm* pays for

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[7] S*ee also Jenkins*, 491 U.S. at 287 n.9 (responding to defendant's claim that if paralegal services are separately compensated "attorneys next [will] try to bill separately—and at a profit—for such items as secretarial time, paper clips, electricity, and other expenses," by noting that attorneys "would have no basis for requesting separate compensation of such expenses unless this were the prevailing practice in the local community. The safeguard against the billing at a profit of secretarial services and paper clips is the discipline of the market.").

the employee's benefits, insurance, and pension, and the allocable share of *that firm's* costs for general overhead, such as rent and utilities. *See* NALA Br. 16 (noting that "two otherwise identically situated paralegals—with the same level of experience and the same billing rate—could have markedly different costs to their employer depending on, for example, their seniority in the firm" and other factors). By contrast, documenting market rates is relatively easy because they can be ascertained by what clients are willing to pay for particular services regardless of what it costs to produce those services. Law firms make known the going rates for their services, and indices are published describing market rates in various communities.

The weakness of the government's position is underscored by its discussion of the cases decided in the wake of the decision below (which were reviewed in our opening brief at 41-42). The government claims that *Former Employees of BMC Software, Inc. v. Sec'y of Labor*, 519 F. Supp. 2d 1291 (C.I.T. 2007), does not reveal any problem in proving the lawyer's cost. But that opinion said that the decision below made calculating the award for paralegal work "particularly difficult," *id.* at 1343, and the plaintiff later accepted the same per-hour rate affirmed by the Federal Circuit in this case. *See Former Employees of BMC Software, Inc. v. Sec'y of Labor*, 2007 WL 4181696, *3 (C.I.T. 2007). The government says that "nothing in the court's decision suggests that the rate was insufficient," Gov't Br. 43 n.19, but the rate in *Former Employees* was *per se* insufficient, even under the government's theory, because it was based not on the lawyer's full cost for paralegal services, but on paralegal salaries alone. Even more weakly, the government asserts

that *Information Sciences Corp. v. United States*, 78 Fed. Cl. 673 (Fed. Cl. 2007), "does not reflect the reason" why the prevailing party "withdrew its request for fees for paralegal expenses." Gov't Br. 43 n.19. That is flatly incorrect: The $15,875 claim was withdrawn "[i]n light of the level of proof demanded by *Richlin*." 78 Fed. Cl. at 683.

And, finally, that law firms "may decline to disclose" their paralegal costs "for any number of reasons independent from the inability to determine that cost," Gov't Br. 43 n.19, hardly helps the government. To the contrary, it shows that, under the Federal Circuit's ruling, *clients* may lose some or all of their (already inadequate) award because of their *lawyers'* understandable reluctance to disclose their firms' internal costs.

* * *

For all of these reasons, the government's argument that paralegal services, alone among "other expenses," should not be awarded at the cost incurred by clients cannot be squared with EAJA's text or purpose or with common sense. We acknowledge, however, that viewing paralegal services as an out-of-pocket expense—as one would view an airline ticket—is awkward. But that is hardly our doing. It is the natural consequence of the *government's* position, which attempts to shoehorn paralegal services—which, like the work of law firm associates, are in-house professional services—into "other expenses," rather than treating them as "attorney fees," where they naturally belong. As *Jenkins* put it, because paralegal services are part of "the work product for which an attorney bills her client," it is a "self-evident proposition" that they are "attorney fees." 491 U.S. at 285.

CONCLUSION

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

Respectfully submitted,

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