No. 06-1717

In the Supreme Court of the United States

RICHLIN SECURITY SERVICE COMPANY, PETITIONER

v.

MICHAEL CHERTOFF, SECRETARY OF HOMELAND SECURITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT

PAUL D. CLEMENT
Solicitor General
Counsel of Record

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

ANTHONY A. YANG
Assistant to the Solicitor General

JEANNE E. DAVIDSON
REGINALD T. BLADES, JR.
MICHAEL JAY SINGER
MICHAEL E. ROBINSON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, under the Equal Access to Justice Act, 5 U.S.C. 504 and 28 U.S.C. 2412, paralegal services are "attorney fees" compensable at market rates or "other expenses" compensable at the rate of cost to the attorney.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Statutes and rules:

Statutes and rules—Continued: Page

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 06-1717

RICHLIN SECURITY SERVICE COMPANY, PETITIONER

v.

MICHAEL CHERTOFF, SECRETARY OF HOMELAND SECURITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT

1. Petitioner contracted with the Immigration and Naturalization Service in 1990 and 1991 to provide guard services for detainees at the Los Angeles International Airport. Pet. App. 2a. In 1995, the Department of Labor determined that the contracts had misclassified petitioner's employees for purposes of the wage classification scheme of the Service Contract Act of 1965, 41 U.S.C. 351 *et seq.*, resulting in underpayment of petitioner's employees. Pet. App. 2a-3a. The Department of Labor further found that employees were entitled to back wages from petitioner. *Ibid.* Petitioner then filed a claim against the government for the increased costs associated with the parties' misclassification of petitioner's employees and, after its claim was denied, pur-

sued an administrative appeal to the Department of Transportation Board of Contract Appeals (Board) without representation by legal counsel. *Id.* at 26a, 32a.

After the Board determined that petitioner was entitled to compensation from the government, petitioner retained legal counsel in 1998 to represent petitioner before the Board in further proceedings to quantify the amount of compensation owed. Pet. App. 27a, 33a-34a. A series of appeals to the Board and to the Federal Circuit ensued. Petitioner ultimately secured partial success on its $1.57 million claim when the Board awarded petitioner approximately $700,000 in compensation. *Id.* at 3a, 26a, 44a. The court of appeals affirmed. *Id.* at 3a.

2. In 2003, petitioner applied to the Board under the Equal Access to Justice Act (EAJA or Act), 5 U.S.C. 504, for an award of attorney fees and other expenses. Pet. App. 29a. The EAJA authorizes an agency to award "fees and other expenses" to a "prevailing party" in adversary administrative proceedings in cases in which the position of the United States is not "substantially justified" and no special circumstances would make an award unjust. 5 U.S.C. 504(a)(1).[1]

The statute defines "fees and other expenses" to include "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" as well as "reasonable expenses of expert witnesses" and "reasonable attorney or agent fees." 5 U.S.C. 504(b)(1)(A). The statute further provides:

---

[1] A separate provision of the EAJA provides for recovery of "fees and other expenses" from the United States by a prevailing party in a civil action in court. 28 U.S.C. 2412(d)(1)(A); see also 28 U.S.C. 2412(d)(2)(A) (defining "fees and other expenses"). Section 2412 is not at issue in this case.

> 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.

Ibid. Because the Department of Transportation (like most agencies) has not promulgated regulations authorizing the Board to increase the statute's $125-per-hour ceiling on "attorney or agent fees," reimbursement for such fees by the Board is limited to $125 per hour.

Petitioner's EAJA application, as amended, sought reimbursement for $51,794 in attorney fees for work on the underlying proceedings before the Board and $14,225 in attorney fees for time spent preparing petitioner's EAJA application based on the statute's maximum rate of $125 per hour. Pet. App. 5a, 29a; cf. C.A. App. 30, 91, 169 (listing hourly rate of petitioner's primary counsel as $325 to $400 per hour). Petitioner additionally sought reimbursement for paralegals used by petitioner's attorney. The amended EAJA application sought reimbursement at an $80 hourly paralegal rate beginning in 1998, which increased to $95 in 2002 and $135 in 2004. *Id.* at 41, 156, 211; cf. Pet. App. 33a (amended application eliminated EAJA claim for work before June 1998). Petitioner thus sought reimbursement, generally at these rates, for 523.8 hours of para-

legal time on the underlying cases and 68.2 hours of paralegal time preparing the EAJA application, totaling $51,901 in paralegal charges. *Id.* at 5a.[2]

3. The Board awarded petitioner $43,312 in attorney fees for the underlying cases and $7,125 in fees for the preparation of the EAJA petition. Pet. App. 47a, 52a. With regard to reimbursement for paralegal expenses, the Board ruled that, under the EAJA, such expenses are recoverable at the cost to the firm, not at the rate billed to the client. Finding no evidence in the record concerning the cost of paralegal services to the firm,[3] the Board, rather than denying paralegal expenses entirely, took judicial notice of paralegal salaries in the Washington, D.C. area and found that $35 per hour was a reasonable cost to petitioner's Washington-based firm.

---

[2] As the court of appeals noted, it appears that petitioner reduced its fee request to $95 per hour for periods in which petitioner's EAJA application asserted a $135 hourly rate. Pet. App. 5a; see Reply to Respondent's Answer to Richlin's Am. Application for Attorney's Fees & Expenses 5 (stating that petitioner "reduced any of its paralegal costs claimed in excess of $95 per hour to $95 per hour").

[3] Petitioner similarly did not submit affidavits or other evidence that its requested rates were consistent with prevailing charges in the relevant legal market. The time records submitted by petitioner were generated in connection with petitioner's EAJA claim (and not submitted as contemporaneous bills to petitioner), see Appellant's Application for Attorney's Fees & Expenses 20, and, while petitioner asserted in a legal brief that $400 (for counsel) and $135 (for paralegals) reflected "market rates" because its counsel uses these hourly rates and "[c]lients pay * * * without objection," Reply to Respondent's Answer to Richlin's Am. Application for Attorney's Fees & Expenses 4, the Board found that petitioner failed to prove that its requested paralegal rate reflected a prevailing market rate. Pet. App. 42a n.4; cf. *Blum* v. *Stenson*, 465 U.S. 886, 896 n.11 (1984). The court of appeals had no occasion to revisit that aspect of the Board's ruling.

Id. at 42a-43a. The Board accordingly awarded petitioner $10,587 for paralegal expenses. *Id.* at 52a.

4. The court of appeals affirmed. Pet. App. 1a-24a. Relying on the text, structure, purpose, and history of the EAJA, the court of appeals ruled that paralegal costs are not compensable as "fees," but rather constitute other "expenses" that are recoverable only at the cost to the attorney. *Id.* at 7a-19a.

In particular, the court explained that the EAJA allows for the recovery of "expenses" beyond just "fees," but allows the recovery of such expenses only to the extent of their underlying cost. Given that additional category and, in light of the strict construction that must be given to the EAJA's limited waiver of sovereign immunity, the court determined that Congress intended paralegal costs to be recoverable as "expenses" reimbursed at cost to the attorney, and not "fees." Pet. App. 6a, 15a. That construction, the court explained, was bolstered by the fact that Congress had gone out of its way to place a cap on attorney fees, but had not separately capped paralegal costs. *Id.* at 16a. In light of that statutory feature, the court found it "unlikely that Congress would have set the maximum fee for paralegal services as high as $75 per hour (the equivalent, of about $185 in today's dollars)—a level that likely exceeded the then-current billing rate for paralegal services—given the overall desire to cap allowable fees below market rates." *Id.* at 16a-17a (footnote omitted) (citing *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 126 S. Ct. 2455, 2460 (2006)). Indeed, the court noted, the legislative history underlying the EAJA's 1985 reenactment specifically addressed the question of paralegal costs and states that paralegal charges reflect a "type of expense[]" under the

EAJA that is "billed at cost." *Id.* at 19a; see *id.* at 56a n.2.

The court of appeals recognized that *Missouri* v. *Jenkins*, 491 U.S. 274 (1989), had construed a "reasonable attorney's fee" under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, to include compensation for the work of paralegals, and that similar fee-shifting statutes using similar language are normally construed in the same manner. Pet. App. 9a-11a, 13a. However, the court concluded that the "differences in the surrounding language, structure, and purpose" of the EAJA required that the Act be interpreted differently from Section 1988. *Id.* at 13a-15a.

Senior Judge Plager dissented. Pet. App. 20a-24a. He reasoned that the interpretation of the EAJA should be guided by this Court's interpretation of Section 1988, and thus concluded that paralegal services should be recoverable as "attorney fees." *Id.* at 20a-21a.

SUMMARY OF THE ARGUMENT

The court of appeals correctly held that paralegal expenses are reimbursed at cost under the EAJA as "other expenses" and are not "attorney fees" reimbursable at prevailing market rates.

I. A. The EAJA provides that federal agencies shall award "fees and other expenses" to prevailing parties in adversary administrative adjudications when the position of the United States is not substantially justified and no special circumstances would make the award unjust. 5 U.S.C. 504(a)(1). "Fees," in turn, are categorized as attorney, agent, and expert witness fees, the reimbursement of which is limited to prevailing market rates subject to a statutory ceiling for each category of fees. 5 U.S.C. 504(b)(1)(A). The language, structure, and leg-

islative history of the EAJA demonstrate that paralegal expenses are "other expenses" reimbursable at cost, and not "attorney fees."

The most natural reading of "attorney fees" in 5 U.S.C. 504 is one that provides compensation for an attorney's time spent representing a party in litigation. In common parlance, "attorney fees" do not mean "paralegal" expenses. That resolution is bolstered by the surrounding text. The EAJA's broader category of "other expenses" naturally captures costs that are associated with an attorney's representation of a party, but are not themselves "attorney fees." Thus, while expenses for paralegal assistance are not readily embraced by the phrase "attorney fees," they fall comfortably into the EAJA's second and related category of reimbursable "other expenses."

Other provisions of the EAJA confirm that "attorney fees" do not include paralegal expenses. While the EAJA requires that attorney fees be calculated based on prevailing market rates, Congress also imposed a statutory ceiling on the amount of "attorney fees" that may be awarded. Congress set the cap based on the billing rates of attorneys and not the rates of paralegals, which were dramatically lower. And when Congress set the cap at $75 and later increased it to $125 the ceiling capped "attorney fees" at a level below that of many attorneys nationwide. Congress's decision to use attorneys' charged rates subject to caps and its failure to impose any analogous caps on paralegals' rates strongly suggests Congress thought paralegal charges would be treated as expenses (subject to the "cap" of their actual cost). Cf. *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 126 S. Ct. 2455, 2460 (2006).

Compensating paralegal expenses as "attorney fees" would result in EAJA awards for *paralegal* time that are disproportionately high relative to the fees that can be recovered for ordinary attorney work (because paralegal rates are generally much lower than those of attorneys) and, indeed, would permit attorneys to recover paralegal expenses that are near or equal to the awards given for the time of even *extraordinarily experienced* attorneys. To the extent that litigation against the government is informed by the availability of EAJA fees, that anomaly could "distort the normal allocation of work" by encouraging attorneys to shift work to paralegals (where they can recover the full amount of, or at least a greater proportion of, their normal hourly rates) and thus "result in a less efficient performance of legal services." Pet. App. 18a.

Missouri v. *Jenkins*, 491 U.S. 274 (1989), does not compel a different conclusion. That case involved the construction of a different fee-shifting statute (Section 1988) with materially different language. Except for a narrow category of court "costs," Section 1988 authorizes reimbursement of prevailing civil rights plaintiffs only for "attorney's fees" and, the Court held in *Jenkins*, the term "attorney's fees" must therefore include compensation for the work of those paid by attorneys to contribute to the attorneys' work product. In the EAJA, however, Congress provided for reimbursement of a second statutory category—"other expenses"—in addition to "attorney fees." That second category fundamentally changes the analysis. In *Jenkins*, the Court's task was to define the term "attorney's fees," and paralegal expenses were either encompassed in that term or unrecoverable. Here, by contrast, paralegal expenses can be recovered, and the Court's task is to decide which statu-

tory category encompasses paralegal expenses. Moreover, Section 1988 was designed to provide a "fully compensatory" fee to prevailing civil rights plaintiffs; by contrast, the EAJA's fee caps specifically preclude such a recovery.

Nor does the canon of construction that similar words should normally be construed similarly suggest that *Jenkins* should be extended to the EAJA context. That canon readily yields where, as here, it is reasonable to conclude from variations in statutory text and context that the words were intended to embrace different meanings. This Court has therefore construed "virtually identical" language in fee-shifting statutes differently when the policy considerations and legislative history underlying the statutes pointed to different outcomes.

B. The EAJA's legislative history underscores that Congress intended the term "attorney fees" and the cap on such fees to apply "only to the compensation of lawyers" themselves and not to other costs connected with their representation of parties. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 15 (1980). Congress made that intent plain in the process of reenacting the EAJA in 1985. For example, the Senate Report on reenactment explained that attorneys' out-of-pocket expenses should be compensated under EAJA as other expenses and that "paralegal time" should be reimbursed in that manner "at cost." S. Rep. No. 586, 98th Cong., 2d Sess. 15 (1984). This Court has twice relied on the very same report as accurately reflecting congressional intent surrounding the reenactment of the EAJA, and it addresses conclusively the question presented here.

C. If there were any doubt as to the proper construction of "attorney fees," the canon of construction that the scope of waivers of sovereign immunity should be

narrowly construed in favor of the sovereign compels the conclusion that paralegal expenses are not a type of "attorney fees" under the EAJA. Nothing in the EAJA's text requires a contrary result, particularly because the EAJA's provision of "other expenses" aptly captures paralegal expenses necessary for the preparation of a party's case.

II. The Court should reject petitioner's alternative argument that even if paralegal time is not compensated as "attorney fees" and are "other expenses" under the EAJA, "other expenses" should be reimbursed at the market rate paid by the client, not at the cost of the attorney. To begin with, this contention is not fairly included in the question presented, was not pressed or passed upon below, and therefore is not properly before the Court. In any event, the argument fails. The EAJA specifically provides that attorney, agent, and expert witness "fees" are to be awarded at prevailing market rates, but makes no similar provision for "other expenses." To the contrary, in discussing the recovery available for such "other expenses," Congress focused on reimbursement for their "reasonable *cost*." 5 U.S.C. 504(b)(1)(A) (emphasis added).

ARGUMENT

I. THE EAJA REIMBURSES PARALEGAL CHARGES AT THE COST TO THE ATTORNEY.

A. The Plain Language And The Structure Of The EAJA Demonstrate That The Paralegal Costs Are "Other Expenses" Reimbursed At Cost, Not "Attorney Fees" Reimbursed At Prevailing Market Rates

The EAJA provides that federal agencies shall award "fees and other expenses" to prevailing parties in adver-

sary administrative adjudications when the position of the United States is not substantially justified and no special circumstances would make an award unjust. 5 U.S.C. 504(a)(1). The statute's definition of "fees and other expenses" distinguishes between two categories of expenses: (1) those that qualify as attorney, agent, or expert witness "fees" and are reimbursed at "prevailing market rates" subject to a statutory cap; and (2) other, non-"fee" expenses which are reimbursed at "cost." 5 U.S.C. 504(b)(1)(A). As the court of appeals correctly concluded, the text, structure, and legislative history all point to the conclusion that paralegal expenses fall into the latter category and thus may be reimbursed at cost, not market rates.

1. The bare language of 5 U.S.C. 504 strongly favors the conclusion that paralegal expenses are reimbursable as a non-fee "expense," rather than an "attorney fee." By authorizing awards of "fees and *other* expenses," the statute identifies two types of compensable "expenses": (1) fees and (2) other, non-fee expenses. Section 504 further permits reimbursement of three types of fees for professionals that a party may retain to litigate a case: the "reasonable expenses [including fees] of expert witnesses" and "reasonable attorney or agent fees." 5 U.S.C. 504(b)(1)(A).[4] An application for an EAJA

[4] In the EAJA context, an "agent" is a specialized non-attorney practitioner authorized to represent clients before an administrative agency with the special permission of the tribunal. See *Lane* v. *United States Dep't of Agric.*, 294 F.3d 1001, 1003 (8th Cir. 2002); *Fanning, Phillips & Molnar* v. *West*, 160 F.3d 717, 721-722 (Fed. Cir. 1998); see also H.R. Rep. No. 1418, *supra*, at 14 ("An 'agent fee' may be awarded for the services of a non-attorney where an agency permits such agents to represent parties who come before it."). Consequently, the EAJA does not authorize the payment of "agent fees" in court proceedings, where only attorneys may normally serve as legal representatives. See 28

award must therefore include an "itemized statement from any attorney, agent, or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed." 5 U.S.C. 504(a)(2).

Petitioner contends that paralegal expenses qualify as an "attorney fee" under the EAJA, but the Act's statutory language points decisively in the opposite direction. The words "attorney fees" do not, on their own, suggest that the term embraces paralegal expenses. A paralegal is not an "attorney," and, indeed, may not practice law. And while paralegals may assist attorneys who provide legal services, Congress's use of the word "attorney" rather than a more general word such as "litigation" to modify "fees" suggests that separate charges for paralegals do not constitute "attorney fees." It is also noteworthy that Congress provided that the professionals whose fees may be reimbursed must submit an itemized list of their expenses and their fees, 5 U.S.C. 504(a)(2), but Congress made no provision for paralegals to submit itemized reports of expenses and fees. That suggests that paralegal services are an expense to be listed on attorneys' itemized statements, not a fee.

At the same time, reimbursement for paralegal work fits comfortably into the EAJA's more general category of "other expenses" that may be compensated in addition to attorney, agent, or expert fees. The term "expenses" is commonly used to refer to "an item of outlay incurred in the operation of a business enterprise" or "the charges that are incurred by an employee in connection with the performance of his duties." *Webster's*

U.S.C. 2412(d)(2)(A). Petitioner does not contend that paralegal expenses qualify as "agent fees" or "expert witness fees." Cf. Pet. App. 7a, 9a.

Third New International Dictionary of the English Language 800 (1986); see *The Random House Dictionary of the English Language* 680 (2d ed. 1987) ("charges incurred during a business arrangement"); *The American Heritage Dictionary of the English Language* 462 (1976) ("[c]harges incurred while performing one's job"). That definition fits well in the EAJA context where an "attorney, agent, or expert witness representing or appearing in behalf of [a] party," 5 U.S.C. 504(a)(2), will incur such business charges in connection with the provision of professional litigation-related services. Where a paralegal provides assistance to an attorney by performing tasks necessary to prepare a party's case, the attorney's payment of such paralegal costs are closely analogous to the "cost of any study, analysis," or "project" that the EAJA identifies as "other expenses" reimbursable when "necessary for the preparation of the party's case." See 5 U.S.C. 504(b)(1)(A).

2. Other provisions within the EAJA confirm that paralegal charges ancillary to an attorney's provision of legal services are "other expenses" and not "attorney fees." In particular, the Act's detailed provisions that "define and limit" the reasonable amount of "fees" that may be compensated with federal funds, *Pierce* v. *Underwood*, 487 U.S. 552, 572 n.3 (1988), both demonstrate that paralegal expenses are not reimbursed as "fees" and reflect Congress's intent to limit the amount of profit imbedded in the fees of attorney, agents, and experts that the government will compensate under the Act.

Two independent statutory restrictions limit the amount of a reasonable fee awarded under the EAJA. First, Congress specified that the "amount of fees * * *

shall be based upon prevailing market rates for the kind and quality of the services furnished." 5 U.S.C. 504(b)(1)(A). Second, Congress further imposed statutory caps limiting the maximum hourly rate reimbursable under the Act, reflecting the judgment that, "whatever the local or national market might be," the reasonable amount of "public reimbursement" for professional services should not exceed the cap (unless a statutory exception is satisfied). See *Underwood*, 487 U.S. at 572. EAJA fee awards in agency proceedings are thus capped, for expert witness fees, at the "highest rate of compensation for expert witnesses paid by the agency involved" and, for "attorney or agent fees," at "$125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor * * * justifies a higher fee." 5 U.S.C. 504(b)(1)(A).[5]

As the court of appeals recognized, it would be anomalous to construe paralegal expenses as a type of "attorney fee" because doing so would provide disproportionately high reimbursement for paralegals (whose hourly charges are generally much lower than the fees charged by attorneys) when the EAJA restricts the hourly rate for attorney time to below prevailing rates in many legal markets. See Pet. App. 16a-17a & n.11. Congress recognized when it originally enacted the EAJA in 1980 that the statute's "attorney fee" ceiling (then at $75 per hour) would often reimburse less than the prevailing

[5] The EAJA imposes similar statutory ceilings with respect to fees associated with civil actions in court. Expert witness fees are limited to "the highest rate of compensation paid for expert witnesses by the United States" and "attorney fees" are subject to the same $125-per-hour cap "unless the court determines that an increase in the cost of living or a special factor * * * justifies a higher fee." 28 U.S.C. 2412(d)(2)(A).

market rate for the work of attorneys. The cap was eliminated then restored in the legislative process, see S. Rep. No. 253, 96th Cong., 1st Sess. 8 (1979), as a compromise that addressed concerns about the fiscal impact of the statute.[6] After the EAJA was repealed following a three-year experimental period from October 1981 to October 1984, see EAJA, Pub. L. No. 96-481, Tit. II, §§ 203(c), 204(c), 208, 94 Stat. 2327, 2329, 2330, Congress reenacted the EAJA in 1985 with several changes, but Congress retained the pre-existing $75 hourly cap on "attorney fees." See Act of Aug. 5, 1985, Pub. L. No. 99-80, §§ 1, 6, 99 Stat. 183, 186. The $75 cap thus remained below prevailing market rates for attorneys in much of the country. See Altman Weil, Inc., *The 2003 Survey of Law Firm Economics* 82 (2003) (comprehensive survey showing that 1985 national median hourly rate for law firm associates and partners was $82 and $128, respectively). When Congress raised the cap to its current $125 per hour ceiling in 1996, it continued that pattern. See Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Tit. II, § 231(b)(1), 110 Stat. 863; Altman Weil, Inc., *The 1996 Survey of Law Firm Economics* II-3 (1996) (*1996 Survey*) (1996 na-

---

[6] In explaining the bill the Senate passed after the bill was reported by the committee which he chaired, Senator DeConcini explained that while attorney rates in some communities might be well below the $75 ceiling, the "going rate" for attorney fees in large cities was $75 per hour "or more," and that the bill's level of reimbursement did not "make the taxpayer whole" because it represented a compromise that addressed the cost concerns of the Administration. See *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) (statement of Sen. DeConcini); see also pp. 27-30, *infra* (discussing legislative history).

tional average hourly rates for associates and partners were $127 and $184, respectively).

Because paralegal rates were undoubtedly far below the EAJA's fee caps when Congress established and revised them in 1980, 1985, and 1996, it would be anomalous to read the Act as compensating paralegal expenses as "attorney fees" subject to a cap that Congress established for attorneys and agents alone. Cf. *1996 Survey* II-3 (1996 national average paralegal rate was $66 per hour); cf. also H.R. Rep. No. 1418, 96th Cong., 2d Sess. 15 (1980) ("The ceiling on attorney fees relates *only* to the compensation of lawyers and agents (e.g., accountants themselves).") (emphasis added). Doing so would mean that Congress intended to ensure that paralegals—but not attorneys—could obtain all or at least a greater portion of their rates under the EAJA.[7]

---

[7] Data from comprehensive surveys of legal billing rates show that the 2007 median billing rates nationwide for law firm partners and associates were $305 and $200 per hour, respectively, and were much higher in some localities. In Washington, D.C., for instance, the data reflect median hourly rates of $455 and $295, respectively. See Altman Weil, Inc., *New Survey Provides Snapshot of Law Firm Economics Across U.S.* (Aug. 2, 2007) <http://www.altmanweil.com/index.cfm/fa/r.resource_detail/oid/87716caa-56df-4ad9-b375-9e9366ba6d60/resource/New_Survey_Provides_Snapshot_of_Law_Firm_Economics_Across_US.cfm>.

The data similarly show that billing rates for paralegal time have increased in 2007 to a national median of $160 per hour. At the median hours billed per paralegal in 2006 (1490 hours), a single paralegal would generate $238,400 in law firm revenue at this rate, far outstripping the $59,973 in median total cash compensation paid to paralegals nationwide. See Altman Weil, Inc., *Paralegal Compensation Survey Shows Solid Increases* (May 22, 2007) <http://www.altmanweil.com/index.cfm/fa/r.resource_detail/oid/3f871071-6be8-44dd-a469-532a7a4ab0fb/resources/Paralegal_Compensation_Survey_Shows_Solid_Increases.cfm>; cf. Richard L. Abel, *American Lawyers* 198 (1989)

This Court recently relied upon a similar statutory anomaly in rejecting the argument that expert fees were recoverable under the attorney's fees provision of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq*. The IDEA "contains detailed provisions that are designed to ensure that ['attorney's fees'] awards are indeed reasonable," but contains no similar provisions geared to regulating the amount of fees for experts. See *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 126 S. Ct. 2455, 2460 (2006) (*Arlington*) (citing 20 U.S.C. 1415(i)(3)(C)-(G)). Given Congress's attention to regulating the appropriate amount of attorney's fees, this Court concluded that the "absence of any comparable provisions relating to expert fees strongly suggests that recovery of expert fees is not authorized." *Ibid.* The same reasoning applies here. Congress's attention to establishing a cap on "attorney fees" in the EAJA based upon a maximum rate that is obviously geared to the billing rates for attorneys and the absence of an analogous cap specifically geared to paralegal rates "strongly suggests" that Congress did not intend paralegal expenses to be compensated as an "attorney fee."

The anomalous results produced under petitioner's construction of "attorney fee" are reinforced by this Court's decision in *Pierce* v. *Underwood*, *supra*. There, the Court explained that the EAJA's fee cap suggests Congress determined that the cap represented "generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be." 487 U.S. at 572. Given that assessment, the "need to preserve the intended effectiveness of the [$125] cap" led the Court to read narrowly the Act's authorization to

---

(discussing data from 1984 to 1986 indicating that law firms billed paralegal time at a rate two to four times the cost of a paralegal).

exceed the cap when the "limited availability of qualified attorneys or agents for the proceedings involved" justifies a higher fee, 28 U.S.C. 2412(d)(2)(A)(ii). See *Underwood*, 487 U.S. at 572-573; cf. 5 U.S.C. 504(b)(1)(A)(ii). The Court thus held that "attorneys 'qualified for the proceedings'" did not permit an increase based on an attorney's "extraordinary level of the general lawyerly knowledge and ability useful in all litigation" and was limited to contexts where attorneys were qualified in some "specialized sense" with "distinctive knowledge or specialized skill needed for the litigation in question." *Id.* at 572. Given that an attorney with an "extraordinary level of the general lawyerly knowledge and ability" can be reimbursed at a rate no greater than the Act's fee cap, it would be particularly incongruous to interpret "attorney fees" as including paralegal expenses that may be reimbursed at a rate up to the very same cap.

Moreover, as the court of appeals explained (Pet. App. 18a), to the extent that litigation against the government is influenced by the availability of EAJA fees, allowing paralegal expenses to be recovered as "attorney fees"—without a meaningful cap like the statute sets for the fees of attorneys—would "create a perverse incentive." In particular, it could cause attorneys—whose fees are capped at $125—to shift work to paralegals—whose charges are generally lower and effectively uncapped. As the court of appeals explained, "treating paralegal fees as attorney's fees would [thus] distort the normal allocation of work and result in a less efficient performance of legal services." *Ibid.* Treating paralegal expenses as "other expenses" recoverable at cost eliminates that "perverse incentive."

3. In arguing that paralegal expenses are "attorney fees" under the EAJA, petitioner principally relies not on the statute's text, but instead on this Court's interpretation of a different statute in *Missouri* v. *Jenkins*, 491 U.S. 274 (1989). Pet. Br. 14-24. *Jenkins* involved a distinct statutory scheme reflecting materially different statutory text with a different structure, purpose, and history. Those differences illustrate Congress's intent to treat the reimbursement of paralegal expenses differently in the EAJA, and demonstrate that *Jenkins*' reasoning and result should not be extended to this case.

a. The Court in *Jenkins* interpreted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, which authorizes courts to award prevailing parties in certain civil rights actions a "reasonable attorney's fee as part of the costs." 42 U.S.C. 1988(b). Just two years earlier, the Court had concluded that Congress "comprehensively addressed" the "kinds of expenses that a federal court may tax as costs" under Fed. R. Civ. P. 54(d) by restricting the meaning of "costs" to the six types of costs listed in 28 U.S.C. 1920. *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 440-442 (1987); see *West Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 87 & n.3 (1991) (*Crawford Fitting*'s reasoning applies to "costs" under 42 U.S.C. 1988). *Jenkins* accordingly addressed the meaning of a "reasonable attorney's fee" in Section 1988 against a backdrop in which paralegal services were not recoverable "costs" and could be recovered under Section 1988, if at all, only as attorney's fees. The Court held that they could be recovered as such fees. See *Jenkins*, 491 U.S. at 285.

Thus, in *Jenkins*, the only statutory hook for awarding paralegal expenses was a provision for "attorney's fees," so the choice was to reimburse paralegal expenses

as "attorney's fees," or nothing. In this context, the Court concluded that the phrase "reasonable attorney's fee" could not have been meant by Congress "to compensate only work performed personally by members of the bar" and, instead, must have been intended to "refer to a reasonable fee for the work product of an attorney." *Jenkins*, 491 U.S. at 285. The Court explained that the term therefore must include "the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client," including "the work of paralegals." *Ibid.*

Jenkins then addressed the appropriate method of valuing the work of paralegals, guided largely by the Court's prior recognition that Section 1988 grants "the successful civil rights plaintiff a 'fully compensatory fee.'" 491 U.S. at 286 (quoting *Hensley* v. *Eckerhart*, 461 U.S. 424, 435 (1983)). That requirement to "yield the same level of compensation that would be available from the market" led the Court to conclude that paralegal expenses must be reimbursed under Section 1988 in the same manner that such expenses are billed to clients in the relevant legal market at prevailing market rates. *Id.* at 286-287. Otherwise, "if the prevailing practice in the community were to bill paralegal time separately at market rates, fees awarded to 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 287.

b. While petitioner contends (Br. 15-16) that *Jenkins*' holding that paralegal expenses are an element of a "reasonable attorney's fee" under Section 1988 "applies with full force to EAJA," the reasoning underlying *Jenkins*' holding demonstrates the opposite to be true.

First, the presence of additional statutory language in the EAJA shows that the Act's use of the term "attorney fees" is more limited than that of its textual counterpart ("attorney's fees") in Section 1988. Section 1988 authorizes awards of "attorney's fees" as part of the "costs," but because the word "costs" is a recognized term of art that consists of the items listed in 28 U.S.C. 1920, see *Casey*, 499 U.S. at 87 & n.3, "attorney's fees" is the only term in Section 1988 that might authorize compensation for expenses associated with preparing a client's case. Cf. *Arlington*, 126 S. Ct. at 2460. *Jenkins* thus concluded that "attorney's fees" under that statute must take into account the "work not only of attorneys" but also the *expense* of those "whose labor contributes to the work product for which an attorney bills her client" (including paralegals) and "*other expenses* and profit." 491 U.S. at 285 (emphasis added).

The EAJA, in contrast, expressly authorizes the reimbursement of "[attorney] fees *and other expenses*," 5 U.S.C. 504(a)(1) and (b)(1)(A) (emphasis added), thereby separating into two distinct components what Section 1988 combines in the single term of "attorney's fees." These other "expenses" include items that would not be recoverable as traditional "costs." Thus, the existence of the category of "other expenses" must inform the meaning of "attorney fees." If the term "attorney fees" in the EAJA were given the same broad interpretation as its Section 1988 counterpart, that interpretation would improperly strip meaning from (and perhaps even render superfluous) Congress's express provision for "other expenses" under the Act.

Petitioner is wrong in arguing that this Court's interpretation in *Jenkins* that paralegal expenses are "attorney's fees" means that paralegal expenses must *always*

qualify as "attorney's fees." Of course, paralegal expenses would not qualify as "attorney's fees" in a statute that separately addressed "paralegal expenses" as such. And here, paralegal expenses do not qualify as "attorney fees" because the EAJA—unlike Section 1988—provides for reimbursement of a second category of "other expenses" that is naturally read to encompass paralegal expenses. Nothing in *Jenkins* precludes that construction.

Moreover, unlike Section 1988, the text of the EAJA provides that "the amount of fees"—not other non-fee expenses—are to be determined based on "prevailing market rates," 5 U.S.C. 504(b)(1)(A); establishes a cap on the rate at which "attorney fees" may be reimbursed; provides an exception from that ceiling on "attorney fees" based on factors addressing attorneys, not paralegals; and requires those categories of professionals (attorneys, agents, and experts) whose fees are to be reimbursed to submit itemized time. See 5 U.S.C. 504(a)(2) (requiring itemized statements of fees and expenses from "any attorney, agent, or expert witness" representing or appearing on behalf the fee applicant); 5 U.S.C. 504(b)(1)(A)(ii) (authorizing exception to fee cap based on "limited availability of qualified attorneys"); see also H.R. Rep. No. 1418, *supra*, at 15 ("The ceiling on attorney fees relates *only* to the compensation of lawyers and agents (e.g., accountants themselves).") (emphasis added). It would be inconsistent with these limiting aspects of the EAJA to compensate "other expenses" for the work of paralegals using prevailing market rates rather than cost since Congress expressly reserved such treatment for the "amount of fees." See also S. Rep. No. 586, 98th Cong., 2d Sess. 15 (1984) ("paralegal time" is an expense reimbursed at "cost"

under the EAJA). Had Congress intended to treat "other expenses" in the same manner, it presumably would have enacted statutory text to that effect.

The EAJA's fee cap further reflects a basic structural difference between the Act and Section 1988. Whereas "Congress's intent [was] to provide a 'fully compensatory fee'" to prevailing plaintiffs under Section 1988, *Jenkins*, 491 U.S. at 287, the EAJA is "fundamentally" different because "it is *not* designed to reimburse fees without limit" and, thus, often does not provide a "fully compensat[ory]" award because prevailing market rates for lawyers often exceed its $125-per-hour cap on fees. See *Underwood*, 487 U.S. at 573 (emphasis added).[8] The very existence of that cap, whose *only* function is to limit "public reimbursement for lawyers' fees" below prevailing market rates, *id.* at 572, illustrates a core distinction between the EAJA and fee-shifting statutes similar to Section 1988. See *id.* at 573 (concluding that whether the contingent nature of an attorney fee agreement may justify an increase in the amount of a reasonable "attorney fee" was "quite different" under the EAJA, which is a "fundamentally" different "sort of statutory scheme" than statutes like Section 1988; distinguishing *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) (*Delaware Valley II*)); cf. *Delaware Valley II*, 483 U.S. at 713 & n.1 (award of "reasonable attorney's fee" under

[8] This is true even in cases, unlike the present case, where regulations permit a cost-of-living adjustment to the EAJA's $125-per-hour ceiling. Assuming plaintiffs' estimate (Br. 7) of an adjusted rate of $168-per-hour to be correct, survey data indicate that the 2007 billing rates of most attorneys far exceed that rate. See p. 16 n.7, *supra* (2007 median hourly rates nationwide for partners and associates were $305 and $200 and, in Washington, D.C., $455 and $295, respectively).

Clean Air Act "follow[s] the principles and case law" developed under Section 1988).

c. The important statutory differences between the EAJA and Section 1988 fatally undermine petitioner's argument that *Jenkins*' interpretation of Section 1988 controls here. To be sure, this Court has often construed similar text to have the same meaning in different statutes and has applied that interpretive principle to Section 1988 and "many other federal fee-shifting statutes" which, like Section 1988, award prevailing parties a reasonable attorney's fee as part of costs. 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). However, the "presumption that identical words * * * are intended to have the same meaning" is "not rigid and readily yields"—even when the same word is used in separate places within a single statute—"whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed * * * with different intent." *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 595 (2004) (quoting *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932)).

This Court in *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 522-524 (1994), thus rejected the contention that its "decisions construing similar fee-shifting language" in other statutes controlled the proper interpretation of the Copyright Act even though the Copyright Act's fee-shifting provision used "virtually identical language."[9] *Fogerty* declined to extend to the copyright context the

[9] The Copyright Act authorizes courts to award "a reasonable attorney's fee to the prevailing party as part of the costs" in civil actions under the act. 17 U.S.C. 505.

holding in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978), that prevailing plaintiffs under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, should normally obtain an award of attorney's fees but prevailing defendants should not. While acknowledging that "fee-shifting statutes' similar language is a 'strong indication' that they are to be interpreted alike," the *Fogerty* Court held that that "normal indication" did not apply because *Christiansburg*'s reasoning relied on factors including policy considerations and Title VII's legislative history that did not apply to the Copyright Act. 510 U.S. at 523 (quoting *Zipes*, 491 U.S. at 758 n.2).[10]

That conclusion applies with even greater force here. As discussed, the pertinent text of the EAJA is not "virtually identical" to Section 1988 and, instead, contains material differences. In particular, the EAJA provides another category of expenses—"other expenses"—that are reimbursable, which is unavailable under the statute at issue in *Jenkins*. Additionally, the broader context of the EAJA's attorney fees provisions illustrates that fee awards under the Act, unlike Section 1988 and similar statutes, are not driven by a policy of full compensation. See pp. 14-16, 23, *supra*. Petitioner's narrow focus on the use of the term "attorney fees" in both the EAJA

---

[10] Petitioner incorrectly suggests (Br. 19) that *Sullivan* v. *Hudson*, 490 U.S. 877 (1989), construed the EAJA's use of the term "civil action" based on the principle that similar terms in fee-shifting statutes are to be construed alike. *Hudson* nowhere invoked or relied upon that interpretive canon. Instead, the Court reviewed the reasoning in its prior decisions that addressed whether other fee-shifting statutes allowed a court to award attorney fees for administrative proceedings that were related to the action before the court, and concluded that the "principles we found persuasive" in those prior decisions also "were controlling here." *Id.* at 888-889, 892; cf. generally *Shalala* v. *Schaefer*, 509 U.S. 292, 298-300 & n.4 (1993) (limiting scope of *Hudson*'s holding).

and Section 1988 thus fails to account for the well-established rule that a statute's use of such terms must be interpreted not only by reference to the terms' specific text but also by "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997).[11]

B. The Legislative History And Purpose Of The EAJA Confirms Congress's Intent To Reimburse Paralegal Time At Cost As An Out-Of-Pocket Expense

The legislative history of the EAJA confirms that paralegal expenses are not a category of "attorney fees" reimbursed at prevailing market rates but rather are a type of "other expenses" to be reimbursed only at the out-of-pocket cost to attorneys. Congress expressed its understanding in 1980 that "attorney fees" was limited to compensation for an attorney's time alone and, when Congress revisited the EAJA in 1984 to reenact the statute, it clarified not only that the EAJA reimbursed reasonable out-of-pocket expenses incurred by attorneys but also that "paralegal time" should be "billed at cost" as such an expense. To the extent the

[11] Petitioner's reliance (Br. 23-24) on *Casey* is unavailing. *Casey* simply discussed this Court's decision in *Jenkins*; it did not alter the meaning of that decision and therefore provides no basis for disregarding the considerations discussed above as to why *Jenkins* is not controlling. See *Casey*, 490 U.S. at 99-100. More fundamentally, *Casey* indicates that this Court has *not* been willing to read the phrase "attorney's fees" broadly to sweep in non-"attorney" fees where, as here, there are textual indications that Congress intended to treat "separate elements of litigation cost" (*id.* at 88) separately when it comes to awarding litigation fees and expenses. Likewise, the Court cautioned against a reading of fee-shifting statutes (including the EAJA) that would deprive meaning from the full statutory text of those provisions. See *id.* at 89, 91.

Court determines it useful to consult the legislative history, that should end the matter. Cf. *Arlington*, 126 S. Ct. at 2466 (Breyer, J., dissenting).

1. a. The EAJA's authorization to award "attorney fees" subject to a statutory ceiling resulted from a compromise entered to facilitate the Act's passage by limiting the size of awards and, hence, the Act's impact on the federal fisc. Initial efforts to enact the EAJA were derailed in the 95th Congress because of concerns regarding the Act's "high projected costs to the United States." H.R. Rep. No. 1418, *supra*, at 6. Those concerns persisted and led to a compromise in the 96th Congress limiting the scope of recovery. In the Senate, proponents of a broader bill to reimburse attorney fees more fully initially succeeded in amending the Senate bill to eliminate the $75 per hour "attorney fee" cap, but the cap was later restored by the Judiciary Committee before that bill passed the Senate. See S. Rep. No. 253, *supra*, at 8.

The Chairman of the Senate Judiciary Committee explained that the bill's $75 attorney fee cap did not "make the taxpayer whole" and, while he would have preferred authorizing more generous awards, the bill reflected a necessary "compromise[]" made in the "process of attempting to grind out legislation." See *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) (statement of Sen. DeConcini). That compromise "tried to strike some common ground" recognizing that "attorneys' fees per hour vary immensely" by locality and that the "going rate" for attorneys in large cities was $75 per hour "or more." *Ibid.*; see also *ibid.* (statement of Rep.

Kastenmeier) (bill appears to "strike a balance" and to be an "accommodation to the feelings of the Government * * * as to cost" to facilitate "passing the bill"); *id.* at 33 (statement of Rep. Railsback) (bill "represent[s] a compromise").

The 1980 House Report on the Senate bill, which was enacted as the EAJA, accordingly explained that the $75 "ceiling on attorney fees relates *only* to the compensation of lawyers or agents (e.g., accountants themselves)" and does not apply to the "costs connected with their representation of a particular interest in a proceeding." H.R. Rep. No. 1418, *supra*, at 15 (emphasis added); cf. H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 22 (1980) (EAJA's text is identical to bill reported by House). That understanding of "attorney fees" and the associated cap on reimbursement for *attorney* time indicates that expenses for items such as paralegal time, if reimbursable at all under the EAJA, would have been understood by Congress not as "attorney fees" but as "other expenses" similar to the reimbursable "cost of any study, analysis," or "project" "necessary for the preparation of the party's case," 5 U.S.C. 504(b)(1)(A).

In the three-year period between the Act's October 1981 effective date and its October 1984 repeal, see EAJA, Pub. L. 96-481, Tit. II, §§ 203(c), 204(c), 208, 94 Stat. 2327, 2329, 2330, a "controversy [arose] over whether the definition of 'fees and other expenses' was intended to be exclusive or whether, in addition to the costs of studies and analyses [expressly included in that definition], courts and agencies may award reasonable *out-of-pocket expenses* incurred in connection with a case." S. Rep. No. 586, *supra*, at 15 (emphasis added).[12]

---

[12] Compare, *e.g.*, *Ashton* v. *Pierce*, 580 F. Supp. 440, 443 & n.4 (D.D.C. 1984) ("compensation for * * * paralegal time" is "an expense

The Senate Report addressing the EAJA's reenactment thus explained that, while the bill reenacting the Act retained the original 1980 "language" of the definition, the Report provided congressional "clarification" that the definition permits reimbursement of such out-of-pocket expenses. *Ibid.*

Significantly for present purposes, the Report stated that "[e]xamples of the type of expenses that should ordinarily be compensable include paralegal time *(billed at cost)*." S. Rep. No. 586, *supra*, at 15 (emphasis added). In doing so, the Report expressly endorsed (1) an interpretation of the EAJA reflected in 1981 Model Rules implementing the Act and (2) the result reached by the Sixth Circuit concerning out-of-pocket expenses in the Section 1988 context in *Northcross* v. *Board of Educ. of the Memphis City Schs.*, 611 F.2d 624, 639 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980), overruled in relevant part by *Missouri* v. *Jenkins*, 491 U.S. 274, 285 n.7 (1989). See S. Rep. No. 586, *supra*, at 15. Both the Model Rules and the Sixth Circuit specifically treated

---

covering 'study' and 'analysis' within the meaning of [the EAJA]," which is "reimbursed at actual salary cost for time expended"), and *American Acad. of Pediatrics* v. *Heckler*, 580 F. Supp. 436, 440 (D.D.C. 1984) (paralegal expenses "may be reimbursed at actual salary cost to the law firm as an expense of litigation" under the EAJA; following *Ashton*), vacated in part, 594 F. Supp. 69 (D.D.C. 1984) (vacating different portion of EAJA award), with *Glick* v. *United States Civil Serv. Comm'n*, 567 F. Supp. 1483, 1487 n.5 (N.D. Ill. 1983) (rejecting claim for paralegal expenses because such expenses are "part of the lawyer's overhead, covered by the lawyer's fee rate" under the EAJA, which "should not be assessed against a defendant at a 'profit making' rate"), aff'd, 799 F.2d 753 (7th Cir. 1986) (Table), and *Photo Data, Inc.* v. *Sawyer*, 533 F. Supp. 348, 353 (D.D.C. 1982) (limiting reimbursement of expenses to the "reasonable cost of any study, analysis, engineering report, test, or project") (quoting 28 U.S.C. 2412(d)(2)(A)).

paralegal expenses as reimbursable at the out-of-pocket cost to an attorney, not as part of an attorney fee.

b. Petitioner contends (Br. 24-28) that the Senate Report's statement that paralegal expenses are "billed at cost" does not undermine petitioner's view that such expenses are "attorney fees" compensable at market rates. That position rests on four contentions, each of which is misplaced. First, petitioner states (Br. 25) that "expenses" under the EAJA encompass "attorney fees" and that the Report merely notes that paralegal costs are "expenses." But the statute clearly distinguishes between things like studies and fees for attorneys, agents, and experts. The Report specifically explains that "out-of-pocket expenses" may be reimbursed like "the *cost* of studies and analyses" and proceeds to identify "paralegal time" as one "such expense[]" reimbursable at "cost." S. Rep. No. 586, *supra*, at 15 (emphasis added).

Second, petitioner asserts (Br. 26) that the Report's approval of the result in *Northcross* aids petitioner's case because, in petitioner's view, *Northcross* "held that attorney fees for paralegal services should be awarded at market rates," not cost. That is incorrect. *Northcross* concluded that paralegal expenses constitute "reasonable out-of-pocket expenses incurred by the attorney," which therefore would be reimbursed under 42 U.S.C. 1988 at the attorney's cost for such assistance. See *Northcross*, 611 F.2d at 639. Indeed, in *Jenkins*, this Court itself concluded that *Northcross* "considered paralegal work 'out-of-pocket expense,' recoverable only at cost to the attorney." 491 U.S. at 285 n.7.

Third, petitioner argues (Br. 25-26) the Report's reliance on a Model Rule issued by the Chairman of the Administrative Conference of the United States is inconclu-

sive because the Rule permits expenses to be billed separately from an attorney fee under the EAJA if such expenses are ordinarily billed to clients. Cf. 46 Fed. Reg. 32,900, 32,913 (1981) (Model Rule 0.106(b)). The Rule's preamble, however, explains that the Rule is based on the understanding that an "attorney's out-of-pocket expenses ordinarily chargeable to clients" should be reimbursed separately and in addition to the "charges for the attorney's time" that would be subject to the EAJA's (then) $75-per-hour ceiling on attorney fees. *Id.* at 32,904-32,905 (citing H.R. Rep. No. 1418, *supra*, at 15). The preamble accordingly explains that "paralegal costs should be chargeable as expenses" in that manner. *Id.* at 32,905. Indeed, the preamble highlights the out-of-pocket character of paralegal expenses in stating that the Model Rule's drafters decided against listing paralegal time or other specific items as "compensable expenses" because "practices with respect to charging [clients] for paralegal time, as with respect to other expenses such as duplicating, telephone charges, and the like, vary" depending on locality and field of practice. *Ibid.*

Finally, petitioner claims (Br. 26-28) that the Senate Report "is not 'legislative history' at all" because the bill it accompanied was vetoed by the President late in the second session of the 98th Congress and the EAJA was not reenacted until the next year in the following Congress. In at least two unanimous decisions, however, this Court has cited the same report as accurately reflecting congressional intent underlying the EAJA's reenactment in contexts where, as here, the post-veto passage of the EAJA involved statutory language that was not materially different from the text discussed in the report. See, *e.g.*, *Melkonyan* v. *Sullivan*, 501 U.S.

89, 96 (1991) (citing Report as demonstrating that Congress "explicitly" adopted and ratified one side of circuit split concerning the meaning of "final judgment"); *Commissioner, INS* v. *Jean*, 496 U.S. 154, 159 & n.7 (1990) (citing Report as reflecting Congress's understanding of the EAJA's definition of "position of the United States"). See also *United States* v. *Enmons*, 410 U.S. 396, 404-405 & n.14 (1973) (concluding that earlier legislative history may be pertinent where it reflects an interpretation of "the very language subsequently enacted by Congress").

In this case, the relevant statutory text of 5 U.S.C. 504(b)(1)(A) discussed in the 1984 Report is *identical* to the statutory text reenacted by Congress in 1985. In fact, the post-veto bill was merely a "revision" of the legislation that the President vetoed in 1984 and, while portions were changed to "address concerns which the Administration raised in the President's veto message," H.R. Rep. No. 120, 99th Cong., 1st Sess. 6 (1985), the bill at issue in the 1984 Senate Report reflected the definition of "fees and other expenses" enacted as law in 1985. Compare 5 U.S.C. 504(b)(1)(A) (1988), with S. Rep. No. 586, *supra*, at 1-2 (text of bill reported by 1984 Report), and EAJA, Pub. L. No. 96-481, Tit. II, § 203(a)(1), 94 Stat. 2326 (original definition retained upon reenactment).

To the extent petitioner suggests (Br. 21-22) that Congress likely intended paralegal expenses to be a form of "attorney fees" reimbursed at prevailing market rates because Congress enacted the EAJA in 1980 against a "legal background" in which courts "generally" awarded paralegal expenses at market-rates, petitioner is incorrect. Before 1980, the few precedential decisions addressing the reimbursement of paralegal expenses

under other federal fee-shifting statutes had produced decidedly uneven results.[13] More to the point, the Senate Report's ratification of the outcome in *Northcross*—in which the court held that paralegal expenses were recoverable at cost—cuts decidedly against petitioner's position.[14]

In short, to the extent there is any doubt from the EAJA's statutory text, the Act's legislative history strongly confirms that the Act reimburses "paralegal time" as an "out-of-pocket expense[]," not an attorney fee, and compensates that expense at "cost," S. Rep. No. 586, *supra*, at 15, in the same manner that the Act reimburses "other [non-fee] expenses" such as the "cost of any study, analysis," or "project * * * neces-

---

[13] Compare *Northcross*, 611 F.2d at 639, and *Lamphere* v. *Brown Univ.*, 610 F.2d 46, 48 & n.3 (1st Cir. 1979) (paralegal expense reimbursed at amount paid by attorney under Title VII when paralegals were not regularly employed by the attorney), with *Todd Shipyards Corp.* v. *Director, OWCP*, 545 F.2d 1176, 1182 (9th Cir. 1976) (interpreting 33 U.S.C. 928).

[14] Not only does petitioner misread *Northcross*, as discussed earlier, petitioner's description of the "legal background" in 1980 overreads other decisions. See, *e.g.*, *Francia* v. *White*, 594 F.2d 778, 781-782 (10th Cir. 1979) (holding that award totaling $400 for legal services was abuse of discretion where record showed expenditure of 133.75 hours of attorney and paralegal time; remanding for recalculation of award without addressing how to compensate paralegal expenses); cf. *Jones* v. *Armstrong Cork Co.*, 630 F.2d 324, 325 n.1 (5th Cir. 1980) (noting that district courts had taken various positions concerning paralegal expenses). Perhaps because of the "increasingly widespread custom of separately billing for the services of paralegals" observed in the 1980s, courts of appeals appear to have more frequently addressed the question of reimbursing paralegal charges (in non-EAJA contexts) after the EAJA's enactment. See *Jenkins*, 491 U.S. at 284 & n.7, 286 (citation omitted) (noting circuit split under 42 U.S.C. 1988 based on *Northcross* and cases decided after *Northcross*).

sary for the preparation of the party's case," 5 U.S.C. 504(b)(1)(A).

2. Petitioner suggests (Br. 34) that limiting reimbursement of paralegal expenses to cost as an "other expense" would contravene the "central purpose of EAJA" to eliminate financial disincentives to litigation against the government. But the caps that Congress enacted in the EAJA for attorney fees, among other provisions, underscore that Congress did not pursue such a purpose at all costs, and petitioner simply fails to account for the compromises that Congress struck to enact the legislation.[15] More generally, petitioner ignores the fact that "no legislation pursues its purposes at all costs" and that "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."). Indeed, this Court's decision in *Underwood*, which construed the EAJA's attorney fee provisions narrowly in order to "preserve the intended effectiveness" of the EAJA's ceiling on the reimbursement of attorney fees, illustrates that the Act's general goals cannot form a proper basis for determining the amount of reimburse-

[15] Petitioner cites to language in *Jean*, 496 U.S. at 163, suggesting that the EAJA was intended to "eliminate" not just diminish the financial disincentive to challenge certain governmental actions. *Jean*, however, only addresses the "narrow" question of eligibility for an EAJA award "rather than the amount that may be appropriately awarded," and nothing in *Jean* suggests that EAJA awards should fully compensate litigants. See *id.* at 156, 163.

ment awarded under the EAJA. See *Underwood*, 487 U.S. at 572-573.

Petitioner contends that the EAJA should be construed to reimburse paralegal costs at market rates rather than cost because doing so would encourage paralegal use at lower rates and, thus, encourage the "cost-effective delivery of legal services." Br. 28-29 (quoting *Jenkins*, 491 U.S. at 288). There are two problems with this argument in the EAJA context. First, because the "EAJA subsidy is not directed to a category of litigation that can be identified in advance," a "lawyer will rarely be able to assess with any degree of certainty the likelihood that the Government's position will be deemed so unreasonable as to produce an EAJA award," *Underwood*, 487 U.S. at 573-574, and it therefore may be unlikely that the availability of fees will substantially influence litigation against the government. Cf. 5 U.S.C. 504(a)(1) (authorizing EAJA awards to prevailing parties only where the government's position is not "substantially justified"). Second, to the extent that such litigation *is* influenced by the availability of EAJA fees, petitioner has it wrong. As the court of appeals explained, treating paralegal fees as attorney fees could "distort the normal allocation of work and result in a less efficient performance of legal services" under the EAJA, because of the fact that the Act's cap is set generally to attorney rates (not paralegal expenses) and paralegal rates are much lower than those of attorneys. Pet. App. 18a. The inefficient delegation of attorney tasks to paralegals could, at the very least, increase the time it takes to complete such tasks, thereby increasing the overall size of EAJA awards in a manner contrary to Congress's intent to limit awards under the EAJA's fee caps.

C. Principles Of Sovereign Immunity Require That The Term "Attorney Fees" Be Narrowly Construed To Exclude Paralegal Expenses

Because the EAJA's statutory text, structure, and relevant background confirm that paralegal expenses are not "attorney fees" reimbursed at prevailing market rates, this Court need not invoke sovereign immunity principles to resolve this case. However, if the Act's text were ambiguous on this point, those principles would require that the Act's award of "attorney fees" be construed narrowly to exclude paralegal time.

It is well settled that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)). Statutory text waiving that immunity must be "specific and express," *King*, 395 U.S. at 4, and not enlarged beyond what the language plainly requires. *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992); see *Lane* v. *Pena*, 518 U.S. 187, 191-192 (1996). A statutory waiver therefore "must be 'construed strictly in favor of the sovereign,'" *Nordic Vill.*, 503 U.S. at 34 (citation omitted), by interpreting "ambiguities in favor of immunity." *United States* v. *Williams*, 514 U.S. 527, 531 (1995). Even when Congress has waived sovereign immunity, that waiver itself must be "strictly construed, in terms of its scope, in favor of the sovereign." *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (citing *Lane* v. *Pena*, *supra*, and *Library of Cong.* v. *Shaw*, 478 U.S. 310 (1986)).

Nothing in the EAJA's text clearly and unambiguously requires that "attorney fees" be construed to include paralegal expenses. The statutory text does not directly address the work of paralegals and, even in less

complex statutory fee-shifting regimes such as Section 1988, this Court has suggested that the term "attorney's fees" standing alone is "genuinely ambiguous" with respect to whether it includes paralegal costs. See *Casey*, 499 U.S. at 100; pp. 12-13, *supra*. Moreover, as noted, the Act contains provisions that are distinct from and more detailed than the average fee-shifting statute, and those unique provisions indicate that "attorney fees" in the EAJA context are limited to compensation for time worked by attorneys alone. See pp. 13-18, *supra*. Those provisions defining the amount of fees that may be awarded and the EAJA's broader authorization to award non-fee "other expenses" thus indicate that paralegal costs are best understood as "other expenses," not as "attorney fees." Even assuming that this interpretation were not compelled as a textual matter, the statute's silence regarding paralegal expenses at the very least reflects ambiguity regarding whether such costs are "attorney fees," which are reimbursed at prevailing market rates, or "other expenses" necessary for the preparation of a party's case, which are reimbursed at cost. Cf. *Barnhart* v. *Walton*, 535 U.S. 212, 218 (2002) (Where a "statutory provision says nothing explicitly about" an issue, "such silence * * * normally creates ambiguity.").

"Attorney fee" should thus be construed narrowly to exclude paralegal expenses in light of any such ambiguity. See *Ardestani* v. *INS*, 502 U.S. 129, 137-138 (1991) (applying strict construction to the EAJA's use of "adversary adjudication" and rejecting view that "broad purposes" of the EAJA can be invoked to overcome strict construction); *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983) (strictly construing the term "appropriate" in fee-shifting statute waiving sovereign

immunity from fee award); see also *United States Department of Energy* v. *Ohio*, 503 U.S. 607, 626-627 (1992) (construing statutory authorization to impose monetary "sanctions" imposed as "civil penalties" against government as excluding punitive penalties notwithstanding Congress's use of "a seemingly expansive phrase like 'civil penalties arising under federal law' " and "unresolved tension" in the statutory scheme suggesting that punitive sanctions may have been intended by Congress). Application of sovereign immunity principles to limit the recovery of paralegal expenses to actual costs is particularly appropriate for two additional reasons. First, the concerns about protecting the public fisc that animate the strict construction rule are not just an abstraction in the EAJA context. Congress in enacting and amending the EAJA specifically recognized the need to limit the burden on the public fisc. It is quite unrealistic to think Congress would have *sub silentio* vastly increased the government's exposure to charges for paralegals above and beyond actual cost. Second, application of the principles here will not leave petitioner without a remedy or render paralegal expenses unrecoverable. As discussed, Congress authorized EAJA awards not only for "attorney fees" but also for "other expenses" necessary for the preparation of a party's case, and paralegal expenses qualify as such "other expenses." Accordingly, this case (unlike *Jenkins*) concerns only *the extent to* which paralegal time is reimbursed by the EAJA, not whether they are reimbursed at all.

II. THE EAJA COMPENSATES "OTHER EXPENSES" AT THE COST TO THE ATTORNEY, NOT AT MARKET RATES CHARGED TO CLIENTS.

Petitioner argues in the alternative (Br. 36-43) that, even if payments for paralegal time constitute "other expenses" rather than "attorney fees," the EAJA compensates "other expenses" at market rates paid by the client, not at the cost to the lawyer. That issue is not fairly included in the question presented on which this Court granted certiorari, was not pressed or passed upon below, and, thus, is not properly before this Court. See *Yee* v. *City of Escondido*, 503 U.S. 519, 535, 537 (1992) (questions "related" and "complementary" to question presented are not "fairly included therein"); S. Ct. R. 14.1(a); see also *Caspari* v. *Bohlen*, 510 U.S. 383, 388-389 (1994).[16] However, even assuming the issue

---

[16] The question presented asked whether a prevailing party under the EAJA may "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*." Pet. i (emphases added). The petition stated that the four circuit decisions referenced in its question presented included "the Eleventh Circuit's * * * [holding] that EAJA authorizes recovery of market-rate *attorney fees* for paralegal services" and decisions from three other circuits that "refer[ed] to compensation for paralegal services as *'fees'* " and thus "presumably rel[ied] on the part of EAJA that ties the proper method of calculating 'fees' to 'market rates.' " Pet. 7-9 (emphases added). Those four rulings, the petition argued, were "directly at odds with the Federal Circuit's basic holding that paralegal services are cost-based 'expenses,' *not* 'fees.' " Pet. 9. Accordingly, the petition sought certiorari based on that purported conflict and a purported conflict with this Court's decision in *Jenkins*, which held that paralegal costs were "attorney's fees" under 42 U.S.C. 1988. Pet. 13-22. Fairly read, the question presented thus asked this Court to review only whether paralegal costs were "attorney fees" reimbursed at market rates under one line of authority or, instead,

were properly presented, petitioner's argument is unavailing.

As noted, the EAJA both distinguishes between "fees" and "other expenses" and specifically provides that the "amount of *fees*" that may be reimbursed "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); see pp. 11-14, *supra*. Congress's specific choice to measure "fees" by market rates while providing no similar provision for "other expenses" strongly indicates Congress's intent to reimburse only the expense of such non-fee items, *i.e.*, only their cost. Indeed, in specifically identifying as other expenses the "reasonable *cost* of any study [or] analysis * * * necessary for the preparation of the party's case," 5 U.S.C. 504(b)(1)(A) (emphasis added), Congress manifested its intent that non-fee "other expenses" be reimbursed at "cost." Not only does the interpretive principle of *ejusdem generis* support this conclusion, the strict construction owed to waivers of sovereign immunity requires that "other expenses" be taken no further than

---

were other "expenses" reimbursed by cost under the decision below, not whether such costs were other "expenses" that should be reimbursed at market rates.

In addition, petitioner never argued below that, if paralegal costs were not "attorney fees," they should nevertheless be compensated as an "expense" at market rates. See, *e.g.*, Pet. C.A. Reply Br. 5 (arguing that "paralegal time billed at cost is an *expense* of the attorney" but "paralegal time billed as fees at billing rates are *not* 'expenses' of the attorney and may be allowed as fees"); *id.* at 6 (concluding that "paralegal services should have been awarded as fees"). Petitioner's failure to make this argument below—and the related lack of any opportunity for the court of appeals to consider and pass upon the argument—is itself a persuasive reason for this Court not to address it. See *Sereboff* v. *Mid Atl. Med. Servs., Inc.*, 126 S. Ct. 1869, 1877 n.2 (2006).

the reimbursement of "cost" reflected in the statutory text.[17]

Moreover, compensating paralegal services at market rates would be inconsistent with the statutory ceiling that Congress placed on the amount of attorney and other professional "fees" that may be reimbursed under the EAJA. While Congress clearly authorized further compensation (*i.e.*, "other expenses") beyond "fees" to cover the reasonable cost of items or services necessary for such professionals to prepare a case, there is no evidence that Congress intended to reimburse parties for any additional profit collected by attorneys that may be imbedded in the market rates tied to any "other expenses" billed to their clients. Such a reading would improperly undermine the "need to preserve the intended effectiveness of the [$125] cap," *Underwood*, 487 U.S. at 573, that plays a critical role in the Act's fee reimbursement.

Nor is petitioner correct in asserting (Br. 39) that courts have adopted a "market rate" approach to compensating "other expenses."[18] While courts have re

---

[17] While petitioner argues (Br. 37-38) that the court of appeals improperly distinguished between "fees" and "expenses" because fees are a type of "expense" under the EAJA, petitioner's contention seizes on semantics not substance. The Act clearly distinguishes between "fees" and "other [non-fee] expenses" and, while the court of appeals did not retain the word "other" in its discussion of that distinction, a fair reading of the court's decision in context makes plain that its use of the term "expenses" refers to "other expenses" that do not qualify as "fees." See, *e.g.*, Pet. App. 4a, 15a.

[18] While petitioner states (Br. 39) that courts "regularly" approve expenses such as "transportation and other travel costs, postage, [and] long[-]distance telephone charges," the courts of appeals have divided over whether such charges are properly reimbursable under the EAJA. Compare *Aston* v. *Secretary of HHS*, 808 F.2d 9, 12 (2d Cir. 1986)

quired that expenses be of a type that are normally billed separately to clients in order to be reimbursable under the EAJA, see, *e.g.*, *International Woodworkers of Am.* v. *Donovan*, 792 F.2d 762, 767 (9th Cir. 1986), that requirement simply ensures that the expenses are not general overhead costs that are already accounted for (in addition to profit) in the prevailing market rates for attorney fees. Cf. *Jenkins*, 491 U.S. at 287 n.8 (noting that both "costs and profit margin" are imbedded in amount of attorney's fees billed to clients). Requiring that such "other expenses" be of a type normally billed to clients not only prevents over-reimbursing expenses, it ensures that the profit margin in an attorney's hourly rate is not improperly extended beyond that contemplated by the EAJA's attorney fee caps.

Petitioner's distinction between expenses directly paid by attorneys to third-party vendors and those paid for similar products produced by a firm in-house does not withstand scrutiny. While petitioner asserts (Br. 39) that "other expenses" should be paid at "market rates—that is, at the rate that the client is willing to pay in the relevant market"—that reasoning would permit reimbursement for charges beyond those paid by attorneys to 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. Petitioner's approach would likewise permit reimbursement of items such as in-house photocopying at rates that would in-

---

(travel, postage, and telephone costs are reimbursable), and *International Woodworkers of Am.* v. *Donovan*, 792 F.2d 762, 767 (9th Cir. 1986) (travel, air courier, postage, and telephone costs reimbursable), with *Precision Concrete* v. *NLRB*, 362 F.3d 847, 854 (D.C. Cir. 2004) (travel, taxis, courier and overnight delivery, facsimile and telephone costs are not reimbursable).

clude profit margin in addition to cost. Nothing in the EAJA's text or history suggests Congress intended any distinction between "other expenses" resulting from in-house or external purchases or that such expenses should be compensated at a profit-making rate for attorneys.

Petitioner's final suggestion (Br. 40-42) that calculating the cost of paralegal services poses practical problems is overstated. Attorney's fees calculations often involve litigation over amounts of fees or costs included in attorney's fee requests, including when it comes to determining the prevailing market rate. There is no reason to believe that reasonable valuations of costs attributable to paralegal expenses will prove inherently more difficult, much less elusive.[19]

Much of the difficulty that petitioner and its amici suggest may be associated with calculating paralegal costs stems from the degree of precision that they assume is required to document such costs. Such precision, however, is artificial in the attorney-fee context where reasonable approximations are generally accepted. Courts routinely estimate "reasonable" costs,

---

[19] The two post-*Richlin* cases that petitioner cites do not suggest otherwise. The prevailing party in one case *requested* a $35 hourly rate based on the rate derived in this suit. That request was granted without government opposition, and nothing in the court's decision suggests that the rate was insufficient. See *Former Employees of BMC Software, Inc.* v. *United States Sec'y of Labor*, No. 04-00229, 2007 WL 4181696, at *3 & n.1 (Ct. Int'l Trade Nov. 28, 2007). The prevailing party in the second case withdrew its request for paralegal expenses rather than document the relevant paralegal costs, and the court's decision does not reflect the reason for that withdrawal. *Information Scis. Corp.* v. *United States*, 78 Fed. Cl. 673 (2007). A law firm may decline to disclose the cost it pays for its paralegals for any number of reasons independent from the inability to determine that cost.

market rates, and the time "reasonably" expended on litigation. Attorneys similarly routinely record and bill their time in estimated six- or fifteen-minute intervals. There is no reason why attorneys cannot also provide a reasonable approximation of the costs of paralegal services based on documentation of such costs.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
GREGORY G. GARRE
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
JEANNE E. DAVIDSON
REGINALD T. BLADES, JR.
MICHAEL JAY SINGER
MICHAEL E. ROBINSON
Attorneys

FEBRUARY 2008

APPENDIX

1. 5 U.S.C. 504 provides in relevant part:

Costs and fees of parties

(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.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the under-

lying merits of the case have been finally determined pursuant to the appeal.

* * * * *

(b)(1) For the purposes of this section—

(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.);

* * * * *