No. 11-1344

In the Supreme Court of the United States

PAUL L. GABBERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, when a claimant substantially prevails in a civil forfeiture proceeding, the Civil Asset Forfeiture Reform Act of 2000, 28 U.S.C. 2465(b)(1)(A), requires the United States to pay attorney fees "incurred by the claimant" to the claimant rather than to the claimant's attorney.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rule:

Miscellaneous:

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 642 F.3d 753.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2011. A petition for rehearing was denied on December 20, 2011 (Pet. App. 29-30). On March 19, 2012, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including May 3, 2012, and the petition was filed that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In this civil forfeiture proceeding, the claimant, United Medical Caregivers Clinic (UMCC), prevailed in an action initiated by the United States for the forfeiture of

$186,416.00. See *United States* v. *$186,416.00 in U.S. Currency*, 590 F.3d 942 (9th Cir. 2009). Petitioner, an attorney, represented UMCC in connection with those proceedings. UMCC then applied for an award of attorney fees under the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), 28 U.S.C. 2465(b)(1)(A), and requested that the award be paid directly to its attorney. Pet. App. 2. The court of appeals denied that request and ruled that attorney fee awards under CAFRA are payable to the claimant, not to the claimant's attorney. *Id.* at 5-10.

1. Enacted in 2000, Pub. L. No. 106–185, 114 Stat. 202, CAFRA entitles a claimant who substantially prevails in a civil forfeiture action to a payment of reasonable attorney fees.[1] CAFRA provides, in pertinent part:

> (b)(1) Except as provided in paragraph (2), in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for—
>
> (A) reasonable attorney fees and other litigation costs reasonably incurred by the claimant;
>
> (B) post-judgment interest * * * ; and

[1] Before CAFRA was enacted, successful claimants in civil forfeiture actions could seek attorney fees under the Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, Tit. II, 94 Stat. 2325 (1980). EAJA authorizes the court in a civil action to "award to a prevailing party other than the United States fees and other expenses * * * incurred by that party" if the position of the United States is not "substantially justified" and no special circumstances would make an award unjust. 28 U.S.C. 2412(d)(1)(A). CAFRA, unlike EAJA, contains no exception for cases in which the government's position is "substantially justified."

> (C) in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale—
>
> (i) interest actually paid to the United States * * * ; and
>
> (ii) an imputed amount of interest that such currency, instruments, or proceeds would have earned[.]
>
> (2)(A) The United States shall not be required to disgorge the value of any intangible benefits nor make any other payments to the claimant not specifically authorized by this subsection.

28 U.S.C. 2465.

2. Upon prevailing in its civil forfeiture proceeding, UMCC moved for an award of attorney fees under CAFRA. It requested that the court use the "lodestar" method—by which the number of hours reasonably expended is multiplied by a reasonable hourly rate—to calculate the attorney fee award, and also that the award be paid directly to its attorney. Pet. App. 2-3. The government argued that the fee award should instead be based primarily on the actual fee agreement between UMCC and petitioner and that the award should be paid to UMCC. *Ibid*.

The court of appeals held that while the lodestar method should be used in calculating the attorney fee award, the actual fee agreement could be taken into account in determining a reasonable fee. Pet. App. 3-4, 10. It thus ordered UMCC to disclose its agreement with petitioner. *Id*. at 4. The court referred the matter to the Appellate Commissioner to make the calculations

and to order an award of fees and other litigation costs, noting that the Commissioner's order was subject to a motion for reconsideration by the panel. *Ibid.*

The court of appeals also held that the CAFRA fee award should be paid to UMCC as the prevailing claimant rather than petitioner. Pet. App. 5-10. UMCC argued that CAFRA should be read to authorize payment directly to attorneys because CAFRA, unlike the Equal Access to Justice Act (EAJA), does not direct that a court "shall award to a prevailing party * * * fees and other expenses" in specified circumstances, 28 U.S.C. 2412(d)(1)(A), but instead provides that "the United States shall be liable for" fees and costs, 28 U.S.C. 2465(b)(1)(A). The court of appeals rejected that argument. The court acknowledged that in *Astrue* v. *Ratliff*, 130 S. Ct. 2521 (2010), this Court relied in part on EAJA's "prevailing party" language in concluding that EAJA attorney fees are payable to the prevailing litigant. Pet. App. 6. But the court noted that *Ratliff* also relied on "the absence of language in EAJA explicitly directing fees to attorneys." *Ibid.* (citing *Ratliff*, 130 S. Ct. at 2525, 2527-2528). In particular, the court of appeals noted, the *Ratliff* Court contrasted EAJA with a provision of the Social Security Act making attorney fee awards "payable directly to a prevailing claimant's attorney." 130 S. Ct. at 2527 (citing 42 U.S.C. 406(b)(1)(A)). The latter provision, the Court noted, demonstrates that "Congress knows how to make fees awards payable directly to attorneys where it desires to do so." *Ibid.*; see Pet. App. 6. In this case, the court of appeals concluded that, under *Ratliff*, "direct payment to the attorney should not be presumed" "in the absence of explicit instructions from Congress awarding fees to the attorney." *Ibid.*

The court of appeals found no indication in CAFRA's text or history that Congress envisioned direct payment to counsel. On the contrary, the court noted that "the remarks of CAFRA's legislative supporters suggest that it was intended to award 'attorney fees and costs to *property owners* who prevail against the government in civil forfeiture cases.'" Pet. App. 8 n.1 (quoting 145 Cong. Rec. 29,719 (1999) (statement of Sen. Hatch)).

Finally, the court of appeals rejected UMCC's policy arguments in support of awarding fees and costs to the claimant's attorney rather than to the claimant. UMCC argued that if fees are not paid directly to attorneys, attorneys may not get paid for their work and will therefore be less likely to represent claimants in forfeiture actions, thus defeating Congress's intention that successful claimants receive redress for their losses. Pet. App. 8-10. The court of appeals noted that this Court considered much the same argument in *Ratliff*, in which the government was asserting a right to offset a debt owed by the claimant against the fee award, and nevertheless concluded that the award was payable to the claimant and therefore subject to offset. *Id.* at 9; see 130 S. Ct. at 2528. Here, by contrast, the court noted that nothing indicated that the government was seeking an offset against UMCC. Pet. App. 9 n.2.

Judge Berzon dissented. Pet. App. 10-28. In her view, CAFRA "doesn't expressly direct fees to the client *or* to the attorney," and district courts therefore should be permitted to decide on a case-by-case basis to whom an attorney fee should be paid. *Id.* at 21-22.

3. After the court of appeals issued its opinion, petitioner discovered that UMCC's status as a California corporation had been suspended by the California Franchise Tax Board. *United States* v. *$186,416.00 in U.S.*

Currency, No. 07-56549, Docket entry No. 73, at 2-7 (9th Cir. June 27, 2011). Petitioner thereafter filed emergency motions requesting to be relieved as UMCC's counsel and to intervene for the purpose of filing a petition for rehearing. *Id.* at 8-20. The court of appeals granted the motions, 7/21/11 Order, but denied petitioner's rehearing petition, Pet. App. 29-30.

ARGUMENT

1. Petitioner contends (Pet. 5-14) that CAFRA authorizes courts to direct payment of attorney fees to the attorney rather than the successful claimant in a civil forfeiture proceeding. The court of appeals correctly rejected that contention, and the decision below does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

a. CAFRA provides that, "in any civil proceeding to forfeit property * * * in which the claimant substantially prevails, the United States shall be liable for * * * reasonable attorney fees and other litigation costs reasonably incurred by the claimant." 28 U.S.C. 2465(b)(1)(A). By its terms, the beneficiary of this provision is the "claimant": the provision is triggered when the "claimant substantially prevails," after which the United States is liable for the fees and costs reasonably "incurred by the claimant." The most natural reading of this language is that the United States is liable to the person who "substantially prevails" in a forfeiture proceeding and who "incurs" the attendant fees and costs—that is, the claimant, not his attorney. Cf. *Richlin Sec. Serv. Co.* v. *Chertoff*, 553 U.S. 571, 579 (2008) (construing EAJA's administrative adjudication provision, 5 U.S.C. 504(a)(1), which provides for an award of fees and expenses "incurred by [a] party," as indicating Congress's intent that payments be determined from "the

perspective of the litigant," not "from the perspective of the party's attorney").

That Section 2465(b)(1)(A) governs the United States' liability for both "reasonable attorney fees" and "other litigation costs" further indicates that Congress did not grant lawyers an entitlement to payment. Petitioner does not argue that "other litigation costs" (which might include costs for expert witnesses or other analysts) are payable to the claimant. If Congress had intended that CAFRA payments be divided into multiple payments made directly to multiple people, it presumably would have said so. See *Astrue* v. *Ratliff*, 130 S. Ct. 2521, 2527 (2010) (noting that the EAJA allows prevailing parties to recover both attorney fees and other, specified "reasonable expenses"; that other vendors are not paid directly indicates that attorneys are not either). The grouping of attorney fees with other litigation costs in Section 2465(b)(1)(A) reinforces the conclusion that both the fees and costs are to be paid to the claimant who incurred them.

Another, related CAFRA provision confirms that the claimant, rather than his attorney, is the proper recipient of a CAFRA fee payment. Subsection (b)(1), containing the attorney fee provision, cross-references Subsection (b)(2), which exempts the United States from payments under certain circumstances. Subsection (b)(2) states, "The United States shall not be required to disgorge the value of any intangible benefits nor make *any other payments to the claimant not specifically authorized by this subsection*." 28 U.S.C. 2465(b)(2)(A) (emphasis added). Subsection (b) authorizes three types of payments: attorney fees and litigation costs, 28 U.S.C. 2465(b)(1)(A); post-judgment interest, 28 U.S.C. 2465(b)(1)(B); and pre-judgment interest

on seized assets in certain circumstances, 28 U.S.C. 2465(b)(1)(C). Awards of litigation costs, post-judgment interest, and pre-judgment interest all qualify as "payments to the claimant." Nothing in the statutory text suggests that Congress categorized attorney fees differently. Subsection (b)(2) thus indicates that an award of attorney fees, like other payments authorized under Subsection (b)(1), is a "payment[] to the claimant," not to his attorney.[2]

b. Even if the language of Section 2465(b)(1)(A) were ambiguous, petitioner identifies no persuasive reason to read that provision as authorizing direct payment to attorneys. As the Court noted in *Ratliff*, other fee-shifting provisions "show[] that Congress knows how to make fees awards payable directly to attorneys where it desires to do so." 130 S. Ct. at 2527-2528. In *Ratliff*, even accepting EAJA's attorney fee provision as ambiguous, comparison to other fee-shifting provisions made the Court "reluctant to interpret [EAJA] to contain a direct fee requirement, absent clear textual evidence supporting such an interpretation." *Ibid.* As is true of EAJA, no textual evidence in Section 2465(b) indicates that Congress intended to authorize direct payment to

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[2] In her dissent, Judge Berzon read the "other payments to the claimant" in Subsection (b)(2)(A) to refer only to the "other payments to the claimant" mentioned in that same sentence—*i.e.*, the "value of any intangible benefits." See Pet. App. 18-20 ("[S]ubsection (b)(2)(A) is self-contained and does not affect subsection (b)(1) at all."). That reading ignores both Subsection (b)(1)'s cross-reference to Subsection (b)(2)(A) and Subsection (b)(2)(A)'s explicit reference to "other payments to the claimant * * * *authorized by this subsection*." 28 U.S.C. 2465(b)(2)(A) (emphasis added). The dissenting opinion would effectively rewrite Subsection (b)(2)(A) by replacing "payments * * * authorized by this subsection" with "payments mentioned in this sentence."

attorneys—and as the court of appeals concluded (Pet. App. 6-7), without such evidence, the statute should not be read to contain one.[3]

Interpreting Section 2465(b)(1)(A) as directing payment to claimants, rather than their attorneys, is consistent with CAFRA's goal of giving innocent property owners "the means to * * * make themselves whole" after wrongful government seizures. H.R. Rep. No. 192, 106th Cong., 1st Sess. 11 (1999). The law thus provides for the seized property to be returned to the claimant, see 28 U.S.C. 2465(a)(1), and for reimbursing the claimant for reasonable fees and costs he incurred in defending against the forfeiture action.

Finally, as the court of appeals noted, the remarks of CAFRA's legislative supporters suggest that they contemplated payment to successful claimants in civil forfeiture actions, rather than their attorneys. See Pet. App. 8 n.1 (CAFRA was "intended to award 'attorney fees and costs to *property owners* who prevail against the government in civil forfeiture cases.'") (quoting 145 Cong. Rec. 29,719 (1999) (statement of Sen. Hatch)); see *ibid.* ("The award of attorney fees and costs to property owners who prevail against the government in civil forfeiture cases is justified because * * * the property owner is not charged with a crime * * * [;] it is unfair for the property owner to have to incur attorney fees and costs when the government does not prevail in civil forfeiture actions."); 146 Cong. Rec. 5228 (2000) (state-

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[3] Indeed, another CAFRA provision—providing that, upon entry of a judgment for the claimant, the property that is the subject of the proceeding "shall be returned forthwith to the claimant *or his agent*," 28 U.S.C. 2465(a)(1) (emphasis added)—demonstrates that, in CAFRA itself, Congress knew how to authorize disbursements or transfers to someone other than the claimant.

ment of Rep. Hyde) ("The bill provides that property owners who substantially prevail * * * will receive reasonable attorney's fees.").

c. Petitioner contends (Pet. 8-10) that the court of appeals erred in concluding that CAFRA, like EAJA, requires direct payment of attorney fees to claimants rather than their attorneys because CAFRA, unlike EAJA, does not "explicitly command[] that fees 'shall' be awarded to the 'prevailing party.'" Pet. 8. But while CAFRA is worded differently from EAJA, the most natural reading of its provision rendering the United States "liable" for "reasonable attorney fees and other litigation costs" incurred by the claimant is that fees and costs are to be paid to the claimant, rather than to attorneys, expert witnesses, or others who provide relevant services to the claimant. See 28 U.S.C. 2465(b)(1)(A) and (2)(A); pp. 6-8, *supra*.

Nor does CAFRA's "textual divergence" from EAJA carry particular significance given "the genesis of CAFRA as a reform of EAJA." Pet. 9-11 (internal quotation marks and citation omitted). Petitioner provides no persuasive reason to think that Congress omitted EAJA's "prevailing party" language for the unstated purpose of discarding EAJA's requirement that attorney fees be paid to the successful litigant. Although CAFRA is worded differently from EAJA, its text nevertheless makes clear that Congress contemplated that attorney fee awards would be treated as "payments to the claimant" rather than to the claimant's attorney. 28 U.S.C. 2465(b)(2)(A).

Petitioner also contends (Pet. 11-12) that the court of appeals erred in creating an "unprecedented presumption" that attorney fees should be paid to litigants rather than their attorneys. But in the passage to which peti-

tioner refers, the court of appeals simply observed that, "in general, statutes bestow fees on parties, not upon attorneys." Pet. App. 6-7 (citing, *inter alia*, 42 U.S.C. 1988 and antitrust laws making attorney fee awards payable to parties); see also *Evans* v. *Jeff D.*, 475 U.S. 717, 730-732 (1986) (attorney fees awarded under Section 1988 belong to the prevailing party, not his attorneys); *Venegas* v. *Mitchell*, 495 U.S. 82, 87-88 (1990) (same). That observation does not conflict with the settled rule that the text of a particular statute controls. See *Ratliff*, 130 S. Ct. at 2529.[4]

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[4] Nor does the court of appeals' rejection of a presumption *in favor* of interpreting fee-shifting statutes to authorize direct payment of attorney fees to the attorney, see Pet. App. 6, conflict with cases petitioner cites in support of the proposition that, "absent explicit provisions in a fee statute to the contrary, a federal court retains equitable power to award fees to counsel," Pet. 11. Neither *Central R.R. & Banking Co.* v. *Pettus*, 113 U.S. 116 (1885), nor *Brandenburger* v. *Thompson*, 494 F.2d 885 (9th Cir. 1974), concerned the interpretation of a fee-shifting statute. In each case, rather, the court recognized an equitable exception to the well-established rule that "attorney's fees 'are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor,'" *Summit Valley Indus., Inc.* v. *Local 112, United Bhd. of Carpenters & Joiners*, 456 U.S. 717, 721-722 (1982) (quoting *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 717 (1967)), and contemplated direct payment to counsel as part of the court's exercise of the equitable power to grant attorney fees. See *Central Railroad*, 113 U.S. at 124-125 (equitable power to grant attorney fees in common fund cases); *Brandenburger*, 494 F.2d at 888-889 (equitable power to grant attorney fees to legal services organization in suit under 42 U.S.C. 1983).

In *Miller* v. *Amusement Enterprises, Inc.*, 426 F.2d 534, 539 (1970), the Fifth Circuit suggested that attorney fees could be awarded directly to attorneys under a statute that "allow[s] the prevailing party * * * a reasonable attorney's fee as part of the costs," 42 U.S.C. 2000a-3(b). That decision, however, predated this Court's decisions interpreting the comparable language of other fee-shifting statutes to direct payment to

Finally, petitioner argues (Pet. 6-8, 13-14) that reading CAFRA to provide payment to the claimant and not his attorney would defeat Congress's objectives by discouraging attorneys from representing civil forfeiture claimants because, for example, their fees could be subject to offset if the claimant owes debts to the government. But as the court of appeals recognized (Pet. App. 8-10), this Court considered that precise argument in *Ratliff* and nevertheless concluded that EAJA attorney fees are payable directly to the claimant and are therefore subject to offset. 130 S. Ct. at 2528; see also *id.* at 2530-2531, 2533 (Sotomayor, J., concurring).[5] Sound policy reasons support making attorney fees and litigation costs payable to the claimant, rather than his attorney. As the Court noted in *Ratliff*, an attorney's entitlement to the payment of the fee award is typically conferred by "nonstatutory (contractual and other assignment-based) rights." *Id.* at 2529. In many cases, the prevailing claimant may have paid some or all of the bills submitted to him by his attorneys, and in other cases, the parties may dispute matters relevant to the litigation contract. By making CAFRA awards payable to the claimant, Congress avoided the need to have federal courts resolve such collateral issues under CAFRA. Cf. *Pierce* v. *Underwood*, 487 U.S. 552, 563 (1988) (A "request for attorney's fees [under the EAJA] should not result in a second major litigation.") (quoting *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983)). Such disputes between CAFRA fee recipients and their attor-

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the prevailing litigant rather than his attorney. See *Ratliff*, 130 S. Ct. at 2529; *Evans*, 475 U.S. at 730-732 & n.19.

[5] Here, moreover, as the court of appeals noted, nothing in the record suggests that UMCC faces any offset to satisfy an outstanding debt to the government. Pet. App. 9 n.2.

neys concerning their financial obligations to each other are appropriately resolved under applicable non-CAFRA law.

d. Petitioner does not contend that any court of appeals has concluded, in conflict with the decision below, that CAFRA attorney fees are payable directly to attorneys, rather than the claimants they represent. Rather, as petitioner acknowledges, the Ninth Circuit is the only court of appeals to have decided that issue. See Pet. 7 (describing this case as one of "first impression"). At least until other courts of appeals have had the opportunity to consider the issue, this Court's review would be premature.

2. Petitioner also contends (Pet. 14-16) that the court of appeals' directive that UMCC disclose its fee agreement with petitioner conflicts with a provision of California's State Bar Act that deems a written fee contract a "confidential communication" within the meaning of other state laws. Cal. Bus. & Prof. Code § 6149 (West 2003). He further contends that the court of appeals' decision therefore violates Rule 54 of the Federal Rules of Civil Procedure, which provides for disclosure of fee agreements "[u]nless a statute or a court order provides otherwise." Fed. R. Civ. P. 54(d)(2)(B)(iv).

Petitioner cites no authority in support of the proposition that Section 6149 of the California Business and Professions Code bars a federal court from ordering the disclosure of a fee agreement to resolve a motion for attorney fees. In any event, petitioner did not raise this issue before the court of appeals and the court did not pass on it. See Pet. 15 (acknowledging that the privilege issue was not raised before the court of appeals issued its decision). This Court ordinarily does not consider issues that were not pressed or passed on below. See

Cutter v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). Nothing justifies a departure from that practice in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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