No. _____

In The
Supreme Court of the United States

ROBERT M. ATHEY, MICHAEL R. CLAYTON, THELMA R. CURRY, RICHARD S. DROSKE, RALPH L. FULLWOOD, PAUL D. ISING, CHARLES A. MILBRANDT, TROY E. PAGE,

***Petitioners*,**

v.

UNITED STATES,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

"*The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law….*" Section 2412(b) of the Equal Access to Justice Act (EAJA) "essentially strips the government of its cloak of immunity with respect to costs and fees and requires it to litigate under the same professional standards applicable to a private litigant." *Mortenson v. United States*, 996 F.2d177, 1180-1181 (Fed. Cir. 1991); *see also Gavette v. OPM*, 808 F.2d 1456, 1466 (Fed. Cir. 1986) (*en banc*). The legislative history is clear that Congress enacted section 2412(b) so that the United States may be held liable for payment of plaintiffs' costs and attorney when the government must pay monetary damages to a "common fund." As held in *Gavette*, at 1466, the statute "expanded" the ancient American Rule under common law.

The Question Presented is:

Did a panel of the Federal Circuit err by entirely exempting the United States *as a matter of law* from liability for such fees and costs pursuant to the American Rule despite the explicit wording of the statute and the precedent of *Gavette* and *Mortenson* that Congress had "expanded" the common law in 2412(b) to shift liability for attorney fees and costs to the United States, subject to the reasonable discretion of the trial court?

LIST OF PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

STATEMENT OF RELATED CASES

Court of Federal Claims (CFC):

Athey v. United States, No. 99-2051 (June 2, 2006)

Court of Appeals for the Federal Circuit:

Athey v. United States, No. 2020-2291 (Sept. 21, 2021)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit (Fed. Cir.).

OPINIONS BELOW

The opinion in *Athey v. United States* from the United State Court of Appeals for the Federal Circuit (Fed. Cir.) is reported at 2021 U.S. App. LEXIS 28602 (Fed. Cir. Sept. 21, 2021). It is reprinted in the Appendix at Pet. App. 2a. The opinion in *Athey v. United States* from the United States Court of Claims is reported at 149 Fed. Cl. 497, 2020 U.S. Claims LEXIS 1234 (July 21, 2020). It is reprinted in the Appendix at Pet. App. 18a.

JURISDICTION

The Federal Circuit granted review of Petitioner *Athey's* appeal on September 12, 2021; it affirmed the Claims Court's decision. Pet. App. 17a. This Court's jurisdiction over the *Athey* case emanates from 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §§ 2412(b) and 2412(d) are produced in the appendix. (50a).

INTRODUCTION

THE FEDERAL CIRCUIT COMMITTED A FUNDAMENTAL ERROR OF LAW IN SUBSTITUTING THE WORDING "OTHER DEFENDANTS" FOR "ANY OTHER PARTY" IN APPLYING EAJA SECTION 2412(b) TO A REQUEST FOR ATTORNEY FEES WHERE A "COMMON FUND" WAS ESTABLISHED BY THE TRIAL COURT

This case is about protecting Congress's decision to provide plaintiffs who prevailed in suits against the United States Government the opportunity to recover attorney's fees and costs against the defendant, subject to the reasonable discretion of the trial court. The nonprecedential decision of a panel of the United States Court of Appeals for the Federal Circuit below both violates that congressional mandate and produces an incongruous result which, in practice, could negatively impact thousands of small businesses, veterans, and federal employees in their ability to retain attorneys to represent them. The panel's decision in effect entirely repeals a key section of the Equal Access to Justice Act that was enacted forty-two (42) years ago. No decision of any court in that entire history has reached a similar result. Moreover, the Federal Circuit panel's decision in the *Athey* case specifically violates conclusive precedent established by two earlier decisions of the same Court of Appeals, one of which was an *en banc* decision signed by all eleven (11) Federal Circuit Judges.

Section 2412(b) of the Equal Access to Justice Act (EAJA) "essentially strips the government of its cloak of immunity with respect to costs and fees and requires it to litigate under the same professional standards applicable to a private litigant." *Mortenson v. United States*, 996 F.2d177, 1180-1181 (Fed. Cir. 1991); *see also Gavette v. OPM*, 808 F.2d 1456, 1466 (Fed. Cir. 1986) (*en banc*). The legislative history is clear that Congress enacted section 2412(b) in 1980 so that the United States may be held liable for payment of plaintiffs' costs and attorney fees only in three situations: 1) when the government must pay monetary damages to a "common fund"[1]; 2) where there are multiple beneficiaries of the judgment against the United States; or 3) where the government engaged in "bad faith." Congress shifted the liability for such fees and costs to the United States. As held by the entire Federal Circuit in *Gavette*, at 1466, the statute "expanded" the ancient American Rule under common law which otherwise would require plaintiffs to pay their own attorney fees and costs.

The precedent set by *Gavette* and *Mortenson* is irrefutable in the case at bar. Moreover, there is no decision of any court in any jurisdiction since Congress enacted section 2412(b) which refutes the reasoning and holding of *Gavette* and *Mortenson,* except the decision of the panel of the Court of Appeals for the Federal Circuit in *Athey et al. v. United States.*

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[1] The fact that the United States must pay $570,000 to a "common fund" which was established by the Court of Federal Claims below was conceded by the government below. Appx2639.

The panel held, *as a matter of law*, that the wording of the second sentence of 2412(b) reverses the explicit intent and wording of the statute's first sentence, thereby immunizing the government from all liability. The panel alleged the government is not liable for plaintiffs' attorney fees because *"other defendants* would not be liable" *under the common law*. The panel did not acknowledge that *Gavette* and *Mortenson* expressly held that Congress "expanded" the common law American Rule when an undisputed "common fund," as here, is a predicate to government liability under 2412(b).

Nor did the panel explain why Congress would absolve the United States of all liability in the same two-sentence statute that explicitly shifted liability to the United States?

This key section of the EAJA was intended as a fee-incentive for attorneys to represent small independent businesses which have small claims against the government. The EAJA is one of the most utilized statutes by litigants of limited means against the litigation power of the Federal government. By virtue of this decision, thousands of veterans and federal employees also could lose the work product of effective counsel in cases which involve relatively small amounts of money. The government has the ability to extend the litigation for many years, as here, regardless of ultimate liability. As an incentive, Congress provided standard attorney hourly rates by virtue of 2412(b) rather than the greatly reduced hourly rates pursuant to the alternative fee schedule afforded by 2412(d). As a practical matter, this decision jeopardizes the express intent of Congress.

The decision in *Athey* is plainly contrary to Congress' purpose in enacting section 2412(b). The ramification of the Federal Circuit's remarkably erroneous decision has broad practical implications for litigants of limited means unless remedied by this Court.

PROCEDURAL AND FACTUAL BACKGROUND

In *Athey v. United States,* 3,231 former federal employees prevailed after seventeen (17) years of contentious litigation with respect to the failure of the United States to pay recently retired or separated employees pay increases required by 5 U.S.C. 5551(a). The Court of Federal Claims finally approved a settlement providing a class of former federal employees with 100% of back pay damages equal to $570,374.49. The Court stipulated in the settlement agreement that the Class Action Administrator must create and maintain a common fund to which "payment is to be made to the Class Administrator who will establish an '*Athey* Class Settlement Trust' [which] the Administrator will manage the distribution of proportionate shares to eligible members of the class, or their heirs, based on the amount of lump-sum pay owed to each individual as calculated by the VA from individual payroll records."

The class of prevailing employees who recovered a judgment for 100% back pay filed a motion pursuant to section 2412(b) of the EAJA for attorney's fees and costs amounting to more than one million dollars, which far exceeded the amount of back pay approved by the Court. The prevailing plaintiffs filed a detailed hour by hour, day by day,

recital of their attorney's legal work in support of their claims. A recently appointed judge of the Court of Federal Claims new to the case held, in agreement with the government, that only the common fund itself could be liable for the plaintiffs' attorney fees and costs. Had the common fund paid the attorney's fees and costs, the 3,231 employees would have received none of the back pay which they were admittedly owed. This was precisely what Congress intended to prevent by the passage of 28 U.S.C. § 2412. Plaintiffs filed a timely appeal to the Court of Appeals for the Federal Circuit.

Congress amended the EAJA, § 2412(b), to provide a clear statement which explicitly states, contrary to common law, that the United States *can be held liable* for reasonable fees and expenses of attorneys. The statute provides, in relevant part, that "a court may award reasonable fees and expenses of attorneys to the prevailing party in any civil action brought by or against the United States."

Congress also provided an explanatory second sentence which fashioned a new statutory rule that equated the government's liability for attorney fees and costs with that of of private parties, such as plaintiffs or beneficiaries of a common benefit under common law . The parties dispute the meaning and application of the statute's second sentence: "The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law…."

The Federal Circuit panel held that the Claims Court was correct in deciding that only the "common fund" is liable despite the language of the second

sentence of § 2412(b). App.8a. To reach that result, the panel substituted the words "other defendants" for the statute's phraseology of "any other parties" in order to support the panel's decision that the age-old American Rule which exempted all defendants from liability still governs despite Congress' explicit statutory rule that the United States can be held liable under section 2412(b). App.11a.

The panel's decision, which depended exclusively on its rationale that the exemption of defendants from common law liability nonetheless prevailed as Congress must have intended that the United States was "any other party," is directly at odds with long standing precedential decisions of the Federal Circuit in *Gavette v. OPM*, 808 F.2d 1456, 1466 (Fed. Cir. 1986) (*en banc*) and *Mortenson v. United States*, 996 F.2d 1177, 1180 (Fed. Cir. 1993). Both of those decisions command an entirely different result than the panel's opinion. The court noted in *Gavette,* at 1466, that "it would require a strained and logically impossible construction to find that the United States is a party "other than the United States" for the purposes of § 2412(b)...." Meaningfully, as a matter of statutory construction, Congress' use of the words "any *other* party" (emphasis added to the word "*other*") necessarily compared the United States' liability as a defendant to the age-old liability of plaintiffs for their own attorney fees under common law, as illustrated in *Gavette*.

The Federal Circuit's analysis in *Athey* is that the United States is exempt from any liability for plaintiffs' attorney fees and costs even though the explicit wording of both the first and second sentence

of § 2412(b) shifts such liability to the United States. Respectfully, plaintiffs contend that this makes no sense.

Plaintiffs respectfully submit that the panel overlooked the refutation in both *Gavette* and *Mortenson which* rejected any suggestion that the second sentence of § 2412(b) somehow excluded the United States from liability. App.12a. No other case since *Gavette* and *Mortenson* has interpreted the phrase "any other party" as did the panel in *Athey*. The panel cited no authority to support its unique holding that the second sentence of § 2412(b) refers to the United States as "any other party." App.11a.

The panel incorrectly, and out of context, alleged that plaintiffs have advanced the "theory that § 2412(b) stands alone to supplant the common law," and that plaintiffs' claim "§ 2412(b) operates independently." The examples the panel recites in snippets from "Appellants' Br. 22," and "24-27", when examined in context, correctly stated that 2412(b) shifted liability for attorney fees and costs by statute from the plaintiffs to the United States. App.9a. Contrary to the mis-characterizations of the panel, plaintiffs consistently asserted that a substantial "common fund" was created by direction of the trial court, in accord with the agreement of the government and the plaintiffs, *and therefore*, the "common fund" serves as one of the three (3) necessary common law predicates to shift liability to the United States under § 2412(b). Indeed, the panel contradicted itself by acknowledging plaintiffs' consistent legal theory, as follows: "In applying for fees at the trial court, Plaintiffs themselves relied on the "common fund"

common law exception to the American Rule as providing the basis for fees under § 2412(b)." App.10a.

In effect, the panel created a straw man which supported the court's patently incorrect statement: "Thus, we agree with the Court of Federal Claims' determination that the common fund exception does not apply in the manner asserted by plaintiffs—namely to impose additional liability on the United States as a defendant . *Athey* IV, 149 Fed. Cl. at 509." App.9a. However, both *Gavette* and *Mortenson, supra,* specifically stress that the common fund exception to the American Rule serves as one of the three predicates for shifting liability to the United States *under § 2412(b)*, which is precisely "the manner asserted by plaintiffs to impose additional liability on the United States as a defendant." App.9a.

Plaintiffs petition this Court to resolve whether the second sentence of 28 U.S.C. § 2412(b) completely shields the United States from any liability for prevailing plaintiffs' attorney fees and expenses.

ARGUMENT

I. A "Common Fund" Shifts Liability For Attorney Fees and Related Expenses To the Government Under § 2412(b)

The Federal Circuit panel acknowledged that there are three exceptions to the American Rule which would subject "other private parties" to liability for attorney fees under common-law "such as the exceptions of "bad faith," "common fund," and "common benefit":

> "Section 2412(b) was intended to subject the United States to the same common law or statutory exceptions to the American Rule of attorney fees[1] that other private parties would be subject to, such as the exceptions of "bad faith," "common fund," and "common benefit." *See Gavette v. OPM*, 808 F.2d 1456, 1460 (Fed. Cir. 1986). Before the trial court, Plaintiffs argued they were entitled to fees under § 2412(b) based on the common law exceptions of "common fund" and "bad faith." *Id.* at 4-5.

It is an undisputed fact in this case that the United States agreed "the settlement fund established by the trial court in this case is a common fund because 'each member of [the] certified class has an undisputed and mathematically ascertainable claim to part of [the] lump-sum judgment recovered on his behalf.' Appx2639. *See* H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984, 4987; S. Rep. No. 253, 96th Cong., 1st Sess. 4 (Star Print 1979)."

While the common law American Rule shields the defendant from liability for successful plaintiffs' attorney fees, there are exceptions recognized in *Trustees v. Greenough*, 105 U.S. 527, 26 L. Ed. 1157 (1882) which apply to the plaintiffs themselves or the beneficiaries of a common fund. Thus, when there is a "common fund" involved as a "predicate basis," such liability shifts from the plaintiff to the "common fund" itself.

In 1980, Congress created a further exception from common law in the Equal Access to Justice Act, section 2412(b).

The panel recognized "that § 2412(b) is a fee shifting statute that trumps the American Rule" and that "[a]lthough this is generally true, fee shifting pursuant to § 2412(b) has clearly-specified common-law and statutory limits to when it trumps the American Rule." *Id.* at 9. [2] Plaintiffs contend that the rule enacted by Congress with respect to liability by the United States under section 2412(b) is completely different than the American Rule under the common law. The panel, as well as the government and the claims court, all contend that *under common law* only the "common fund" is liable for plaintiffs' attorney fees, and therefore section 2412(b) of the EAJA is inapplicable. However, the plain language of 2412(b), its unquestioned legislative history, and this court's solid precedent set by *Gavette v. OPM,* 808 F.2d 1456, 1466 (Fed. Cir. 1986) and *Mortenson v. United States*, 996 F.2d 1177, 1180 (Fed. Cir. 1993), compel a completely different result.

Congress enacted 28 U.S.C. § 2412(b) to supercede those common law rules as long as a "common fund" was established. Congress obviously had the specific objective of shifting liability for fees

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[2] The Court of Federal Claims below ignored § 2412(b) when it decided that liability for the payment of attorney fees is the responsibility only of the "common fund" established to pay back pay to 3,231 employees. Appx0008. Thus, the Claims Court's analysis was governed exclusively under common law rules and the court made no mention whatsoever of § 2412(b) at the point it determined that the common fund was liable.

to the United States in line with the common fund exception. But the panel's opinion under the undisputed facts of this case completely nullifies the application of § 2412(b) and thwarts Congress' specific statutory objective.

Plaintiffs therefore contend that § 2412(b) is applicable because Congress said so by operation of law when a common fund is established. Congress clearly expressed that objective in the text and the undisputed legislative history of § 2412(b) as the court agreed in *Gavette* and *Mortenson*.

II. The Panel's Reliance Upon *Knight* Is Unsupportable On The Facts

The panel's primary citation in support of its conclusion is *Knight v. United States*, 982 F.2d 1573 (Fed. Cir. 1993). The panel held (*Id.* at 7):

> In *Knight*, plaintiffs' attorneys made a claim for attorney fees against the defendant Government under a common fund theory. We rejected that claim, holding that plaintiffs' attorneys were improperly applying the common fund doctrine because that theory "does not impose additional liability on the losing defendant," and instead "is essentially a suit for contribution from third party beneficiaries for expenses actually incurred." *Id.* at 1579–80.

The panel improperly relied on *Knight* because the citation quoted by the panel related expressly to a separate and distinct claim in *Knight* for recovery pursuant to *common law* "under a common fund theory."

> "Knight's claim for attorneys fees [was] under the 'common fund' doctrine of liability recognized in *Trustees v. Greenough*, 105 U.S. 527, 26 L.Ed. 1157 (1882)." *Id.* at 1579....

That particular claim in *Knight* had nothing whatsoever to do with liability under section 2412(b). This court appropriately rejected the common law claim because, unlike the *Athey* case, no common fund was created in *Knight:*

> Looked at realistically, Foster Pepper's claim against the government is *not* for "common fund" recovery, but for improper disbursement of back pay to employees without withholding attorney's fees....All of these circumstances lead us to conclude that the district court was correct in holding that there was never a common fund under the control of the court against which the court could under common law principles impose a charge for attorney fees on nonparties and we affirm the denial of attorney fees on Foster Pepper's common fund claim. (*Id.* at 1582).

As to the entirely separate claim under the EAJA's section 2412(b), the panel's reliance on *Knight* as precedent is entirely misplaced. Unlike in *Athey*, Knight's attorney was retained on a contingent fee contract and inasmuch as no damages were awarded, no attorney fees were "incurred":

> Here, Knight has "incurred" no attorney fees for the district court litigation. Foster Pepper was retained on a contingent fee basis, the amount of which accrued and was fixed before the suit. Although the "administrative attorney

> fees" sought as the object of the district court litigation are included within the "Claim" subject to Foster Pepper's 25 percent charge, our disposition of the case leaves no basis upon which such fees may be awarded. Thus the fees "incurred" by Knight in connection with the district court litigation are twenty-five percent of nothing--in other words, nothing. (*Id.* 1583-1584).

The Federal Circuit in *Knight* did not deny the shift of attorney fees to the government under the EAJA's section 2412(b) as no common fund was established and no attorney fees were incurred.

III. The Second Sentence Does Not Absolve Defendant From Liability

The panel cited *Gavette,* at 1466*,* as precedent for its finding that the government is not liable for plaintiffs' attorney fees pursuant to section 2412(b) based on an inappropriate substitution of the words "other defendants" for the words "any other party" in the second sentence (*Id.* at 8-9):

> In other words, EAJA was intended to alleviate a potential litigant's concern that they would be monetarily worse off even if they won an award or mounted a successful defense against the government. This general purpose however, cannot overcome the plain language of the particular statute that Plaintiff's argue entitle them to fees—§ 2412(b)—which only applies in specified situations. Here, that situation is where "any other party would be liable under the common law." *And because other defendants would not be liable for an*

> *additional award of fees under the "common fund" doctrine, neither is the Government here. (emphasis added).*

The key words which the panel substituted for the precise wording of the statute is "other defendants" instead of "any other party." The panel's unsupportable theory is that since the American Rule shields all defendants from liability for plaintiffs' attorney fees under the common law's doctrine of "common fund," the United States *cannot be liable even under a statute* which was enacted to change common law.[3] The panel reaches such an illogical result by misinterpreting the statutory phrase "any other party" to mean "other defendants" rather than such *other* parties as the plaintiffs or the multiple beneficiaries of the common fund. The panel insisted the statute is inapplicable against the United States although it specifically provides: "The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award."

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[3] The cited legislative history specifies that fee shifting provided by § 2412(b) also occurs when the government commits "bad faith." Thus, the panel's interpretation of the second sentence would also apply theoretically whenever the government committed "bad faith." However, it is obvious that the government could not both commit "bad faith" and also be exempt from liability under § 2412(b) for plaintiffs' attorney fees and costs because "other defendants" are not liable under common law. That illogical illustration convincingly demonstrates the panel's error in refusing to recognize that Congress specifically intended to change "common law" in order to shift liability for attorney fees to the government in all three (3) factual situations which are covered by § 2412(b).

The phraseology of § 2412(b)'s second sentence is as follows: "*The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law....*" (emphasis added). The statute does not say that the United States shall be liable for such fees and expenses to the same extent that "other defendants" would be liable under the common law. The United States cannot be liable as the defendant, and not liable as the defendant, within the same sentence. *Gavette* squarely addressed this argument and clarified that "any other party" is not the government. *Gavette,* at 1466, stands for the proposition that fee shifting against the United States is perfectly appropriate under § 2412(b) when a "common fund" is involved:

> The present case is representative of a situation in which congressional intent is clear, even though imprecisely couched in the statutory phraseology of section 2412(b). The legislative history of the EAJA and the circumstances surrounding the passage thereof demonstrate that the drafters explicitly contemplated recovery of attorney fees against the government under circumstances other than those narrowly revealed by the "terms of any statute" language. The pertinent legislative history reads, in part:
>
> First, [EAJA] amends [section 2412(b)] to permit a court in its discretion to award attorney fees and other expenses to prevailing parties in civil litigation involving the United States to the same extent it may award fees in cases involving private parties. Thus, the

> United States would be liable for fees under the "bad faith," "common fund," and "common benefit" exceptions to the American rule [against fee-shifting].
>
> It would require a strained and logically impossible construction to find that the United States is a party "other than the United States" for purposes of section 2412(b)....

Thus, the panel erred in its interpretation of the words "any *other* party" (emphasis added) in the second sentence to mean "the United States," which this court held in *Gavette* was "logically impossible." Nonetheless, the panel arrived at this erroneous interpretation of § 2412(b) by first substituting "other defendants" for "any other party." The panel then relied on common law, rather than the plain language of the statute, "because other defendants would not be liable for an additional award of fees under the "common fund" doctrine,—"*neither is the Government here*." *Id.* at 8-9 (italics added).

By revising the wording of the second sentence to substitute "defendants" for "any other party," the panel gave no meaning to the actual wording of the statute-- illogically concluding the United States is simultaneously both the "defendant" and "any other party" within the same litigation, as this court definitively held in *Gavette*.[4] The panel's

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[3] In *Mortenson v. United States*, 996 F.2d 1177, 1180 (Fed. Cir. 1993), this Court held: "The second waiver of immunity, EAJA § 204(a), 28 U.S.C. § 2412(b) (1988), explicitly waives the government's sovereign immunity in a civil case to an award of

interpretation fundamentally changed the commonly understood meaning of this separate portion of the statute, thereby completely absolving the United States of any and all liability for attorney fees and expenses regardless of the government's agreement to fund a "common fund."

The panel reasoned in strongly worded language that the government should not be liable for attorney fees and expenses under 28 U.S.C. § 2412(b) in every case because "under common law," no defendant is ever liable for prevailing plaintiffs' attorney fees. But section 2412(b) of EAJA changed "common law" when a common fund was created and funded. Thus, pursuant to the holding of the panel, the second sentence entirely eviscerates the first sentence even though the first sentence unquestionably holds the government liable when a "common fund" is involved, and the second sentence itself begins with the following: "*The United States shall be liable for such fees and expenses….*"

Plaintiffs respectfully contend that the panel's holding is illogical on its face, contrary to binding precedent, and cannot stand. Plaintiffs recognize that the panel's decision is technically nonprecedential, but such a definitive and unsupportable ruling potentially will have a profound impact not only with respect to the denial of attorney fees in multiple cases

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reasonable attorney fees "to the same extent [any court having jurisdiction] may presently award such fees against other [private] parties." H.R. Rep. 1418 at 5-6, *reprinted in* 1980 U.S.C.C.A.N. at 4984. Section 2412(b) essentially strips the government of its cloak of immunity with respect to costs and fees and requires it to litigate under the same professional standards applicable to a private litigant."

going forward, but as well as to whether small businesses, veterans, and federal employees of limited means can attract legal counsel to represent them in innumerable potential cases against the government.

IV. The Federal Circuit Committed A Fundamental Error In Its Reliance On "Deference To The Trial Court Under The Abuse of Discretion Standard" Inasmuch As The Claims Court Judge To Whom Such Deference Was Afforded Did Not Function As "The Trial Court" In The *Athey* Case

Alternatively, plaintiffs requested attorney fees under 28 U.S.C. § 2412(d)(1)(A). In *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991), the Federal Circuit defined the standard to be followed in determining whether the government's decision to deny plaintiff's attorney fees pursuant to 28 U.S.C. § 2412(d)(1)(A) was "substantially justified": "...trial courts are instructed to look at the entirety of the government's conduct and make a judgment call whether the government's overall position had a reasonable basis in both law and fact."

The Federal Circuit panel in *Athey* acknowledged the holding of both *Chiu* and *Doty v. United States,* 71 F.3d 384, 385 (Fed. Cir. 1995), *as modified,* 109 F.3d 746 (Fed. Cir. 1997), "that the government bears the burden of establishing that its position was substantially justified." Subsequently, in *Hubbard v. United States*, 480 F.3d 1327, 1332 (Fed. Cir. 2007), the Federal Circuit further defined the government's burden of proof with respect to its "position" which includes the action *or inaction* of the agency both before and during the litigation.

Significantly, the Federal Circuit panel held that it rejected any independent responsibility to review the entire record as to whether the government's position was substantially justified" because it deferred to the trial court's determination. The panel held as follows in various paragraphs of its decision quoted here:

> "We decline Plaintiffs' request to reweigh the trial court's determination based on its view of the entire record, a determination that is reviewed with a significant amount of deference under the abuse of discretion standard." App.12a-13a.
>
> "Considering the trial court's familiarity with the record before it and the high standard of review applicable here, we cannot say that the trial court abused its discretion in determining that the issues on which the Government won were "key issues"; nor can we say that it abused its discretion in concluding that these wins were sufficient to render the Government's overall position substantially justified such that fees under § 2412(d) are precluded. On appeal, Plaintiffs ask us to second guess the trial court's weighing of the relative importance of the issues in determining whether the United States' position was "substantially justified." App.14a.

"The key piece of evidence Plaintiffs point to in making this argument is their expert's declaration, which estimated monetary values for the various issues and indicated that the two issues on which Plaintiffs prevailed were much more valuable than the issues on which the Government prevailed. The

expert's speculation as to the potential monetary values of the issues, even if accurate, cannot substitute for the trial court's judgment in weighing those issues. This required weighing is a highly discretionary task reserved for the trial court, as we described in *Chiu*:

> This exercise . . . is quintessentially discretionary in nature. For instance, whether the government was substantially justified overall where in litigation it depended on the ground of lack of jurisdiction and a party prevails on a substantive aspect of the agency's action which gave rise to the litigation necessarily involves an apples to oranges comparison. It is for the trial court to weigh each position taken and conclude which way the scale tips, and as an appellate court we must be wary not to redistribute these weights among different positions unless a serious error in judgment has been made. 948 F.2d at 715 n.4." App.14a-15a.

Here, Plaintiffs identify no such "serious error in judgment" by the trial court and instead simply ask that we assign more weight to the particular issues on which they prevailed. We exercise our judicial restraint and decline this invitation," App.15a.

> "The Court of Federal Claims properly denied Plaintiffs' motion for fees under EAJA § 2412(b) as improperly applying the legal theory on which they based their motion for fees (the "common fund" exception), and we find no abuse in discretion in the trial court's weighing of the Government's "overall position" under § 2412(d) and its conclusion that the Government was "substantially justified." App. 17a.

Plaintiffs respectfully contend the Federal Circuit's deference to the "trial court's discretion" is flawed in this case because the Claims Court judge who denied plaintiffs any recovery of attorney fees was not "the trial court." The "trial court" judges were former Chief Judge Loren Smith, succeeded by former Chief Judge Patricia Campbell-Smith. Those two judges presided over three-hundred eighteen (318) "Court Electronic Records" (ECFs) which were filed in this case over a period of thirteen and one-half years. These "trial" entries for this case consisted of multiple motions, trial briefs, oral arguments, and interim decisions on a myriad of issues over the years from June,2006 to December,2019. Judge Smith and Judge Campbell-Smith collectively presided over all aspects of the "trial." The comprehensive decisions issued by Judge Smith and Judge Campbell-Smith ultimately resulted in plaintiffs' attorney succeeding in winning the case as the United States finally admitted full liability for payment of $570,374.49 to 3,231 federal employees of 100% of the back pay which they were owed.

The case was abruptly re-assigned to a newly appointed judge years after all the factual and legal issues with respect to government liability for back pay were decided by Judge Loren Smith and Judge Patricia Campbell-Smith. Judge David A. Tapp was not appointed to this case until December 3, 2019. It is undisputed that Judge Tapp's only function thereafter was to determine the sole issue relating to the government's liability for plaintiffs' attorney fees pursuant to the EAJA.

The Federal Circuit panel committed a reversible error because it erroneously assumed that Judge Tapp had presided over the "trial" in this case

rather than only with respect to the attorney fees issue pursuant to an entirely different statute. The proof of the panel's error, *as a matter of law,* is that the court blindly relied on "the trial court's familiarity with the record before it…", without any evidence whatsoever that this judge had personal "familiarity" with the 318 motions, briefs, oral arguments, issues of fact and law, as well as interim "trial court" decisions which had preceded his assignment to this case on December 3, 2019. (ECF No. 319).

Moreover, having erroneously accepted and quoted as a key "fact" the "trial court's familiarity with the record before it," the panel then invoked--without question--the "abuse of discretion" standard. The panel candidly declined to evaluate the merits of three substantive issues which are fundamental to whether "the trial court abused its discretion:

> 1) "we cannot say that the trial court abused its discretion in determining that the issues on which the Government won were "key issues";
>
> 2) "nor can we say that it abused its discretion in concluding that these wins were sufficient to render the Government's overall position substantially justified such that fees under § 2412(d) are precluded."
>
> 3) "On appeal, Plaintiffs ask us to second guess the trial court's weighing of the relative importance of the issues in determining whether the United States' position was "substantially justified." App.14a.

In effect, the appellate court admitted that it made no legal decisions as to whether the claims court "abused its discretion" in denying all attorney fees and

costs even under 2412 (d). Instead, the panel stated it relied exclusively on the "discretion" of a judge whose only "familiarity with the record" that had occurred over the previous thirteen and one half years of litigation was what he may have read in the briefs of the parties, and what he heard in the only conversation that he had with these attorneys at oral argument as to attorney fees on April 23, 2020. ECF No. 338.

Plaintiffs contend that this was not "the discretionary standard" which this Court approved in *Pierce v. Underwood,* 487 U.S. 552, 557-564 (1988). There, the majority held that this complicated issue is best resolved by the "trial judge" who has heard the evidence, considered all of the variations at trial, and ultimately weighed the alternatives. What Justice Scalia described in *Pierce v. Underwood* certainly wasn't reflected in the decision in the case at bar, either of the Claims Court or the Federal Circuit panel:

> We turn first to the language and structure of the governing statute. It provides that attorney's fees shall be awarded "unless *the court finds* that the position of the United States was substantially justified." 28 U.S.C. § 2412(d)(1)(A) (emphasis added). This formulation, as opposed to simply "unless the position of the United States was substantially justified," emphasizes the fact that the determination is for the district court to make, and thus suggests some deference to the district court upon appeal. That inference is not compelled, but certainly available. Moreover, a related provision of the EAJA requires an administrative agency to award attorney's fees to a litigant prevailing in an agency

adjudication if the Government's position is not "substantially justified," 5 U.S.C. § 504(a)(1), and specifies that the agency's decision may be reversed only if a reviewing court "finds that the failure to make an award . . . was unsupported by substantial evidence." § 504(c)(2). We doubt that it was the intent of this interlocking scheme that a court of appeals would accord more deference to an agency's determination that its own position was substantially justified than to such a determination by a federal district court. Again, however, the inference of deference is assuredly not compelled.

We recently observed, with regard to the problem of determining whether mixed questions of law and fact are to be treated as questions of law or of fact for purposes of appellate review, that sometimes the decision "has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Miller v. Fenton*, 474 U.S. 104, 114 (1985). We think that consideration relevant in the present context as well, and it argues in favor of deferential, abuse-of-discretion review. To begin with, some of the elements that bear upon whether the Government's position "*was* substantially justified" may be known only to the district court. Not infrequently, the question will turn upon not merely what was the law, but what was the evidence regarding the facts. By reason of settlement conferences and other pretrial activities, the district court

may have insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon, or whether critical facts could easily have been verified by the Government. Moreover, even where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense, requiring the court to undertake the unaccustomed task of reviewing the entire record, not just to determine whether there existed the usual minimum support for the merits determination made by the factfinder below, but to determine whether urging of the opposite merits determination was substantially justified.

In some cases, such as the present one, the attorney's fee determination will involve a judgment ultimately based upon evaluation of the purely legal issue governing the litigation. It cannot be assumed, however, that *de novo* review of this will not require the appellate court to invest substantial additional time, since it will in any case have to grapple with the same legal issue on the merits. To the contrary, one would expect that where the Government's case is so feeble as to provide grounds for an EAJA award, there will often be (as there was here) a settlement below, or a failure to appeal from the adverse judgment. Moreover, even if there is a merits appeal, and even if it occurs simultaneously with (or goes to the same panel that entertains) the appeal from the attorney's fee award, the latter legal question will not be precisely the same as the

merits: not what the law now is, but what the Government was substantially justified in believing it to have been. In all the separate-from-the-merits EAJA appeals, the investment of appellate energy will either fail to produce the normal law-clarifying benefits that come from an appellate decision on a question of law, or else will strangely distort the appellate process. The former result will obtain when (because of intervening legal decisions by this Court or by the relevant circuit itself) the law of the circuit is, at the time of the EAJA appeal, quite clear, so that the question of what the Government was substantially justified in believing it to have been is of entirely historical interest. Where, on the other hand, the law of the circuit remains unsettled at the time of the EAJA appeal, a ruling that the Government was not substantially justified in believing it to be thus-and-so would (unless there is some reason to think it has changed since) effectively establish the circuit law in a most peculiar, secondhanded fashion. Moreover, the possibility of the latter occurrence would encourage needless merits appeals by the Government, since it would know that if it does not appeal, but the victorious plaintiff appeals the denial of attorney's fees, its district-court loss on the merits can be converted into a circuit-court loss on the merits, without the opportunity for a circuit-court victory on the merits. All these untoward consequences can be substantially reduced or entirely avoided by adopting an abuse-of-discretion standard of review.

Another factor that we find significant has been described as follows by Professor Rosenberg:

"One of the 'good' reasons for conferring discretion on the trial judge is the sheer impracticability of formulating a rule of decision for the matter in issue. Many questions that arise in litigation are not amenable to regulation by rule because they involve multifarious, fleeting, special, narrow facts that utterly resist generalization -- at least, for the time being.

"The non-amenability of the problem to rule, because of the diffuseness of circumstances, novelty, vagueness, or similar reasons that argue for allowing experience to develop, appears to be a sound reason for conferring discretion on the magistrate. . . . A useful analogue is the course of development under Rule 39(b) of the Federal Rules of Civil Procedure, providing that in spite of a litigant's tardiness (under Rule 38 which specifies a ten-day-from-last-pleading deadline) the trial court 'in its discretion' may order a trial by jury of any or all issues. Over the years, appellate courts have consistently upheld the trial judges in allowing or refusing late-demanded jury trials, but in doing so have laid down two guidelines for exercise of the discretionary power. The products of cumulative experience, these guidelines relate to the justifiability of the tardy litigant's delay and the absence of prejudice to his adversary. Time and experience have allowed the formless problem

> to take shape, and the contours of a guiding principle to emerge." *Rosenberg* 662-663.

Justice White, joined by Justice O'Connor, in dissent, at 585, warned that the "abuse of discretion" standard would lead to inconsistency of results from one judge to another:

> "D*e novo* appellate review of whether the Government's legal position was substantially justified would also foster consistency and predictability in EAJA litigation. A court of appeals may be required under the majority's "abuse of discretion" standard to affirm one district court's holding that the Government's legal positionwas substantially justified and another district court's holding that the same position was not substantially justified. As long as the district court's opinion about the substantiality of the Government case rests on some defensible construction and application of the statute, the Court's view would command the court of appeals to defer even though that court's own view on the legal issue is quite different. The availability of attorney's fees would not only be difficult to predict but would vary from circuit to circuit or even within a particular circuit. Such uncertainty over the potential availability of attorney's fees would, in my view, undermine the EAJA's purpose of encouraging challenges to unreasonable governmental action. See *Spencer, supra*, at 249-250, 712 F.2d, at 563-564."

CONCLUSION

Plaintiffs respectfully urge this Court to grant certiorari in order to consider correction of the panel's egregious errors of statutory interpretation and to affirm Congress' constitutional authority to address by statute pursuant to 28 U.S.C. 2412(b) and (d) the government's liability for prevailing plaintiffs' reasonable attorney fees and costs.

Respectfully submitted.

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ENTERED SEPTEMBER 12, 2021

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ROBERT M. ATHEY, MICHAEL R. CLAYTON, THELMA R. CURRY, RICHARD S. DROSKE, RALPH L. FULLWOOD, PAUL D. ISING, CHARLES A. MILBRANDT, TROY E. PAGE,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

2020-2291

Appeal from the United States Court of Federal Claims in No. 1:99-cv-02051-DAT, Judge David A. Tapp.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

ENTERED BY ORDER OF THE COURT

September 21 2021 /s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

ENTERED SEPTEMBER 21, 2021

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ROBERT M. ATHEY, MICHAEL R. CLAYTON, THELMA R. CURRY, RICHARD S. DROSKE, RALPH L. FULLWOOD, PAUL D. ISING, CHARLES A. MILBRANDT, TROY E. PAGE,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

2020-2291

Appeal from the United States Court of Federal Claims in No. 1:99-cv-02051-DAT, Judge David A. Tapp.

Decided: September 21, 2021

IRA MARK LECHNER, Ira M. Lechner, Esq., Washington, DC, argued for plaintiffs-appellants.

BRYAN MICHAEL BYRD, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by REGINALD THOMAS BLADES, JR., JEFFREY B. CLARK, ROBERT EDWARD KIRSCHMAN, JR.

Before REYNA, SCHALL, and STOLL, *Circuit Judges*.

Plaintiffs appeal the United States Court of Federal Claims' denial of their motion for attorney fees based on two provisions of the Equal Access to Justice Act, 28 U.S.C. § 2412(b) and (d). Plaintiffs' first basis for fees under § 2412(b) rests on an erroneous application of the common law "common fund" doctrine. We therefore affirm the trial court's denial of fees on this basis. Regarding Plaintiffs' second basis for fees under § 2412(d), the trial court weighed the Government's conduct and found the Government's overall position to have been "substantially justified" and accordingly denied attorney fees as a result. Our review of this issue on appeal is highly deferential. Because we discern no abuse of discretion in the trial court's determination, we affirm on this basis as well.

BACKGROUND

This appeal originated from a class action lawsuit in the United States Court of Federal Claims filed in April 1999. Compl., *Archuleta v. United States*, No. 99-205C, ECF No. 1 (Fed. Cl. Apr. 7, 1999). The plaintiffs in *Archuleta* alleged that several federal agencies had underpaid the former-employee plaintiffs for their unused leave, which is typically paid as a lump sum at the end of their employment. Among other complaints, the *Archuleta* plaintiffs alleged that the agencies had improperly failed to include Cost of Living Adjustments (COLAs) and locality pay increases in their payments.

Five months after the complaint was filed, the Office of Personnel Management finalized a regulation making clear that federal agencies should include COLAs and other applicable pay in the lump-sum payment. 5 C.F.R. § 550.1201–1207. After this regulation was promulgated, seventeen of the eighteen government agencies involved settled with the former-employee plaintiffs, agreeing to the COLAs and locality increases. The United States Department of Veterans Affairs (VA) was the lone holdout. The former VA employees who were plaintiffs in *Archuleta* were severed into a new case at the Court of Federal Claims, thus becoming the *Athey* plaintiffs ("Plaintiffs"). Am. Compl., *Athey v. United States*, No. 99-2051C, ECF No. 2 (Fed. Cl. June 21, 2006).

The *Athey* litigation then proceeded for several years. A few milestones are described below. In 2007, the Court of Federal Claims granted the Government's motion to dismiss from the case Plaintiffs' claims to night premium pay, weekend additional pay, and Sunday pay after October 1, 1997. *Athey v. United States* (*Athey I*), 78 Fed. Cl. 157, 161–64 (2007). The trial court also excluded all registered nurses from the class. *Id.* Several years later, in 2015, the trial court granted the Government's motion for summary judgment that Plaintiffs were not entitled to interest under the Back Pay Act, 5 U.S.C. § 5596. *Athey v. United States* (*Athey II*), 123 Fed. Cl. 42 (2015). Finally, in 2017, the parties reached a settlement in which the Government agreed to pay the lump-sum adjustments owed due to the COLAs and locality increases for the 3,231 former VA employees in Plaintiffs' class.

Plaintiffs then appealed the trial court's grant of the Government's motion to dismiss with respect to Plaintiffs' claims for evening and weekend pay as well as the court's granting of summary judgment that Plaintiffs were not entitled to interest under the Back Pay Act. We affirmed those determinations. *Athey v. United States* (*Athey III*), 908 F.3d 696 (Fed. Cir. 2018).

Thereafter, on January 13, 2020, Plaintiffs sought fees at the trial court pursuant to the Equal Access to Justice Act (EAJA), which allows for costs and attorney fees to be awarded in suits against the United States in certain situations. Plaintiffs specifically sought fees under 28 U.S.C. § 2412(b) and (d)(1)(A). Sections 2412(b) and (d)(1)(A) state:

> (b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. *The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.*
>
> . . .
>
> (A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the

> United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, *unless the court finds that the position of the United States was substantially justified* or that special circum- stances make an award unjust.

Section 2412(b), (d)(1)(A) (emphases added).

Section 2412(b) was intended to subject the United States to the same common law or statutory exceptions to the American Rule of attorney fees[1] that other private parties would be subject to, such as the exceptions of "bad faith," "common fund," and "common benefit." *See Gavette v. OPM*, 808 F.2d 1456, 1460 (Fed. Cir. 1986). Before the trial court, Plaintiffs argued they were entitled to fees under § 2412(b) based on the common law exceptions of "common fund" and "bad faith."[2] They also argued under § 2412(d)(1)(A) that they were entitled to fees because the position of the United States was not substantially justified.

The trial court denied Plaintiffs' motion for fees. *Athey v. United States* (*Athey IV*), 149 Fed. Cl. 497 (2020). With regard to § 2412(b), the trial court determined that the "common fund" exception to the

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[1] The American Rule is that each party is responsible for its own attorney fees.

[2] Plaintiffs do not appeal the trial court's denial of fees on the "bad faith" basis.

American Rule allows a plaintiff's counsel to recover its fee from the common fund awarded to a plaintiffs class in certain circumstances, but it does not impose additional fees on a defendant. *Id.* at 508–09. Accordingly, the trial court denied Plaintiffs' attempts to extract an additional award from the Government in a way not permitted by the "common fund" doctrine. *Id.* The trial court also denied Plaintiffs' motion for fees under § 2412(d) because, in the trial court's judgment, the overall position of the United States was substantially justified. *Id.* at 510–13.

Plaintiffs appeal. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review decisions of the Court of Federal Claims regarding attorney fees for an abuse of discretion. *Haggart v. Woodley*, 809 F.3d 1336, 1354 (Fed. Cir. 2016); *see also Chiu v. United States*, 948 F.2d 711, 713 (Fed. Cir. 1991). Errors of law in the determination of attorney fees, however, are reviewed de novo. *Haggart*, 809 F.3d at 1354.

I

We begin with Plaintiffs' request for attorney fees under EAJA § 2412(b). The trial court denied Plaintiffs' motion for fees because the common-law theory Plaintiffs invoked for applying § 2412(b)—the common fund exception to the American Rule—does not apply to impose "an additional award" against a defendant, but instead allows for fees and expenses to be recovered from the common fund. *Athey IV*, 149 Fed. Cl. at 508–09. We agree that the common fund

doctrine does not apply here in the manner proposed by Plaintiffs, and therefore we affirm the trial court's denial of fees under § 2412(b).

According to the plain language of the statutory text, § 2412(b) is a fee-shifting statute that applies only in certain, specified conditions—namely, "under the common law or under the terms of any statute which specifically provides for such an award." This provision "simply reflects the belief that, at a minimum, the United States should be held to the same standards in litigating as private parties." *Gavette*, 808 F.2d at 1466 (emphasis omitted) (quoting H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984, 4987); *see also M.A. Mortenson Co. v. United States*, 996 F.2d 1177, 1181 (Fed. Cir. 1993) (citing S. Rep. No. 253, 96th Cong., 1st Sess. 4 (Star Print 1979)).

In applying for fees at the trial court, Plaintiffs themselves relied on the "common fund" common law exception to the American Rule as providing the basis for fees under § 2412(b). As described below, however, the common fund exception does not apply to impose fees on defendants, as the trial court correctly held.

We discussed the common fund doctrine at some length in *Knight v. United States*, 982 F.2d 1573 (Fed. Cir. 1993). In *Knight*, plaintiffs' attorneys made a claim for attorney fees against the defendant Government under a common fund theory. We rejected that claim, holding that plaintiffs' attorneys were improperly applying the common fund doctrine because that theory "does not impose additional liability on the losing defendant," and instead "is essentially a suit for contribution from third party

beneficiaries for expenses actually incurred." *Id.* at 1579–80. The fundamental basis for the exception is unjust enrichment—that a party who benefits from a plaintiff's attorney's advocacy in recovering an award should also contribute to that attorney's fees. *Id.* at 1580; *see also Haggart*, 809 F.3d at 1352. Thus, we agree with the Court of Federal Claims' determination that the common fund exception does not apply in the manner asserted by Plaintiffs—namely to impose additional liability on the United States as a defendant. *Athey IV*, 149 Fed. Cl. at 509.

On appeal, Plaintiffs interpret § 2412(b) as a fee-shifting statute that operates independently of the common law and the "common fund" doctrine. *See, e.g.*, Appellants' Br. 22 (arguing the "operative mechanism created by [§ 2412(b)] is to 'shift' liability for payment of reasonable attorney fees and related expenses to 'the United States' rather than from the 'common fund'"), 24–27 (arguing that the trial court erroneously applied the "common fund doctrine" in lieu of the "fee shifting" statute of § 2412(b)). Plaintiffs propose that their interpretation is supported by the legislative history and precedent interpreting § 2412(b) and other fee-shifting statutes. We disagree with Plaintiffs' interpretation.

First, Plaintiffs' theory that § 2412(b) stands alone to supplant the common law cannot be squared with the statute's plain language, which requires a predicate basis for shifting fees in either "the common law or under the terms of any statute which

specifically provides for such an award."[3] *See Gavette*, 808 F.2d at 1466; *M.A. Mortenson*, 996 F.2d at 1181. Indeed, it was Plaintiffs themselves that predicated their § 2412(b) argument on the common fund common law exception to the American Rule. J.A. 2580. Thus, the trial court's consideration of the applicability of this common law theory was not erroneous.

Second, the legislative history does not support Plaintiffs' interpretation. On appeal, Plaintiffs cite broad statements describing the purpose of the EAJA statutory scheme as removing a deterrent to initiating litigation against or defending litigation initiated by the Government by "providing in specified situations for an award of attorney fees and other costs." Appellants' Br. 22–24; *see also id.* at 21 n.5. In other words, EAJA was intended to alleviate a potential litigant's concern that they would be monetarily worse off even if they won an award or mounted a successful defense against the Government. This general purpose, however, cannot overcome the plain language of the particular statute that Plaintiffs argue entitles them to fees—

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[3] To the extent that Plaintiffs are arguing the portion of § 2412(b) reciting a "statute which specifically provides for such an award" is actually referring to § 2412(b) *itself* as a fee-shifting statute, we reject this reading. If § 2412(b) were applied in this self-referential manner, the Government would always be liable for fees under this section and the section would no longer be limited to "common law . . . or statute," rendering the second sentence of § 2412(b) meaningless. *See Sharp v. United States*, 580 F.3d 1234, 1238 (Fed. Cir. 2009) (applying the statutory cnnon that courts "'give effect, if possible, to every clause and word of a statute' and should avoid rendering any of the statutory text meaningless or as mere surplus age" (quoting *Duncan v. Walker*, 533 U.S. 167, 174(2001)).

§ 2412(b)—which only applies in specified situations. Here, that situation is where "any other party would be liable under the common law." And because other defendants would not be liable for an additional award of fees under the "common fund" doctrine, neither is the Government here.

Finally, the precedent relied on by Plaintiffs does not support their interpretation of § 2412(b). Plaintiffs first rely on *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121 (2015), and *NantKwest, Inc. v. Iancu*, 898 F.3d 1177 (Fed. Cir. 2018), for the proposition that § 2412(b) is a fee shifting statute that trumps the American Rule. Appellants' Br. 21. Although this is generally true, fee shifting pursuant to § 2412(b) has clearly-specified common-law and statutory limits to when it trumps the American Rule. In contrast, the EAJA fee shifting provision mentioned in *Baker Botts* and *NantKwest*—§ 2412(d)—applies in a much broader range of circumstances.[4]

Plaintiffs also rely on *Haggart v. Woodley*, 809 F.3d 1336 (Fed. Cir. 2016), but *Haggart* does not support Plaintiffs' interpretation. In *Haggart*, we found that a separate fee-shifting statute—the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA), which provides for "reasonable" attorney fees—preempted an additional recovery under a common fund theory. 809 F.3d at 1354–59. In other words, plaintiffs' counsel was seeking, and was granted by the trial court, not only "reasonable" attorney fees under the

[4] As discussed below, however, even § 2412(d) has limits on when fee shifting applies.

URA, but also additional fees under a "common fund" theory. Based on the particular fee-shifting statute at issue in *Haggart*, which was intended to make plaintiffs whole by shifting litigation expenses to the Government, we declined plaintiffs' counsel's request for additional fees under a common fund theory as it would have "unjustly enriche[d] class counsel at the expense of class members a result diametric to the primary purpose of the common fund doctrine." *Id.* at 1357. Here, Plaintiffs point to no fee-shifting statute that operates independently from the common law that would apply, as the URA did in *Haggart*, but instead point to § 2412(b), which expressly requires a predicate common law or statutory basis to award fees.

Because Plaintiffs misapply the predicate common-law exception upon which Plaintiffs based their § 2412(b) fees motion, we affirm the trial court's denial of fees on this basis.

II

We turn next to Plaintiffs' request for fees under § 2412(d)(1)(A). The trial court denied Plaintiffs' motion after determining the Government's position to have been "substantially justified." *Athey IV*, 149 Fed. Cl. at 510–13. On appeal, Plaintiffs ask us to reweigh the trial court's determination, discounting the issues Plaintiffs consider to have been "minor" or "peripheral" and focusing only on what Plaintiffs call the "singular 'position'" of the Government—i.e., the position regarding the issues on which Plaintiffs ultimately prevailed. Appellants' Br. 32–36. We decline Plaintiffs' request to reweigh the trial court's determination based on its view of the

entire record, a determination that is reviewed with a significant amount of deference under the abuse of discretion standard.

When evaluating a claim under § 2412(d), "trial courts are instructed to look at the entirety of the government's conduct and make a judgment call whether the government's overall position had a reasonable basis in both law and fact." *Chiu*, 948 F.2d at 715; *see also Pierce v. Underwood*, 487 U.S. 552, 565 (1988). In making this judgment call, "the entirety of the conduct of the government is to be viewed, including the action or inaction by the agency prior to litigation." *Chiu*, 948 F.2d at 715; *see also* 28 U.S.C. § 2412(d)(2)(D) (defining "position of the United States"). "When a party has prevailed in litigation against the government, the government bears the burden of establishing that it position was substantially justified." *Doty v. United States*, 71 F.3d 384, 385 (Fed. Cir. 1995), *as modified,* 109 F.3d 746 (Fed. Cir. 1997).

Here, the trial court agreed with the Government that its overall position was substantially justified largely based on its "string of successes" in paring the case down. *Athey IV*, 149 Fed. Cl. at 513. In particular, the trial court pointed to the Government's success in defending against claims made by Plaintiffs to "night premium pay, weekend additional pay, and Sunday pay after October 1, 1997," back pay for "non-General Schedule employees" (i.e., nurses), as well as "pre-judgment interest under the Back Pay Act." *Id.* (citing *Athey I*, 78 Fed. Cl. 157 (granting motion to dismiss as to those issues)); *see also Athey III*, 908 F.3d 696 (affirming those issues). The Court of Federal Claims

determined that this "drumbeat of favorable decisions for the United States on multiple key issues . . . strongly indicates the United States' position was 'justified to a degree that could satisfy a reasonable person.'" *Athey IV*, 149 Fed. Cl. at 513 (quoting *Pierce*, 487 U.S. at 569).[5] Considering the trial court's familiarity with the record before it and the high standard of review applicable here, we cannot say that the trial court abused its discretion in determining that the issues on which the Government won were "key issues"; nor can we say that it abused its discretion in concluding that these wins were sufficient to render the Government's overall position substantially justified such that fees under § 2412(d) are precluded.

On appeal, Plaintiffs ask us to second guess the trial court's weighing of the relative importance of the issues in determining whether the United States' position was "substantially justified." More specifically, Plaintiffs challenge the trial court's weighing of the COLA and locality increases (issues on which Plaintiffs prevailed), on the one hand, against the night premium pay, weekend pay, Sunday pay, and pre-judgment interest issues (issues on which the Government prevailed), on the other hand. The key piece of evidence Plaintiffs point to in making this argument is their expert's declaration, which estimated monetary values for the various issues and indicated that the two issues on which Plaintiffs prevailed were much more valuable than the issues on which the Government pre- vailed. The expert's speculation as to the potential mone- tary values of

[5] Plaintiffs do not contest the trial court's use of the "justified to a degree that could satisfy a reasonable person" standard.

the issues, even if accurate, cannot substitute for the trial court's judgment in weighing those issues. This required weighing is a highly discretionary task reserved for the trial court, as we described in *Chiu*:

> This exercise . . . is quintessentially discretionary in nature. For instance, whether the government was substantially justified overall where in litigation it depended on the ground of lack of jurisdiction and a party prevails on a substantive aspect of the agency's action which gave rise to the litigation necessarily involves an apples to oranges comparison. It is for the trial court to weigh each position taken and conclude which way the scale tips, and as an appellate court we must be wary not to redistribute these weights among different positions unless a serious error in judgment has been made.

948 F.2d at 715 n.4.

Here, Plaintiffs identify no such "serious error in judgment" by the trial court and instead simply ask that we assign more weight to the particular issues on which they prevailed. We exercise our judicial restraint and decline this invitation.

The trial court also addressed what it discerned to be "the Class's primary complaints": "(1) the delay in obtaining relief for class members and (2) the failure of the United States to correct the procedures which led to class members failing to receive compensation to which they were entitled." *Athey IV*, 149 Fed. Cl. at 512. On appeal, Plaintiffs do not

challenge the trial court's determination on the first concern, calling the "court approved enlargements [of time] irrelevant," Appellants' Reply Br. 12, and thus we do not address it here.

Regarding the second concern, however, Plaintiffs' reply brief forcefully contests the Government's narrative regarding previous settlement offers. For context, in the Government's response to Plaintiffs' motion for fees at the trial court, the Government countered Plaintiffs' assertions that the United States failed to correct the underpaid back pay by highlighting a previous offer to settle by the Government. This offer was refused by Plaintiffs' counsel. Plaintiffs did not respond to this contention in their reply at the trial court, and the trial court, accordingly, relied on this contention. *Athey IV*, 149 Fed. Cl. at 512–13. Plain- tiffs' opening brief on appeal once again raised no issue concerning this contention by the Government or the trial court's reliance thereon. It was only after the Government again relied on this settlement offer in its response brief that Plaintiffs addressed this contention, calling it a "false narrative" because, according to Plaintiffs, the offer related only to a small fraction of the plaintiffs' class. Appellants' Reply Br. 12–15.

Plaintiffs, however, failed to raise this argument at a time when the Government could have responded, either at this court or at the trial court. And in any case, this issue only relates to the COLAs and locality pay issues on which Plaintiffs were successful, but it in no way diminishes the trial court's view of the importance of the "multiple key issues" that it relied on in finding the Government's position to have been "substantially justified." Therefore, even

if we were to credit Plaintiffs' reply argument, Plaintiffs still fail to show the trial court abused its discretion.

CONCLUSION

The Court of Federal Claims properly denied Plaintiffs' motion for fees under EAJA § 2412(b) as improperly applying the legal theory on which they based their motion for fees (the "common fund" exception), and we find no abuse in discretion in the trial court's weighing of the Government's "overall position" under § 2412(d) and its conclusion that the Government was "substantially justified."

AFFIRMED

[ENTERED: JULY 21, 2020]

In the United States Court of Federal Claims

No. 99-2051C

Filed: July 21, 2020

ROBERT M. ATHEY, *et al.*, ***Plaintiffs*,** **v.** **THE UNITED STATES,** ***Defendant*.**	**Keywords:** Equal Access to Justice Act; EAJA; 28 USC § 2412; Attorney's Fees; Class Action; Position of the United States; Substantially Justified; Notice to Class.

Ira M. Lechner, Washington, D.C., for Plaintiffs.

Bryan M. Byrd, Trial Attorney, *Reginald T. Blades, Jr.*, Assistant Director, *Robert E. Kirshman, Jr.*, Director, and *Ethan P. Davis*, Assistant Attorney General, Civil Division, United States Department of Justice, with whom was *Gia Chemsian*, Department of Veteran Affairs, Washington D.C., for Defendant.

MEMORANDUM OPINION AND ORDER

TAPP, Judge.[1]

At the epilogue of protracted class action litigation, following a lump-sum settlement between

[1] This matter was initially assigned to Judge Loren A. Smith, reassigned to Judge Mary Ellen Coster Williams (ECF No. 203) in 2013, Judge Patricia Elaine Campbell-Smith (ECF No. 210) in 2014, and to the undersigned on December 3, 2019 (ECF No. 320).

the Department of Veterans Affairs ("the VA") and the class action plaintiffs (the "Class"), the Class seeks payment of attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. Resolution of this issue requires the Court to juxtapose the Class's modest success on the merits with notice requirements and firmly rooted jurisprudence governing the payment of attorney fees and expenses where the position of the United States was substantially justified.

The Court reluctantly concludes these considerations preclude recovery. While this outcome does not implicate the financial interests of the Class, it directly affects Class counsel. Of equal importance, because recovery of the expenses of litigation is inexorably linked to the criteria of EAJA for attorney fees, the as-yet unpaid third-party Class Administrator is left adrift, burdened by continuing duties to the Class with no certainty of payment. Because the Class does not satisfy the conditions of 28 U.S.C. § 2412(b) or (d), the Motion for Attorney Fees (ECF No. 324) is **DENIED**.

I. Background

The history of this litigation is well-documented. The Class comprises former employees of the VA. *Athey v. United States*, 908 F.3d 696, 698 (Fed. Cir. 2018). From 1993 through 1999, the Class members retired or separated from the VA. *Id.* In the Complaint, filed June 21, 2006,[2] the Class claimed the VA omitted pay increases from lump-sum

[2] This case was severed from *Archuleta et al. v. United States*, Case No. 99-205C.

payments received upon termination of their employment. *Id*. at 698–99; *see also* (Am. Compl., ECF No. 2).[3] These pay increases included Cost of Living Adjustments (COLA), Locality Pay Adjustments, Sunday premium pay, as well as evening and weekend pay.[4] Finally, Class members sought prejudgment interest under the Back Pay Act, 5 U.S.C. § 5596. *Athey*, 908 F.3d at 699.

In widely separated decisions, the Court determined that (1) "additional pay," which class members contended should have been included in the lump-sum payouts received by class members upon separation from the VA, did not include evening and weekend pay; (2) non- General Schedule employees were not entitled to relief; (3) Sunday pay was not available after October 1, 1997, *Athey v. United States*, 78 Fed. Cl. 157, 161–63 (2007) ("*Athey I*"); and (4) the Class was barred from recovering pre-judgment interest. *Athey v. United States*, 123 Fed. Cl. 42, 61 (2015) ("*Athey III*").

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[3] The Court cites to many documents throughout this opinion, some only once. To avoid clutter, the Court cites only to the CM/ECF document number for many of these passing references.

[4] Employees of other federal agencies have initiated similar challenges to lump sum and back pay practices. *See* U.S. Gen. Accounting Office, *GGD-97-100, Federal Civilian Personnel: Cost of Lump-Sum Annual Leave Payments to Employees Separating from Government* (May 29, 1997) (Noting differences in agency practices regarding back pay and filing of court cases); *see also Kandel v. United States*, 85 Fed. Cl. 437 (2009) (involving employees of United States Information Agency, the Resolution Trust Corporation, and the Nuclear Regulatory Agency); *Archuleta et al. v. United States*, Case No. 99-205C (involving employees of an additional 17 agencies not including those involved in *Kandel*).

In early 2017, the parties entered into a final settlement agreement resolving the remaining claim between the parties. *Athey v. United States*, 132 Fed. Cl. 683 (2017) ("*Athey IV*"), *aff'd,* 908 F.3d 696 (Fed. Cir. 2018) ("*Athey V*"). During the fairness hearing, both parties acknowledged that the settlement agreement did not provide for payment of attorney fees pursuant to the Back Pay Act. (ECF No. 293). The Class thereafter appealed the decisions in *Athey I* and *Athey III*. *Athey V*, 908 F.3d at 696. The Federal Circuit affirmed each of the trial court rulings thus ending the merits litigation. *Id.* at 710.

The settlement agreement provided for the payment of $637,347.37 consisting of $570,374.49 in lump-sum pay and $66,972.88 for the employer's contribution of employment- related taxes to the Class consisting of 3,231 members. *Athey IV*, 132 Fed. Cl. at 687. On May 17, 2019, the Class filed its first Motion for Attorney Fees which the United States opposed on June 13, 2019 as deficient and premature due to the possibility the parties would be able to resolve the fees dispute. The Court stayed this case to facilitate those negotiations. On December 19, 2019, the Court lifted that stay and permitted the class administrator to distribute sums in accordance with the settlement agreement. The Class's present motion for attorney's fees and expenses and supporting brief followed on January 13, 2020.[5] (Pl.'s Second Mot. for Atty. Fees, ECF No. 324-4 ("Pl.'s Brief")). The United States responded on February 12, 2020. (Def.'s Resp., ECF No. 326). The Class filed its reply in support on March 20, 2020. (Pl.'s Reply, ECF No. 331).

[5] The filing of the second motion seeking attorney fees and costs mooted the Class's initial motion. (ECF No. 304).

On April 23, 2020, the Court heard oral argument and ordered additional briefing related to the RCFC 23(h) notice requirement, supporting invoices, and documents of the Class's consulting experts. These issues also prompted the filing of supplemental documentation by the Class on April 30, 2020 at the direction of the Court. (*See* Supp. Decl. of Ira Lechner, ECF No. 340). Thereafter, the United States and the Class submitted their final memoranda regarding the issue of attorneys' fees and expenses on May 18, 2020 and May 26, 2020, respectively. (Def.'s Resp. to Pl.'s Submission, ECF No. 344; Pl.'s Reply in Supp. of Submission, ECF No. 345).

Additional facts will be developed as required.

II. Analysis

The Court begins by examining its own provisions for the recovery of attorney's fees and expenses in class actions, as well as the specific sums sought by the Class, before turning to the substance of recovery pursuant to EAJA.

A. Procedure for Recovery of Attorney Fees.

RCFC 23 sets forth the procedure for class actions in the Claims Court. Subsection (h) authorizes an application for reasonable attorney's fees and nontaxable costs if certain requirements are met:

> **(h) Attorney's Fees and Nontaxable Costs.** In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties'

agreement. The following procedures apply:

> **(1)** A claim for an award must be made by motion under RCFC 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
>
> **(2)** A class member, or party from whom payment is sought, may object to the motion.
>
> **(3)** The court may hold a hearing and must find the facts and state its legal conclusions under RCFC 52(a).

RCFC 23(h). Despite reciting these plainly worded provisions, (Pl.'s Brief at 6), Class counsel did not provide notice of the motion to class members as RCFC 23(h)(1) requires. Depending on the nature of a fee request, as discussed below, literal compliance with the notice requirement of the rule can be significant.

i. Class Counsel Did Not Provide the Required Notice to the Class.

Class counsel did not provide notice to members of the Class prior to filing the motion seeking an award of attorney's fees and expenses pursuant to § 2412(b) and (d). The text of RCFC 23

requires, without exception, notice be given to class members in order to file a motion for fees and expenses. *See Greenwood v. United States*, 131 Fed. Cl. 231, 243–44 (2017) (Advisory committee notes to analogous Fed. R. Civ. P. 23(h)(1) require "notice . . . in all instances."). Specifically, RCFC 23(h)(1) requires the class members be given "[n]otice of the *motion*" for a fee award; generalized notice of class counsel's proposed compensation arrangement is insufficient. *See* RCFC 23(h)(1) (emphasis added). A boilerplate summary regarding payment of class counsel, years following settlement of the claim, and nearly a decade prior to the motion provided for by RCFC 23(h), is not sufficient.[6]

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[6] Following the certification of the Class on November 5, 2010 (Order Approv. Class Cert., ECF 164), the following appeared on the Class website:

> If Class Counsel succeeds in recovering money for the Class, he will ask the Court for his fees and expenses. You will not have to pay these fees and expenses. If the Court grants Class Counsel's request, the fees and expenses would either be deducted from any money obtained for the Class, and/or paid separately by the United States. If the Class Counsel's fees and expenses are paid out of the money obtained for the Class, there will be a reduction in the amount available for distribution to Class Members, and it may reduce the amount of money you may be awarded. If there is no recovery in this case, you will not be required to pay any attorneys' fees or costs to Class Counsel, and if there is a recovery of money for the class in this case, you will NOT be asked to pay Class Counsel directly his fees and "out-of-pocket" costs.

Usually, notice to class members will accompany the notice of a proposed settlement agreement. *See* Fed. R. Civ. P. 23(h) advisory committee's note (2003) ("When a settlement is proposed for Rule 23(e) approval, either after certification or with a request for certification, notice to class members about class counsel's fee motion would ordinarily accompany the notice to the class about the settlement proposal itself."); *Greenwood*, 131 Fed. Cl. at 244 (notice regarding proposed settlement which "expressly discussed plaintiffs' motion for attorneys' fees and costs" was sufficient). Notice provided in this manner allows class members the opportunity to object or comment on the motion for attorney's fees and costs in writing and at the fairness hearing. *Id.* at 244.

The settlement did not include terms related to the payment of attorney's fees and expenses. (*See* Settl. Agr. at ¶ 10, ECF No. 285-1 (specifically reserving issue of "attorney fees and expenses.")). While the notice of the settlement, posted on the Class website in early or mid- 2017, specifically stated that the Court denied "payment of interest and attorney fees/expenses under the Back Pay Act[,]" it did not reference payment of attorney's fees and expenses pursuant to EAJA. (*See* Not. of Website Info., ECF No. 340-7).[7] Nor could it. Class counsel's motion followed years later. (*See* Pl.'s Brief (filed Jan. 13, 2020)).

[7] The exact date notice of the settlement appeared on the website could not be discerned from the record. On June 28, 2017, however, the Court noted that notice had previously been posted on the website. (Order Appr. of Settl. Agr. at 5, ECF No. 294).

ii. Failure to Provide Notice was Harmless.

No cases discuss the effect of the failure to provide notice required by RCFC 23(h)(1). Based on the purposes of RCFC 23(h), the importance of the notice requirement is dependent on the nature of the fee request. A motion for attorney's fees and expenses under the "common fund" doctrine, discussed below, is particularly significant for the Class.[8] An award under the "common fund" exception to the American Rule must be paid from the common fund of damages awarded to the class, thereby directly impacting the compensation payable to each Class member. Because fees are paid from the common fund, the relationship between class counsel and the Class transforms from a union of counsel and client aligned in advancing the client's interests, to both client and counsel competing for compensation from the limited funds in the common fund.

As some courts have noted in common fund cases, the relationship between clients and counsel is adversarial in the fees context. *See In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1302 (9th Cir. 1994). This conflict over limited resources

[8] Class counsel takes the position that the notice requirement set forth in RCFC 23(h) does not apply to this action: "[I]t was procedurally unnecessary to post on the website the motion by Plaintiffs to award attorney fees and expenses . . .." (Decl. of Ira Lechner at 3). The Courtrespectfully disagrees with Class counsel's broad assertion. Moreover, Class counsel's current position, first advanced in briefing filed April 30, 2020, contrasts with Class counsel's earlier representation during oral argument: "So I believe that that notice occurred on the website and I – I hope it did, put it that way." (Or. Arg. Trans. at 11, ECF No. 343).

may also raise constitutional concerns: "[T]he fact that Rule 23 requires settlement and fee notice follows from the fact that these decisions are each likely to deprive the plaintiff of property . . .." Herbert B. Newberg, 6 *Newberg on Class Actions* § 18:43 (5th ed.) (notes eliminated). The deprivation of funds awarded to the Class "[triggers] a constitutional right to notice." *Id.* Without notice of counsel's efforts to be compensated from a common fund, Class members stand to lose some percentage of recovery, achieved after decades of litigation, without being made aware of their right to object. This result would hardly be comparable to the hypothetical "excellent result" justifying a fully compensable fee discussed in *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). (*See* Pl.'s Reply in Supp. of Subm. at 9).

This tension between counsel and Class members, both competing for the same common fund, mandates strict compliance with the notice provision of RCFC 23(h) when a fee petition is brought under the common fund exception permitted by § 2412(b). Such notice enables "potential objectors to examine the motion" and state objections to the reasonableness of the fees and expenses sought. *Cf.* Fed. R. Civ. P. 23 advisory committee's note (2003). Without notice, common fund beneficiaries who may challenge the reasonableness of the award have no meaningful opportunity to be heard. Even setting aside the other flaws with the Class's petition for fees under the common fund doctrine, Class counsel's failure to give notice to the class members prevents recovery under that theory.

Notice of a motion for payment of attorney's fees and expenses pursuant to § 2412(d) has distinct

and less meaningful considerations because the fees and expenses are recovered directly from the losing party. Most importantly, a court's award of fees and expenses under § 2412(d) does not reduce the sums available to Class members. There is no "adversarial" tension between counsel and Class members and no constitutional implications from failure to provide notice.

Because of this crucial distinction, the failure to provide notice of Class counsel's motion for attorney's fees and expenses pursuant to RCFC 23(h) in this instance is harmless. *See* RCFC 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."). Moreover, because the Court denies recovery of attorney's fees pursuant to § 2412(d), as explained below, the failure to provide notice is irrelevant.

B. Recovery Under the Equal Access to Justice Act (EAJA).

The Court turns now to the substance of the EAJA claim. The Class seeks attorney fees and expenses under subsection (b) and/or (d) of EAJA. (Pl.'s Brief at 4). The United States counters that the Class is not entitled to an award of attorney fees under either subsection (b) or (d), but even if the class is entitled to award of fees and expenses, the sums sought by the Class should be significantly reduced. (Def.'s Resp. at 1–2). Before addressing the parties' respective arguments in detail, additional context is required.

"Congress enacted EAJA . . . in 1980 'to eliminate the barriers that prohibit small businesses and individuals from securing vindication of their rights in civil actions and administrative proceedings brought by or against the Federal Government.'" *Scarborough v. Principi*, 541 U.S. 401, 406 (2004) (quoting H.R. Rep. No. 96–1005, at 9 (1980)). One of the main reforms of EAJA was the amendment of § 2412 to allow parties who prevailed in civil litigation against the United States to recover awards of attorney's fees and expenses; awards that were previously unavailable under the statute. *Id.* "EAJA added two new prescriptions to § 2412 that expressly authorize attorney's fee awards" in addition to costs. *Id.*

Subsection (b) "made the United States liable for attorney's fees and expenses 'to the extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.'" *Id.* (quoting § 2412(b)). Subsection (d) "rendered the Government liable for a prevailing party's attorney's fees and expenses in cases in which suit would lie only against the United States or an agency of the United States." *Id.* at 406–07. Though similar in goal, these two provisions have different requirements. *See Hyatt v. Shalala*, 6 F.3d 250, 255 (4th Cir. 1993) (noting that the distinctions between the two sections of EAJA are of "considerable consequence" in the calculation of fees).

As explained below, the Court finds no basis for awarding fees under Subsection (b) of EAJA. Furthermore, because the Court finds the Class's EAJA application contains various defects, and the position of the United States was "substantially

justified," the Court also rejects the Class's petition for costs and fees under Subsection (d).

i. The Class is Not Entitled to Award of Fees or Expenses Under 28 U.S.C. § 2412(b).

The Class argues it is entitled to attorney's fees and expenses under Subsection (b) because it satisfies one or more common law exceptions to the "American Rule," which disfavors fee-shifting. (Pl.'s Brief at 18). The United States responds that the creation of a common fund does not shift the costs of litigation to the losing party, therefore the Class is not entitled to an additional award to the common fund to cover fees and costs. (Def.'s Resp. at 8–9). Further, the United States argues that the Class has failed to show that the United States committed any act in bad faith. (*Id.* at 10). Thus, the United States concludes that neither recognized common law exception to the "American Rule" is implicated here, and consequently, the Class is not entitled to fees or expenses under § 2412(b). As explained below, the Court agrees with the United States that the Class is not entitled to any award under § 2412(b).

To determine whether § 2412(b) allows the Class to recover additional fees, the Court must first look to the statute. *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 109 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself."). Section 2412(b) provides:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the

> costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. *The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law* or under the terms of any statute which specifically provides for such an award.

(emphasis added).

This statutory formulation contemplates common law exceptions to the "American Rule," the idea that generally each party bears its own expenses. *See generally Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247–60 (1975) (describing the history of the "American Rule" and statutes that maintain recognized common law exceptions); *see also Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251–53 (2010). Common law exceptions recognized by Congress in drafting this statute included the "common fund" and "bad faith" exceptions. *Gavette v. Office of Pers. Mgmt.*, 808 F.2d 1456, 1460 (Fed. Cir. 1986) (quoting H.R. No. 96- 1418 at 17). The Court agrees with the United States that neither common law exception permits the Class to recover fees or expenses in this case.

1. The Common Fund Exception Does Not Permit Recovery.

The "common fund" exception to the American Rule is rooted in traditional notions of equity and derives from the equitable power of the courts under the doctrines of *quantum meruit* and unjust enrichment. *Haggart v. Woodley*, 809 F.3d 1336, 1352 (Fed. Cir. 2016) (citing *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 128 (1885) and *Trustees v. Greenough*, 105 U.S. 527, 532 (1881)). Under the common fund doctrine, "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to [reasonable attorney's fees] from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). A common fund exists "when each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf." *Id.* at 479. The United States expressly concedes that a "'common fund' [in the amount of $637,347.37] exists in this case." (Def.'s Resp. at 9).

While acknowledging the existence of a "common fund," the United States correctly points out that attorney's fees and expenses may only be recovered from the fund; the exception does not permit an additional award to the fund earmarked for fees and expenses. (*Id.* at 8 (citing *Knight v. United States*, 982 F.2d 1573, 1579 (Fed. Cir. 1993) ("The common fund theory does not impose additional liability on the losing defendant.")). Furthermore, the existence of a common fund does not automatically establish that attorney's fees and expenses are recoverable from that fund. *Haggart*, 809 F.3d at 1356

("[T]he fact that a common fund has been created does not mean that the common fund doctrine must be applied in awarding attorney's fees."). Recovery is limited to those situations where an inequity is borne by counsel or the litigant. *Haggart*, 809 F.3d at 1357 ("The *sine qua non* of the common fund doctrine is that some inequity must exist."). In a class action, such inequity exists where some opt-in plaintiffs are not contractually obligated to contribute to the costs of the litigation because they have not entered separate fee agreements with class counsel. *Id.* at 1354; *see also Kane County, Utah v. United States*, 145 Fed. Cl. 15, 18 (2019) (citing *Haggart).* At oral argument, Class counsel represented there are no contingency fee arrangements with members of the class. (Or. Arg. Trans. at 13, ECF No. 343). Therefore, inequity arises from Class counsel's representation from the inception of litigation to its conclusion, and the advancement of litigation expenses by Class counsel.

However, the common fund has been disbursed to the class members. (Order Permitting Disb., ECF No. 323). The Class now seeks an *additional* award to the common fund earmarked for fees and expenses. (Pl.'s Brief at 49, (stating that the Class is "entitled to an award to be paid by defendant of an attorney's fee . . . to be *paid to the Common Fund*") (emphasis added)). This request misapprehends the purpose of the common fund exception. *See Haggart*, 809 F.3d at 1352. Counsel eschews payment of fees and expenses from the common fund. (Or. Arg. Trans. at 53–54). Because of the sums involved, if the common fund doctrine applied it would "result in the Plaintiffs getting absolutely nothing." (*Id.*). This the Court would not approve. Given that an award of attorney

fees under the common fund doctrine cannot be an additional award but must instead be paid from the common fund, the relief sought by counsel is unavailable.

2. The Bad Faith Exception Does Not Permit Recovery.

The Class argues that the United States' conduct amounts to bad faith, such that an exception to the American Rule permits recovery of attorney's fees and expenses under § 2412(b). (Pl.'s Brief at 33–34). In support of its assertion of bad faith, the Class contends that the United States refused to "do the right thing" and consistently and aggressively resisted its "fiscal responsibility." (*Id.* at 36–37). The Class argues that the resulting twenty-three-and-one-half year delay from the accrual of the underlying claims subjects the United States to a finding of bad faith thus justifying application of that exception to the American Rule. (*Id.* at 32–43). The United States counters that the Class's "bad faith" argument relies on an erroneous assertion of meritlessness. (Def.'s Resp. at 12). Specifically, the United States points out that the Class improperly seeks § 2412(b) recovery based on prelitigation conduct and cannot demonstrate any litigation activity conducted in bad faith. (*Id*. at 13–14). The Court agrees with the United States that the bad faith exception does not apply.

The "bad faith" exception to the American Rule arises from the inherent powers of courts "to manage their own affairs to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630–631 (1962)). "[A]

court may assess attorney's fees when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Chambers*, 501 U.S. at 45–46 (quoting *Alyeska Pipeline Serv. Co.*, 421 U.S. at 258–59). The bad faith exception applies to a full range of litigation abuses and depends not on which party wins, but on the parties' conduct during the litigation. *Id.* at 53. Consequently, because the focus is on litigation conduct, "fee awards cannot be assessed based on claims of bad faith primary conduct[,]" *i.e.* conduct of a party prior to litigation. *Centex Corp. v. United States*, 486 F.3d 1369, 1371–72 (Fed. Cir. 2007) (citing eight other circuits articulating a similar standard). To the extent that the Class invites the Court to consider the conduct of the VA prior to litigation, (Pl.'s Brief. at 37), the Court is unwilling to do so.

Though the Class consistently complains of the duration of this litigation, a cursory review of the prior proceedings demonstrates that both parties routinely sought enlargements of time which contributed to delay.[9] Other factors which contribute to delay, such as the duration of an appeal or other

[9] By the Court's reckoning, the parties sought enlargements of time no less than 35 times. Of these, the United States sought 25 while the Class sought nine. (*See* ECF Nos. 3, 18, 20, 27, 36, 52, 57, 66, 70, 75, 79, 85, 87, 89, 119, 136, 168, 172, 201, 215, 219, 221, 223, 225, 268, 271, 273, 275, 277, 279, 281, 293, 308, 327, 329). Moreover, on one occasion, the Court imposed a stay of proceedings following a requested enlargement of time to pursue settlement of the attorney fees dispute. (ECF No. 309; Order Lifting Stay, ECF No. 322). Significantly, the Class opposed only a single request for delay. (*See* ECF 119). While this history indicates a significant degree of collegiality, it does not support a notion of unfair prejudice arising from vexatious delaying tactics.

circumstances uniquely within the control of the courts, are neutral and should afford no adverse inference against either party. In addition, though the Class originally asserted claims relating to the cost of living adjustments (COLA), locality pay adjustments, Sunday premium pay, evening and weekend pay, and prejudgment interest, the United States prevailed on the bulk of these claims in this Court and on appeal, but only after more than a decade of litigation. *See generally*, *Athey V*, 908 F.3d 696 (discussing the extensive litigation history of this dispute). Considering the complete record, an exercise of the Court's inherent powers is unwarranted. Nothing within the record suggests bad faith on the part of the United States after litigation commenced.

ii. The Class is Not Entitled to Award of Fees or Expenses Under 28 U.S.C. § 2412(d).

A prevailing party may be entitled to attorney's fees and expenses under § 2412(d) where the position of the United States was not "substantially justified" and no special circumstances are present which would make such an award unjust. These conditions may be found in § 2412(d)(1)(A) and (d)(1)(B), which provide:

> **(d)(1)(A)** Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review

> of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> **(B)** A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney 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 United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

Stated differently, recovery of an award under the statute has five requirements, neatly summarized

in *WHR Grp., Inc. v. United States*, 121 Fed. Cl. 673, 676 (2015):

> (1) the fee application must be submitted within 30 days of final judgment in the action and be supported by an itemized statement; (2) at the time the civil action was initiated, the applicant, if a corporation, must not have been valued at more than [the applicable] net worth [threshold] or employed more than 500 employees; (3) the applicant must have been the "prevailing party" in a civil action brought by or against the United States; (4) the Government's position must not have been "substantially justified;" and (5) there cannot exist any special circumstances that would make an award unjust.

The burden is on the fee petitioner to satisfy the first three requirements, then the burden shifts to the United States to show its position was "substantially justified" or that special circumstances make an award unjust. *See Impresa Construzioni Geom. Domenico Garufi v. United States*, 100 Fed. Cl. 750, 759 (2011) and *Helfer v. West*, 174 F.3d 1332, 1336 (Fed. Cir. 1999).

In its fee application, the Class commits multiple errors which ultimately preclude recovery under § 2412(d). For example, the Class has failed to affirmatively plead its members satisfy the net worth requirement. While acknowledging this defect, the United States declines to contest the eligibility of any class member under the net worth requirement.

(Def.'s Resp. at 20– 21). Instead, the United States argues that the Class is ineligible for award under § 2412(d) because: (1) the United States' position was substantially justified; (2) the Class has failed to submit a *contemporaneous* itemized statement; and (3) the Class is the "prevailing party" on only a narrow issue. (*Id*. at 21). Though counsel would ordinarily be permitted an opportunity to rectify its failure to provide contemporaneous records, as explained below, the Court finds the position of the United States was substantially justified, thus there is no need for additional filings.

1. The Position of the United States was Substantially Justified.

Even if the Class had properly pleaded that its members met the net worth requirements, properly submitted contemporaneous itemized records supporting its fee application, and given proper notice to the class members, the United States has demonstrated its position was substantially justified. Thus, the Class's fee petition must fail.

The "position" of the United States "refers to the government's position throughout the dispute, including not only its litigating position but also the agency's administrative position." *Doty v. United States*, 71 F.3d 384, 386 (Fed. Cir. 1995), *as modified,* 109 F.3d 746 (Fed. Cir. 1997). "[T]rial courts are instructed to look at the entirety of the government's conduct and make a judgment call whether the government's overall position had a reasonable basis in both law and fact." *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991). This judgment call is

"quintessentially discretionary in nature" and courts "must be wary not to redistribute these weights among different positions unless a serious error in judgment has been made." *Id*. at 715 n.4. So long as the United States has offered a "plausible defense, explanation, or substantiation for its action[,]" fee awards under EAJA should be denied. *See Griffin & Dickson v. United States*, 21 Cl. Ct. 1, 6–7 (1990).

Whether the position of the United States was "substantially justified" is not determined solely by who won and lost on the merits. *See Pierce*, 487 U.S. at 569 ("Conceivably, the Government could take a position that is not substantially justified, yet win; even more likely, it could take a position that is substantially justified, yet lose."). To avoid liability for an EAJA fee award under § 2412(d), the United States' position must merely be "justified to a degree that could satisfy a reasonable person." *Id*. at 565.[10] Although the Class summarily alleges the position of the United States was not substantially justified, (Pl.'s Mot. at 2), the Class did not point the Court to the conduct that it might consider making that determination.[11]

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[10] There is, however, an alternative view. *Procopio v. Wilkie*, No. 2017-1821, 2019 WL 8641304, at *1 (Fed. Cir. Sept. 25, 2019), *cert. denied,* No. 19-819, 2020 WL 2105225 (U.S. May 4, 2020) (O'Malley, J. concurring) (Arguing for "a standard that recognizes that the statutory language [of EAJA] requires something more than reasonableness.").

[11] During Oral Argument, the Court specifically requested Class counsel to offer records cites to support its position. (Or. Arg. Trans. at 15–17). In response, the Court received little more than a general recitation of the procedural history of the case.

Throughout its briefing, the Class's primary complaints about the position of the United States seem to focus on (1) the delay in obtaining relief for class members and (2) the failure of the United States to correct the procedures which led to class members failing to receive compensation to which they were entitled. (*See* Pl.'s Brief). In addition to providing plausible explanations or defenses to these criticisms, the United States submits that its "string of successes" weighs heavily in favor of finding substantial justification for its position. (*See* Def.'s Resp. at 25).

First, as the Court previously noted, (*supra* at n.9), the parties jointly agreed or acquiesced to numerous enlargements of time in this case. Litigation was also briefly stayed following a renewed attempt to extend existing deadlines. (ECF No. 309). The Class was entitled to voice objections or frustrations at any time yet chose not to, acquiescing to the sometimes- torpid pace of litigation. The Court sees no reason why agreed-upon delays, or other neutral factors affecting the progress of this case, should prejudice the United States.

Second, the Class admits that, prior to this lawsuit, the VA's failure to properly compensate the class members "could be fairly attributed to an innocent mistake of process within an extraordinarily large governmental institution."[12] (Pl.'s Brief at 34).

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[12] Even the Class's expert, a career VA employee in human resources, agrees that prior to the implementation of the new system, VA policy was to promptly correct lump sum payment errors:

> Whenever we discovered that someone was not being paid correctly, we immediately corrected

The Class contends that this "innocent mistake" should have been rectified once highlighted by federal litigation. (*Id.*). But, importantly, the United States *did* attempt to rectify this mistake. In 2011, the United States explained to the Court that in 2006, the VA began the process of migrating its payroll systems to a new system, and during that process, it "examined the [new] system to ensure it was properly paying separated VA employees their accrued and accumulated lump-sum annual leave payments[.]" (ECF No. 176 at 2–3). During this examination, the United States "discovered that some of the VA employees who had been paid through the [new system] may not have been paid their supplemental payment" and "approached plaintiffs' counsel to determine if VA could, with the approval of the court, pay those employees their supplemental payment" but "[p]laintiffs' counsel declined the offer." (*Id.* at 3). In this regard, plaintiffs' counsel resisted the United States' efforts to resolve this dispute by "pay[ing] those employees and remov[ing] them from the class." (*See id.*). In its reply brief, the Class makes no attempt to rebut or explain these efforts by the United States. (*See* ECF No. 331). These attempts by the

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> the error and informed payroll to process any retroactive pay adjustments. In such circumstances, I never sought permission from senior leadership even in cases where the correction covered multiple employees because I understood that my action was in line with official policy at the agency to correct such payment errors retroactively.

(Aff. of D. Kowalski at 3, ECF No. 324-5) (emphasis added). While this method was certainly was not optimal, it does indicate that the United States was at least somewhat responsive to its statutory obligations.

United States would surely satisfy a reasonable person that the VA was endeavoring to make its employees whole. But for the reticence of Class's counsel, many VA employees may have received compensation nearly a decade ago.

Finally, the United States establishes that its string of successes indicates its litigation posture was substantially justified. Although success or failure on the merits is not always determinative, in cases such as this one involving multiple issues and decisions, "a string of losses can be indicative; and even more so a string of successes." *Pierce*, 487 U.S. at 569. The United States prevailed on multiple key issues, including whether night premium pay, weekend additional pay, and Sunday pay after October 1, 1997 should be included in class members' back lump-sum pay. *Athey I*, 78 Fed. Cl. 157. The United States also prevailed on whether non- General Schedule employees should be included in the class. (ECF No. 42). And the United States prevailed on the issue of class members' entitlement pre-judgment interest under the Back Pay Act. (ECF No. 242). This drumbeat of favorable decisions for the United States on multiple key issues, both in the trial court and on appeal, strongly indicates the United States' position was "justified to a degree that could satisfy a reasonable person." *See Pierce*, 487 U.S. at 569. It would be difficult to acknowledge this record of successes in both the trial court and the Federal Circuit but conclude the "overall position" of the United States did not have a "reasonable basis" in law and fact. *See Chiu*, 948 F.2d at 715. Therefore, the Court finds that the position of the United States was "substantially justified" under § 2412(d).

Consequently, the Class is not entitled to recover fees and expenses under EAJA.

2. The Class Failed to Submit a Contemporaneous Itemized Statement.

In addition to the position of the United States being substantially justified, the Class has failed to submit contemporaneous itemized statements, a prerequisite to recovery under EAJA. The Federal Circuit has unequivocally held that a party seeking fees and expenses under EAJA must submit contemporaneous records to support the sums it seeks to recover. *Naporano Iron & Metal Co. v. United States*, 825 F.2d 403, 404 (Fed. Cir. 1987).

> The court needs *contemporaneous* records of exact time spent on the case, by whom, their status and usual billing rates, as well as a breakdown of expenses such as the amounts spent copying documents, telephone bills, mail costs and any other expenditures related to the case. In the absence of such an itemized statement, the court is unable to determine whether the hours, fees and expenses, are reasonable for any individual item.

Id. (emphasis added). Spreadsheets of time entries and expenses created years after the work was performed or the expenses accrued do not suffice. *See Prowest Diversified, Inc. v. United States*, 40 Fed. Cl. 879 (1998) (rejecting summary itemization and

requiring fee petitioners to submit monthly billing records to satisfy documentation component).

The Class has submitted an itemized statement that fails to satisfy the contemporaneity requirement. (*See* Pl.'s Mot., Ex. 1). The Class's fee and expense statements submitted appear to have been generated solely for the instant fee dispute, unaccompanied by an affidavit or otherwise satisfying the contemporaneous requirement, and thus cannot be considered "contemporaneous." (*See* Pl.'s Mot., Ex. 1; Ex. 2; Ex. 3). Therefore, the Court concludes the Class has failed to carry its burden to satisfy the first requirement of § 2412(d). Even so, were it not for substantial justification of the United States' positions, the Class would be permitted to supplement the record in order to alleviate this defect. *See Forestwood National Bank of Dallas v. United States*, 852 F.2d 1294 (Fed. Cir. 1988) (stating that trial courts have broad discretion to permit amended application in EAJA petition regarding attorney hours expended). However, given the Court's determination that the position of the United States was substantially justified, any supplement would be in vain.

Agreeing with the United States that its position was substantially justified, the Court has no choice but to conclude that the Class is not entitled to an award of fees and expenses under § 2412(d). The Class's failure to comply with the procedural requirements of EAJA only bolsters this conclusion. While the consequences of this result are unquestionably harsh, the responsibility for satisfying the requirements of EAJA lies solely with the Class. The Court enjoys no liberty to cure defects

in an EAJA application to avoid a result mandated by law, no matter how severe the consequences may be. *Fid. Const. Co. v. United States*, 700 F.2d 1379, 1386 (Fed. Cir. 1983) ("Although the EAJA lifts the bar of sovereign immunity for award of fees in suits brought by litigants qualifying under the statute, it does so only to the extent explicitly and unequivocally provided.").

3. The Class was the Prevailing Party for the Purposes of § 2412(d).

An EAJA fee petitioner must demonstrate it is the "prevailing party" to shift the burden to the United States. A "prevailing party" must show it "receive[d] at least some relief on the merits of [its] claim[.]" *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). A settlement in favor of the fee petitioner evinces success on the merits of at least some of its claims. *See Maher v. Gagne*, 448 U.S. 122, 129 (1980) ("The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees."). The key consideration is whether there has been a "material alteration of the legal relationship [between] the parties[.]" *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989).

The United States concedes the Class prevailed on the issue of General Schedule employees' entitlement to COLA and locality pay adjustments not included in their lump-sum payouts. (Def.'s Resp. at 22 (citing Judgment, ECF No. 295)). However, the United States' attempt to frame this win for the Class as "narrow" is unpersuasive. The Class secured a

settlement in excess of $600,000 for its members, which the Court approved, materially altering the parties' legal relationship. The Class is clearly a "prevailing party" for the purposes of § 2412(d). That determination, however, does not create a presumption that the Class is entitled to recover attorney's fees. *United States v. Hallmark Construction Co.*, 200 F.3d 1076, 1079 (Fed. Cir. 2000) (citing *Marcus v. Shalala,* 17 F.3d 1033, 1036 (7th Cir. 1994)).

III. Conclusion

For the reasons stated above, the Class's petition for attorney fees and expenses pursuant to EAJA is **DENIED**. Additionally, the Class's first motion for attorney's fees (ECF No. 304) is **DENIED AS MOOT**. The parties are **DIRECTED** to file a status report on or before August 20, 2020 describing further proposed proceedings in this case.

IT IS SO ORDERED.

s/ David A. Tapp
DAVID A. TAPP, Judge

ENTERED DECEMBER 14, 2021

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ROBERT M. ATHEY, MICHAEL R. CLAYTON, THELMA R. CURRY, RICHARD S. DROSKE, RALPH L. FULLWOOD, PAUL D. ISING, CHARLES A. MILBRANDT, TROY E. PAGE,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

2020-2291

Appeal from the United States Court of Federal Claims in No. 1:99-cv-02051-DAT, Judge David A. Tapp.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, SCHALL[1] DYK, PROST, O'MALLEY, REYNA, TARANTO, CHEN, STOLL, and CUNNINGHAM, *Circuit Judges*.[*]

PER CURIAM.

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[1] Circuit Judge Schall participated only in the decision on the petition for panel rehearing.

[*] Circuit Judge Hughes did not participate.

O R D E R

Robert M. Athey, Michael R. Clayton, Thelma R. Curry, Richard S. Droske, Ralph L. Fullwood, Paul D. Ising, Charles A. Milbrandt, and Troy E. Page filed a combined petition for panel rehearing and rehearing en banc. Veterans Legal Advocacy Group requested leave to file a brief as amicus curiae, which the court granted. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on December 21, 2021.

FOR THE COURT

December 14, 2021
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

28 U.S.C. § 2412:

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

28 U.S.C. § 2412(d):
(d)(1)

(A)

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B)

A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and

other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney 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 United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C)

The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(D)

If, in a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the

excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this subparagraph shall be paid only as a consequence of appropriations provided in advance.

(2) For the purposes of this subsection—

(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 court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection 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 United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B)

"party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500

employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title 5;

(C)

"United States" includes any agency and any official of the United States acting in his or her official capacity;

(D)

"position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E)

"civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to chapter 71 of title 41;

(F)

"court" includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims;

(G)

"final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

(H)

"prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government; and

(I)

"demand" means the express demand of the United States which led to the adversary adjudication, but shall not include a recitation of the maximum statutory penalty (i) in the complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.

(3)

In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5,

or an adversary adjudication subject to chapter 71 of title 41, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4)

Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(5)

(A)

Not later than March 31 of the first fiscal year beginning after the date of enactment of the John D. Dingell, Jr. Conservation, Management, and Recreation Act, and every fiscal year thereafter, the Chairman of the Administrative Conference of the United States shall submit to Congress and make publicly available online a report on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection.

(B)

Each report under subparagraph (A) shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information that may aid Congress in evaluating the scope and impact of such awards.

(C)

(i)

Each report under subparagraph (A) shall account for all payments of fees and other expenses awarded under this subsection that are made pursuant to a settlement agreement, regardless of whether the settlement agreement is sealed or otherwise subject to a nondisclosure provision.

(ii)

The disclosure of fees and other expenses required under clause (i) shall not affect any other information that is subject to a nondisclosure provision in a settlement agreement.

(D) The Chairman of the Administrative Conference of the United States shall include and clearly identify in each annual report under subparagraph (A), for each case in which an award of fees and other expenses is included in the report—

(i)

any amounts paid under section 1304 of title 31 for a judgment in the case;

(ii)

the amount of the award of fees and other expenses; and

(iii)

the statute under which the plaintiff filed suit.

(6) As soon as practicable, and in any event not later than the date on which the first report under paragraph (5)(A) is required to be submitted, the Chairman of the Administrative Conference of the United States shall create and maintain online a searchable database containing, with respect to each award of fees and other expenses under this subsection made on or after the date of enactment of the John D. Dingell, Jr. Conservation, Management, and Recreation Act, the following information:

(A)

The case name and number, hyperlinked to the case, if available.

(B)

The name of the agency involved in the case.

(C)

The name of each party to whom the award was made as such party is identified in the order or other court document making the award.

(D)

A description of the claims in the case.

(E)

The amount of the award.

(F)

The basis for the finding that the position of the agency concerned was not substantially justified.

(7)

The online searchable database described in paragraph (6) may not reveal any information the disclosure of which is prohibited by law or a court order.

(8)

The head of each agency (including the Attorney General of the United States) shall provide to the Chairman of the Administrative Conference of the United States in a timely manner all information requested by the Chairman to comply with the requirements of paragraphs (5), (6), and (7).

(e)

The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1986 applies (determined without regard to subsections (b) and (f) of such section). Nothing in the preceding sentence shall prevent the awarding under subsection (a) of this section of costs enumerated in section 1920 of this title (as in effect on October 1, 1981).

(f)

If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.