No. 21-1256

In the Supreme Court of the United States

ROBERT M. ATHEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
PATRICIA M. MCCARTHY
REGINALD T. BLADES, JR.
BRYAN M. BYRD
Attorneys

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

QUESTION PRESENTED

Whether 28 U.S.C. 2412(b), which authorizes an award of reasonable attorney's fees against the United States "to the same extent that any other party would be liable under the common law," *ibid.*, authorizes a fee award against the United States in this case on the ground that litigation against the government resulted in the creation of a "common fund," even though the United States is not a beneficiary of the fund and the fee award would not be paid from the fund itself.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Federal Claims:

Archuleta v. *United States*, No. 1:99-cv-205 (Mar. 8, 2007)

Athey v. *United States*, No. 1:99-cv-2051 (July 21, 2020)

United States Court of Appeals (Fed. Cir.):

Athey v. *United States,* No. 17-2277 (Oct. 31, 2018)

Athey v. *United States,* No. 20-2291 (Sept. 21, 2021)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-17a) is not published in the Federal Reporter but is available at 2021 WL 4282593. The opinion of the Court of Federal Claims (Pet. App. 18a-47a) is reported at 149 Fed. Cl. 497.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on September 21, 2021. A petition for rehearing was denied on December 14, 2021 (Pet. App. 48a-49a). The petition for a writ of certiorari was filed on March 14, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This attorney's-fee dispute arose from a class action styled *Archuleta* v. *United States*, No. 1:99-cv-205 (Fed. Cl.), in which former-federal-employee plaintiffs

alleged that several federal agencies had underpaid them for their unused leave, which is typically paid as a lump sum at the end of federal employment, by failing to include cost-of-living adjustments (COLAs) and locality-pay increases in their payments. Pet. App. 3a. Five months after the *Archuleta* plaintiffs filed their complaint, the Office of Personnel Management finalized regulations, 5 C.F.R. 550.1201-550.1207, clarifying that federal agencies should include COLAs and other applicable pay in the lump-sum payment. Pet. App. 4a. Seventeen of the eighteen agencies involved in the *Archuleta* litigation later settled with the former-employee plaintiffs, agreeing to pay COLAs and locality-pay increases. *Ibid*.

The Department of Veterans Affairs (VA) did not settle. Pet. App. 4a. Petitioners are eight former VA employees who were plaintiffs in *Archuleta*. See *ibid*. Petitioners' claims were severed from *Archuleta* and then litigated in this case. *Ibid*.

Petitioners sought damages for more than just the COLAs and locality-pay increases that the government had agreed to provide in the *Archuleta* settlement. See Pet. App. 4a. In 2007, the Court of Federal Claims (CFC) dismissed petitioners' claims for night premium pay, weekend additional pay, and Sunday pay after October 1, 1997, and the court excluded all registered nurses from the plaintiff class. *Ibid*. In 2015, the CFC also granted the government summary judgment on petitioners' claim for interest under the Back Pay Act of 1966, 5 U.S.C. 5596. Pet. App. 4a.

In 2017, the parties settled the case. Pet. App. 4a. In that settlement, as in *Archuleta*, the government agreed to pay lump-sum adjustments due to COLAs and locality-pay increases to the 3231 former VA employees

(including petitioners) in the plaintiff class. *Ibid.* Based on that settlement, the CFC entered a judgment for $637,347—less than $200 per class member. 6/30/2017 Judgment. Petitioners appealed the CFC's adverse rulings on their other claims, and the court of appeals affirmed those rulings. Pet. App. 5a.

2. a. In 2020, petitioners moved for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412. Pet. App. 5a. EAJA contains two provisions that waive the United States' sovereign immunity from certain awards of attorney's fees in civil actions. 28 U.S.C. 2412(b) and (d). Petitioners sought fees under both provisions, Pet. App. 5a, but petitioners' question presented in this Court addresses only Section 2412(b). See Pet. i. Section 2412(b) provides that, unless expressly prohibited by statute,

> 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 * * * . 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(b).

Petitioners sought attorney's fees under Section 2412(b) on the ground that, as relevant here, the government was liable for fees under the common law's "common fund" doctrine. Pet. App. 6a & n.2. Under the common-fund doctrine, a litigant or lawyer who recovers a "common fund" for the benefit of persons other than himself or his client may recover "a reasonable attorney's fee from the fund as a whole." *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 478 (1980). That equitable

doctrine "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Ibid.* By "assessing attorney's fees against the entire fund," the court exercises its equitable authority to "prevent this inequity." *Ibid.*

b. The CFC denied petitioners' fee request. Pet. App. 18a-47a.

i. The CFC determined that petitioners were not entitled to attorney's fees under Section 2412(b), Pet. App. 30a-36a, because, as relevant here, the "common fund" doctrine does not authorize such an award in the circumstances of this case, *id.* at 32a-34a. The court explained that, "[u]nder 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.'" *Id.* at 32a (quoting *Boeing Co.*, 444 U.S. at 478) (second set of brackets in original). The court observed that petitioners' counsel had "echew[ed] payment of fees and expenses from the common fund" and had "misapprehend[ed] the purpose of the common fund" doctrine. *Id.* at 33a; see *id.* at 31a. The court explained that the doctrine's authorization of a recovery "from the fund" does not authorize "an additional award" from a defendant beyond the common fund that the plaintiffs have collectively recovered. *Id.* at 32a.

ii. The CFC also rejected petitioners' claim for attorney's fees under Section 2412(d), which authorizes an award of attorney's fees against the United States if, *inter alia*, "the position of the United States was [not] substantially justified," 28 U.S.C. 2412(d)(1)(A). See Pet. App. 36a-47a. The court explained that the government's position in particular litigation is substantially

justified if it is "justified to a degree that could satisfy a reasonable person." *Id.* at 40a (quoting *Pierce* v. *Underwood*, 487 U.S. 552, 565 (1988)). Based on several factors, including the government's "string of successes" in this litigation (*id.* at 43a), the court concluded that the government's position was substantially justified. *Id.* at 41a-43a.

3. The court of appeals affirmed. Pet. App. 2a-17a.

a. The court of appeals concluded that petitioners were not entitled to fees under Section 2412(b) and the common-fund doctrine. Pet. App. 7a-12a. The court explained that Section 2412(b) authorizes a fee award against the United States "only in certain, specified conditions—namely, 'under the common law or under the terms of any statute which specifically provides for such an award.'" *Id.* at 8a (quoting 28 U.S.C. 2412(b)). The court observed that petitioners had relied on the "common law" by invoking its "common fund" doctrine. *Ibid.* Like the CFC, however, the court of appeals concluded that "the common fund [doctrine] does not apply to impose fees on defendants." *Ibid.* The court explained that the common-fund doctrine rests on a principle of "unjust enrichment," namely, "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 9a. The court further explained that a claim for fees under the doctrine therefore "is essentially a suit for contribution," brought by those who obtained the fund in litigation against the fund's "beneficiaries," and that it is not a means to "impose additional liability on the losing defendant." *Id.* at 8a-9a (citation omitted).

The court of appeals observed that petitioners appeared to "interpret [Section] 2412(b) as a fee-shifting

statute that operates independently of the common law and the 'common fund' doctrine." Pet. App. 9a. The court concluded, however, that such an interpretation "cannot be squared with [Section 2412(b)'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.'" *Id.* at 10a.

b. The court of appeals further held that a fee award under Section 2412(d) was not warranted because the CFC had not abused its discretion in determining that the position of the United States was "substantially justified." Pet. App. 12a-17a. The court explained that "the trial court's judgment in weighing [the various] issues" underlying its assessment of the government's position in a case is a "highly discretionary task," *id.* at 15a; that petitioners were "simply ask[ing] that [the court of appeals] assign more weight to particular issues on which they prevailed," *ibid.*; and that petitioners therefore had "fail[ed] to show the trial court abused its discretion" in finding that the position of the United States was substantially justified, *id.* at 17a.

ARGUMENT

Petitioners contend (Pet. 9-19) that Section 2412(b) "'expanded' the common law," Pet. i, so as to render the United States liable for attorney fees under the "common fund" doctrine, even though the government was the defendant in this case and is not an entity that benefited from the common fund that petitioners obtained for the plaintiff class. The Federal Circuit correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. Petitioners also suggest (Pet. 19-29) that the court of appeals should not have applied a deferential

abuse-of-discretion standard when reviewing the CFC's determination that the position of the United States was "substantially justified" within the meaning of Section 2412(d). That argument is not fairly encompassed within the single question presented in the petition, see Pet. i, and it lacks merit in any event. Further review is not warranted.

1. The court of appeals correctly held that petitioners are not entitled to attorney's fees under Section 2412(b) because the common-law "common fund" doctrine does not authorize fee-shifting between the plaintiffs who have obtained a common fund in litigation and the defendant whose liability created the fund. Pet. App. 7a-12a.

a. Section 2412(b) provides a limited waiver of the United States' sovereign immunity from awards of attorney's fees by making the United States liable to prevailing parties for awards of "reasonable" attorney's fees "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(b). Because that provision makes the United States liable for such awards "to the same extent" that any other party would be "liable under the common law" or a statute specifically providing for a fee award, *ibid.*, a litigant seeking attorney's fees under Section 2412(b) must show that a person similarly situated to the United States would be liable for attorney's fees under the common law or another statute. In this case, petitioners invoked the common-law "common fund" doctrine. That doctrine has no application here, however, because it does not authorize fee-shifting between adversaries in litigation.

Under the "American Rule," "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Baker Botts L.L.P.* v. *ASARCO LLC*, 576 U.S. 121, 126 (2015) (citation omitted). The common law recognized three "'narrowly defined'" exceptions to that rule, including an exception based on a court's "historic equity jurisdiction." *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 45 (1991). That exception "allows [the] court to award attorney's fees to a party whose litigation efforts directly benefit others" by acquiring a "'common fund.'" *Ibid.* (citations omitted).

"The common-fund doctrine reflects the traditional practice in courts of equity," under which "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client" may be awarded "a reasonable attorney's fee from the fund as a whole." *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 478 (1980). That doctrine rests on the equitable principle that "persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Ibid.* By "assessing attorney's fees against the entire fund," the court "prevent[s] this inequity" by effectively forcing the fund's beneficiaries to pay their proportionate share of the expenses incurred to obtain that fund. *Ibid.* The doctrine accordingly allows a plaintiff to recoup its attorney's fees not from the defendant, but "from the [common] fund or property itself or directly from the other parties enjoying the benefit." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 257 (1975).

Here, by contrast, petitioners seek an award of attorney's fees not from the plaintiff class that shared in the common fund that petitioners obtained, or from the fund itself, but rather from the United States as the de-

fendant in this case. The common-fund doctrine provides no support for such a request. Because a private defendant in similar circumstances would not be liable for fees under a common-fund rationale, Section 2412(b)'s waiver of sovereign immunity "to the same extent that any other party would be liable under the common law," 28 U.S.C. 2412(b), does not authorize a common-fund award against the United States.[1]

b. Petitioners do not appear to dispute that an award of attorney's fees against a private defendant in similar circumstances would be impermissible "*under common law*." Pet. 11. Petitioners instead suggest that "the plain language of [Section] 2412(b) * * * compel[s] a completely different result" here because, in petitioners' view, Section 2412(b) "super[s]ede[s] those common law rules as long as a 'common fund' [i]s established." *Ibid.*; see Pet. 9-19. That is incorrect.

Section 2412(b) waives the United States' sovereign immunity from attorney's-fee awards only "to the same extent that any other party would be liable under the common law." 28 U.S.C. 2412(b). That language cannot plausibly be read to authorize a fee award against the United States in circumstances where a similarly situated private party would *not* be subject to common-law liability. EAJA's text thus forecloses petitioners' position, even apart from the interpretive principle that the "scope" of a "waiver of sovereign immunity must be 'unequivocally expressed' in statutory text," and that "any ambiguities" must be resolved "in favor of the sovereign," *FAA* v. *Cooper*, 566 U.S. 284, 290-291 (2012).

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[1] Section 2412(b) could potentially subject the United States to liability for attorney's fees on a common-fund theory if the United States was a beneficiary of a common fund that the plaintiff had obtained. That circumstance, however, is not presented here.

Petitioners rely on the common law for the principle that the creation of a common fund can be an appropriate ground for an attorney's-fee award, while ignoring the common-law rules that identify the *sources* from which such awards may be obtained. Nothing in the text of Section 2412(b) supports that approach. Section 2412(b) does not use the term "common fund" or specifically identify the creation of a common fund as a ground for a fee award against the United States. Rather, Section 2412(b) makes the United States potentially liable for a common-fund award only through its more general directive that "[t]he United States shall be liable for [attorney's] fees and expenses to the same extent that any other party would be liable under the common law." 28 U.S.C. 2412(b). Where (as here) the United States is the defendant in the underlying suit, the applicability of Section 2412(b) turns on whether a similarly situated private *defendant* could be held liable for a fee award—not on whether such liability could be imposed on a private *beneficiary* of the common fund.

Petitioners do not contend that the decision below conflicts with any decision of another court of appeals. Petitioners criticize (Pet. i, 12-18 & n.3) the Federal Circuit for purportedly misapplying the principles it had previously announced in *Gavette* v. *OPM*, 808 F.2d 1456 (1986) (en banc), and *M.A. Mortenson Co.* v. *United States*, 996 F.2d 1177 (1993). But the Federal Circuit's decision here is not inconsistent with those precedents.[2]

[2] The court in *Gavette* recognized that Section 2412(b) could potentially subject the United States to "common fund" fee liability, 808 F.2d at 1466, but it did not suggest that the government could be held liable in circumstances where a similarly situated private party would not be. Petitioners refer obliquely (Pet. i) to the *Gavette* court's description of Section 2412(b) as "expand[ing] the

In any event, intra-circuit conflicts ordinarily do not warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

2. Petitioners suggest (Pet. 19-29) that the court of appeals erred by applying an abuse-of-discretion standard to review the CFC's determination that the government's position was substantially justified under 28 U.S.C. 2412(d). In *Pierce* v. *Underwood*, 487 U.S. 552 (1988), this Court held that the abuse-of-discretion standard applies to appellate review of a trial court's substantial-justification determination under Section 2412(d). *Id.* at 557-563. Petitioners suggest (Pet. 22-29) that the standard of review in this case should be different because petitioners' 2020 fee request was denied by a CFC judge different from the CFC judges who had previously adjudicated the merits of petitioners' underlying claims. That contention does not warrant further review.

As an initial matter, petitioners' arguments regarding Section 2412(d) are not fairly encompassed within the sole question presented in the certiorari petition. That question concerns Section 2412(b) and the common law's common-fund doctrine. See Pet. i. Although the

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common law." 808 F.2d at 1466. Read in context, however, that statement meant simply that, by waiving the sovereign immunity that the United States had previously possessed, Section 2412(b) had expanded the set of parties that can be held liable for common-law fee claims, in order "to place the Government in the same shoes as 'any other party.'" *Ibid.*; cf. p. 9 n.1, *supra*. The *Mortenson* court's statement that "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," 996 F.2d at 1180, likewise reflects the need for parity of treatment between the government and similarly situated private parties.

body of the certiorari petition discusses the standard of review for substantial-justification determinations under Section 2412(d), see Pet. 19-29, "the fact that [petitioners] discussed this issue in the text of [their] petition for certiorari does not bring it before [this Court]," because this Court's "Rule 14.1(a) requires that a subsidiary question be fairly included in the question presented for [the Court's] review." *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) (citation and emphasis omitted).

In any event, petitioners' Section 2412(d) arguments lack merit. The standard of appellate review for substantial-justification determinations under Section 2412(d) does not vary depending on whether a particular determination is made by the same trial judge who adjudicated the merits of the case. Petitioners identify no division of authority on that issue.

To be sure, the Court in *Underwood* identified the trial court's pre-existing familiarity with the strength of the government's arguments, including through "settlement conferences and other pretrial activities" that may give that court "insights not conveyed by the record," as *one* consideration that supported the use of an abuse-of-discretion standard on appellate review of a substantial-justification finding. See 487 U.S. at 560; Pet. 24-29. That rationale for deferential appellate review is inapposite in cases like this one. But the Court in *Underwood* identified the trial judge's usual pre-existing familiarity with the evidence as only one of the factors supporting an abuse-of-discretion standard. See 487 U.S. at 559-563. The Court also observed, for example, that Section 2412(d)'s text—which provides that a fee award to a prevailing party is generally warranted "'unless *the court finds* that the position of the United States was substantially justified'"—suggests

that the relevant determination rests in the trial court's discretion, and that its determination should be given "some deference * * * upon appeal." *Id.* at 559 (quoting 28 U.S.C. 2412(d)(1)(A)).

The Court further explained that, although the "substantial amount" of the fee award in *Underwood* itself might have supported "more intensive[]" appellate review if EAJA awards "ordinarily ha[d] such substantial consequences," the fee award in that case was in fact far larger than the typical EAJA award. 487 U.S. at 563; see *id.* at 557. The Court concluded that, in selecting the appropriate standard of appellate review for substantial-justification findings under Section 2412(d), "the generality rather than the exception must form the basis for our rule." *Id.* at 563. That reasoning confirms that the abuse-of-discretion standard governs across the board, even though not every rationale for that standard will apply to every appeal.

The Court in *Underwood* announced a facially unqualified rule mandating "deferential review of a district court's decision regarding attorney's fees under the EAJA." 487 U.S. at 563. The Court has not suggested, either in that case or in any subsequent decision, that a different standard of appellate review should apply where the merits and EAJA proceedings are conducted by different trial judges. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
PATRICIA M. MCCARTHY
REGINALD T. BLADES, JR.
BRYAN M. BYRD
Attorneys

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