No. 21-1256

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

REPLY BRIEF OF PETITIONERS

Ira M. Lechner
Counsel of Record
IRA M. LECHNER, ESQ.
1150 Connecticut Avenue NW, Suite 1050
Washington, DC 20036
(858) 864-2258
iralechner@yahoo.com

Counsel for Petitioners

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THE LEX GROUP^{DC} ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

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PETITIONERS' REPLY TO THE SOLICITOR GENERAL'S BRIEF IN OPPOSITION

This case exposes a government bureaucracy which-*without the support of a single court precedent*-insists that 28 U.S.C. § 2412(b) is rendered null and void by common law that allegedly shields "all defendants" from liability for plaintiffs' attorney fees and even the legitimate expenses of the court-appointed Class Action Administrator. The SG and the Civil Division mischaracterize the power of common law to nullify § 2412(b). This provision is an important statute when a common fund is established. The statute then modifies common law to "shift" liability for plaintiffs' fees and expenses to the government. In its Brief In Opposition, the SG refuses (at 7-9) to acknowledge settled law that section 2412(b) is an explicit "fee-shifting" statute.

The SG, the panel, and the CFC refused to pay legitimate documented fees and expenses of $231,526.74 incurred over more than ten (10) years by an independent business the CFC appointed as its official "Class Action Administrator" to differentiate and pay thousands of "prevailing" claimants. Pet. App. 5a.

The EAJA is a necessary remedy to help small businesses, veterans and others redress legitimate claims against the government—an essential element of democracy. Unless this Court grants review, lower courts will deny attorney fees to thousands of small businesses which then will not have the legal resources in court to litigate against the

overwhelming power of the DoJ and Federal agencies.[1]

Petitioners call attention to a new case. Rule 15(8). A Senior CFC Judge recently issued a scholarly compendium of decisions recounting the history of exceptions to the "American Rule" and Congressional enactment of § 2412(b) as a "fee-shifting" statute that subjects the government to liability for the attorney fees and expenses of prevailing plaintiffs in three specific situations. *See Agma Security Service, Inc. v. United States*, No. 20-926C, ___Fed. Cl.___ (June 26, 2022), quoted below:

I. "The history of the EAJA and EAJA requirements"

"With regard to paying attorneys' fees and costs, the United States Supreme Court has stated:

> This Court's "'basic point of reference' when considering the award of attorney's fees is the bedrock principle known as the "'American Rule'": Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–53, 130 S. Ct. 2149,

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[1] The Court of Federal Claims is already treating the *Athey* decision as if it is binding and nullifying § 2412(b) without any analysis of the panel's faulty reasoning. *See Gerald K. Kandel, et al. v. United States,* No. 06-872C (June 22, 2022): "And while the decision is not binding precedent, the Circuit has clearly indicated its "view" on the relevant law therein…Here, the Federal Circuit's holding is sufficiently clear and its reasoning sufficiently substantive to mitigate in favor of this court's deference to the same."

176 L. Ed. 2d 998 (2010)….Absent statute or enforceable contract, litigants pay their own attorney's fees." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. at 257 (citations omitted). This has come to be known as the "American Rule," and the only exceptions to this rule are those created by Congress and a small group of common law equitable exceptions which federal courts lack the power to enlarge. *See id.* at 269. The Supreme Court in *Alyeska* noted the equitable exceptions of (1) willful disobedience of a court order, (2) bad faith on the part of a losing party, and (3) the common fund or common benefit exception allowing recovery of costs when the prevailing party is a trustee of property or is a party preserving or recovering a fund for the benefit of others in addition to himself. *See id.* at 257–59. When the House of Representatives considered the Equal Access to Justice Act, it provided the following rationale:

For many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process. When the cost of contesting a Government order, for example, exceeds the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an injustice than to contest it.

H.R. Rep. No. 96-1418, at 9, reprinted in 1980 U.S.C.C.A.N. at 4988.

In addition, litigants seeking to recoup litigation expenses from the United States also face the barrier of overcoming sovereign immunity. *See Nilssen v. Osfam Sylvania, Inc.,* 528 F.3d at 1357; *see also Chiu v. United States*, 948 F.2d 711, 714 (Fed. Cir. 1991); *Gavette v. Office of Pers. Mgmt.*, 808 F.2d 1456, 1460 (Fed. Cir. 1986); *Griffin & Dickson v. United States*, 21 Cl. Ct. 1, 4 (1990). "[T]he traditional principle that the Government's consent to be sued 'must be "construed strictly in favor of the sovereign . . . ."' *United States v. Nordic Vill.*, 503 U.S. 30, 34 (1992) (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. at 685 (quoting *McMahon v. United States*, 342 U.S. 25, 27 (1951))); *see also Ardestani v. I.N.S.*, 502 U.S. 129, 137 (1991)….

Only a statutory directive waiving immunity can make the United States potentially liable in suit. *See Lane v. Pena,* 518 U.S. 187, 192 (1996); *United States v. Testan*, 424 U.S. 392, 399 (1976); *Soriano v. United States,* 352 U.S. 270, 276 (1957). Departing from the American rule that generally each party in a litigation pays its own costs, "Congress enacted EAJA, Pub. L. 96-481, Tit. II, 94 Stat. 2325, 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."' *Starry Assocs., Inc. v. United States,* 892 F.3d 1372, 1377 (Fed. Cir. 2018) (quoting *Scarborough v. Principi,* 541 U.S. 401, 406 (2004) (quoting H.R. Rep. No. 96-1005, at 9 (1980))); *see also Gavette v. Office of Pers. Mgmt.,* 808 F.2d at 1459 (quoting H.R. Rep. No.

96-1418, at 5 (1980). (Congress recognized that the American Rule deterred individuals and small businesses "from seeking review of, or defending against unreasonable governmental action because of the expense involved in securing the vindication of their rights"); *Crawford v. United States,* 157 Fed. Cl. at 743–44 ("the EAJA creates an exception to this general rule [American Rule], and under certain circumstances, also allows for recovery of costs")…."The primary purpose of the EAJA is to ensure that litigants 'will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved.'" *Wagner v. Shinseki,* 640 F.3d 1255, 1259 (Fed. Cir. 2011) (quoting *Scarborough v. Principi,* 541 U.S. at 407) (citations and internal quotation marks omitted in original); *see also Ellis v. United States,* 711 F.2d 1571, 1576 (Fed. Cir. 1983) ("EAJA's primary purpose is to eliminate legal expense as a barrier to challenges of unreasonable government action.").

As indicated by the United States Court of Appeals for the Federal Circuit, EAJA is a fee-shifting statute that allows a party who prevails in a civil action against the government to recover attorney fees and costs. *See Robinson v. O'Rourke,* 891 F.3d 976, 980 (Fed. Cir. 2018); *Gurley v. Peake,* 528 F.3d 1322, 1326 (Fed. Cir. 2008); *Davis v. Nicholson,* 475 F.3d 1360, 1363 (Fed. Cir.), *reh'g and reh'g en banc denied* (Fed. Cir. 2007). Because EAJA "exposes the government to liability for attorney fees and expenses to which it would not otherwise be subjected, it is a waiver of sovereign immunity." *Ed A. Wilson, Inc. v. Gen. Servs. Admin.,* 126 F.3d 1406, 1408 (Fed. Cir. 1997) (citing *Ardestani v. I.N.S.,* 502 U.S. at 137).

In order to accomplish its purpose, EAJA made two primary changes to the then prevailing law. *See Gavette v. Office of Pers. Mgmt.,* 808 F.2d at 1460 (citing H.R. Rep. No. 96-1418, at 9, 1980 U.S.C.C.A.N. at 4987). First, in 28 U.S.C. § 2412(b), the EAJA extended the existing common law and statutory exceptions to the American Rule to make the United States liable for attorney's fees just as private parties would be liable. *See Gavette v. Office of Pers. Mgmt.,* 808 F.2d at 1460 (citing H.R. Rep. No. 96-1418, at 9, 17, 1980 U.S.C.C.A.N. at 4987, 4996); *see also Scarborough v. Principi,* 541 U.S. at 406 ("First, § 2412(b) made the United States liable for attorney's 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.'"). As reflected in *Gavette v. Office of Personnel Management,* the House Committee on the Judiciary stated that:

> Section 2412(b) permits a court in its discretion to award attorney's 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 other parties . . . . Thus, under this subsection, cases involving the United States would be subject to the "bad faith," "common fund" and "common benefit" exceptions to the American rule against fee-shifting. The United States would also be liable under the same standards which govern awards against other parties under Federal statutory exceptions, unless the statute expressly provides otherwise.

Gavette v. Office of Pers. Mgmt., 808 F.2d at 1460 (citing H.R. Rep. No. 96-1418, at 17, 1980 U.S.C.C.A.N. at 4996); *see, e.g., Centex Corp. v. United States,* 486 F.3d 1369, 1372 (Fed. Cir. 2007) (stating that section 2412(b) "allows for fee awards when the government acts in bad faith as defined under the common law."); *Knight v. United States,* 982 F.2d 1573, 1579–82 (Fed. Cir. 1993) (common fund exception); *MVM, Inc. v. United States,* 47 Fed. Cl. 361, 363–65 (2000) (common benefit); *St. Paul Fire & Marine Ins. Co. v. United States,* 4 Cl. Ct. 762, 769 (1984) (bad faith exception)."

II. No court, other than the panel of the Federal Circuit in this case, has ever held that the Government is not liable for common fund attorney fees under § 2412(b) because "other defendants" are not liable under common law.

The SG does not identify <u>*any other decision of any court*</u> which holds the government is immunized from liability under § 2412(b) in a case where a common fund was established. The common fund exception to the "American Rule" serves as the predicate basis to "shift" payment of documented fees to the government. The government admitted that the certified class of 3,231 was owed back pay because they had not been paid properly.

The panel held the government is not liable because "other defendants" are never liable for attorney fees under common law—a defense which makes no legal sense. Congress enacted this statute to expand those common law rules, *as admitted by the SG in footnote 2 (at 11) to its Opposition.* The SG does

not defend the panel's holding! The SG argues an entirely different concept that if "a person similarly situated to the United States" is not liable *under common law,* then Congress' explicitly worded "fee-shifting" statute must be null and void. The SG never explained why common law could supersede a statute which is intentionally designed to expand that very same common law provision when a common fund has been established. Thus, the new definition offered by the SG makes no sense either.

The SG's unique and dangerous theories, never articulated before by any court in any jurisdiction, is ripe for review by this Court. The multiplicity of cases identified above demonstrates that Congress enacted this "fee-shifting" statute specifically to serve as a critically important incentive for small businesses, veterans, and individuals who have valid claims for damages against the government. The availability of "fee shifting" enables small businesses to attract competent legal counsel to withstand the overwhelming power of government bureaucracy to unfairly drag cases out for years beyond the ability of small businesses to withstand such protracted defensive tactics. This case is a stark example of that very same tactic! The employees of 18 agencies had been wrongfully paid cost of living payments from 1993 to 1999. DoJ settled that case in 2006, but only for 17 agencies, excluding the VA. The VA plaintiffs (*Athey*) continued forward. DoJ finally settled to pay 100% of the back pay damages owed to 3,231 members of the certified VA case *but not until in 2017.* Pet. App. 4a.

The SG speculates if a *mythical non-governmental defendant* "similarly situated to the

United States" is not liable for fees and expenses under common law, then so should the government here escape any liability (at 10). The SG insists on this radical argument even though § 2412(b) specifically applies "to shift" the payment of fees to the government, as here, when a common fund has been established! The inapplicability of such a weak and unsupportable argument is readily apparent.

III. The statue controls when a common fund or common benefit is involved. There are "compelling reasons" for a grant of review (Rule 10).

First, the SG ignores the applicable legislative history with respect to the intent of Congress, as well as the actual wording of § 2412(b). There are only two sentences in § 2412(b). Both sentences specifically identify the United States as liable for attorney fees when "any other party" is liable under common law, in the courts' reasonable discretion. Thus, the only applicable legal question is what "*other* party" (emphasis added) is also liable for plaintiffs' attorney fees and expenses under common law when plaintiffs "prevail" in a common fund suit against the government? The terminology "*other* party" must mean a party "other" than the United States. *See Gavette*, *supra*, at 1466: "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)…."; *Mortenson*, 996 F.2d 1177, 1180 (Fed. Cir. 1993). The SG agrees with petitioners (at 7-9) that when a common fund is established in litigation, the beneficiaries who are "any other parties" of the common fund are liable for payment of plaintiffs' attorney fees. Therefore, by

virtue of both sentences of § 2412(b), Congress mandated that when a common fund is established, as unquestionably occurred here, the liability of paying plaintiffs' fees and expenses "shifts" to the government the same as when "any other party" is liable under the "common fund exception" to common law. The panel simply ignored this analysis.

Second, unquestionably, the substantive ruling *en banc* by all eleven (11) judges of the Federal Circuit in *Gavette* was precedential, followed by *Mortenson*. Petitioners' argument is principally supported by those two decisions. However, the SG reverses course again (at 10) to proclaim falsely: "But the Federal Circuit's decision here is not inconsistent with those precedents." But the SG's position is diametrically inconsistent with *Gavette* and *Mortenson*. Then, in footnote 2, at 10-11, the SG expressly admits that: "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.'" Finally, the SG tries to escape those precedents, and its own admission, by introducing for the first time in this litigation an irrelevant, double-negative concept that *Gavette* "did not suggest that the government could be held liable in circumstances where a similarly situated private party would not be." (footnote 2, at 11).

Third, despite the clear legislative and judicial history of § 2412(b), the SG repeats the mistakes of the panel. The panel erroneously claimed that plaintiffs relied on the common law's "common fund exception" itself "to impose fees on defendants" rather than as the "predicate basis" to § 2412(b)'s "shift" of liability for the fees to the government. Pet. App. 7a-

12a. That argument is plainly not true. Plaintiffs throughout this litigation insisted that the "common fund" provided the predicate to shift liability for payment of the fees to the government under the statute. Pet. 9-19. The panel shamelessly switched the actual wording of the statute from "any other party" to mean "other defendants" which, if true, would continue to shield the government despite the wording of § 2412(b). Pet. App. 7a-12a.

This unconscionable substitution of § 2412(b)'s actual wording illustrates the panel's basic mischaracterization of petitioners' legal argument. The SG (at 8) attempts to justify the panel's errors by citing irrelevant dictum from two cases which preceded § 2412(b)'s enactment. (*Boeing Co. v. Van Gemert* and *Alyeska*), and also a bankruptcy case which did not even involve § 2412(b) or the EAJA (*Baker Botts L.L.P. v. Asarco LLC*).

In sum, no court—other than the panel in this case—has ever held that the United States is not liable under § 2412(b) because "other defendants" are not liable under common law. Based on the multiple reasons cited above, the panel's unsupportable decision must be reversed.

IV. Petitioners' argument regarding Section § 2412(d) is fairly included in the Question Presented as a sub-section of 28 U.S.C. § 2412 Rule 14.1(a).

The SG avoids discussing the dominant issue under § 2412(d) as petitioners do not challenge *Underwood*. The newly assigned motions judge who ruled that the government carried its burden of proof as to the reasonableness of its defense was not one of

the two "trial court" judges who heard the evidence over a period from 2006 to 2017. The motions judge's only function was to decide the motion for attorney fees and expenses. He had no first-hand knowledge of the 318 ECFs which preceded his appointment to this case, yet the appellate panel relied on his presumed judgment as "the trial court's familiarity with the record before it." Apparently, the panel must have been unaware that the CFC judge was not the "trial judge." This case must be remanded to the CFC.

CONCLUSION

The petition for a writ of certiorari should be granted and the case remanded to the CFC for reconsideration.

Respectfully submitted,

IRA M. LECHNER, ESQ.
1150 Connecticut Avenue N.W., Suite 1050
Washington, D.C. 20036
IraLechner@yahoo.com
(858) 864-2258