IN THE
UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 13-3194

JOHN K. ROGERS,

Appellant,

v.

ROBERT A. McDONALD,
Secretary of Veterans Affairs,

Appellee.

BRIEF OF AMICUS CURIAE CLINICAL LEGAL EDUCATION ASSOCIATION IN SUPPORT OF APPELLANT'S REPLY BRIEF

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I. Introduction

A federal judge once said, "[W]hen all else fails . . . , consult the statute."[1] Here, the Equal Access to Justice Act ("EAJA") is clear. Under the terms of the statute, Mr. Rogers is the prevailing party, the government's position was not substantially justified, and there are no special circumstances that make an award unjust. The Department of Veterans Affairs ("VA") does not dispute any of these points. Therefore, the plain language of the statute dictates that the "court shall award . . . fees and other expenses." 28 U.S.C. § 2412(d)(1)(A).

VA fails to identify *any* statutory text modifying this clear directive or otherwise supporting its position that the EAJA does not authorize recovery for work performed by law students in law school clinics. Instead, VA relies on misapplied law and misplaced policy in proposing a bar on EAJA awards that would decrease access to legal counsel, disincentivize work done by law school clinics, and diminish law students' ability to serve unrepresented citizens. Pursuant to CAVC Rule 29, *Amicus Curiae* Clinical Legal Education Association ("CLEA"), an organization that aims to promote law school clinics, urges this Court to adhere to the statute's plain language and grant Mr. Rogers's fee petition.

II. VA's Proposed EAJA Bar Is Inconsistent with the Text of the Statute

The EAJA statute at 28 U.S.C. § 2412(d)(1)(A) states in relevant part:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party . . . fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action . . ., 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.

[1] *Arrhythmia Research Tech., Inc. v. Corazonix Corp.*, 958 F.2d 1053, 1066 (Fed. Cir. 1992) (Rader, J., concurring).

Although the result of the statute is in dispute, i.e., "whether the EAJA authorizes an award of payment," Appellee's Br. 1, the plain language of the statute is not. VA does not dispute that Mr. Rogers is the "prevailing party," that the VA's position was not "substantially justified," and that there are no "special circumstances mak[ing the] award unjust"—nor does VA challenge what these terms or phrases mean as a matter of statutory construction. What VA disputes instead is the EAJA's "purpose," *id.* at 3, its "spirit and goals," *id.* at 8, and other "matter[s] of . . . public policy," *id.* at 7.

Based on VA's distorted view of the EAJA's "spirit" and "purpose," VA seeks a categorical bar of EAJA fee awards to appellants for services provided by law students who represent citizens as a part of law school clinics. *Id.* at 2. VA argues that "law school students for whose work Appellant seeks to recover attorney fees . . . were enrolled in an educational law school clinic, and their work in the case was performed not in an employment capacity but an academic one, in exchange for academic credits needed to meet their academic obligations necessary to obtain their law degree." *Id.* at 5. But even accepting these facts as true, they have no relevance to the text of the EAJA statute.

Nowhere does the statutory text weigh educational benefits gained by a party's chosen counsel. Nowhere does the statute address the counsel's motivations. Nowhere does the statute create an outright bar to recovery based on the counsel's financial position or qualifications. Instead, the statute addresses the net worth of the *party*, *see* 28 U.S.C. § 2412(d)(2)(B), and provides for an award of "reasonable"[2] fees and expenses, which the

[2] VA concedes that "[t]he foremost question here is not the 'reasonableness' of the fees requested." Appellee's Br. 10 n.7.

statute explains "shall be based upon prevailing market rates for the kind and quality of the services furnished," 28 U.S.C. § 2412(d)(2)(A). The plain language of the statute does not require—or even permit—any assessment of the actual costs incurred, counsel's financial status, or whether they received any ancillary benefit from their representation.

VA makes much of the EAJA's purported "purpose," but "a statute's *text* is Congress's final expression of its intent." *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (emphasis added). VA's argument that asks the Court to disregard this plain text of the EAJA and rely on nonstatutory arguments should be rejected.

III. VA's EAJA Bar Would Diminish Veterans' Access to Counsel

VA's proposed EAJA bar also fails as a matter of policy. The bar would limit veterans' access to counsel by creating financial disincentives to clinical programs seeking to represent citizens against the government. This policy sits in stark contrast to the EAJA's goal of *promoting* citizen access to legal services to remedy harms from unreasonable governmental action. *See* S. Rep. No. 96-253, at 5 (1979).

Notwithstanding the current state of EAJA law allowing law students to recover EAJA fees, over 4,300 veterans still lacked legal counsel before the Board of Veteran's Appeals during fiscal year 2013. *See* VA Board of Veteran's Appeals Annual Report 25 (2013).[3] Given the scores of unrepresented veterans currently at a disadvantage, VA should seek to incentivize more representation by law school clinics, not less.

Justice O'Connor had this vision. The Justice envisioned law school clinical programs "tak[ing] a big bite out of the legal services shortage." Sandra Day O'Connor, Good News

[3] *Available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2013AR.pdf.

and Bad News, Presentation at American Bar Association, Annual Meeting, Pro Bono Awards Luncheon, Atlanta, Georgia (Aug. 12, 1991) (quoted in Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. Rev. 1461, 1475-76 n.73 (1998)). She noted that "[t]here are over 130,000 law students in the country right now," and "[i]f each could assist one client a year, it would have quite an impact." *Id.* This positive impact envisioned by Justice O'Connor is underway. All fifty states and the District of Columbia now have court rules authorizing supervised law student practice. *See generally* Clinic Bar Rules by State, Georgetown Law (containing a compilation of state and local student practice rules and several federal court student practice rules).[4]

VA itself has publicly stated that by "[w]orking with partners in law schools and the legal community, we can improve the lives of these vulnerable Veterans." Press Release, VA Office of Public Affairs, VA Hosts Forum on Veterans' Legal Needs (Apr. 4, 2014).[5] VA continued that it was "pleased that so many law schools and legal groups have joined us in [an] effort to assist Veterans with their legal issues and their applications for benefits." *Id.* Notwithstanding its public statements, VA now seeks a rule that undermines the progress made by law school clinics and discourages law students from representing veterans. VA's proposed rule should be rejected.

IV. There is No Evidence that VA's EAJA Bar Would Save Money

VA's novel EAJA bar is no doubt an effort to save money. Even if that were a valid consideration under the statute, which we dispute, VA presents no evidence that it will

[4] *Available at* http://www.law.georgetown.edu/library/research/guides/StudentPractice.cfm
[5] *Available at* http://www.va.gov/OGC/docs/Vet_Law_Press_Release.pdf.

actually achieve that goal. In fact, the exact opposite may occur since clinical legal programs promote the availability of lower-cost representation, with "salutary effects on the burden of fee awards, on statutory efforts to remove barriers to litigation of meritorious claims, and on the market forces encouraging settlement in appropriate cases, as well as on the quality of legal education." *DiGennaro v. Bowen*, 666 F. Supp. 426, 432 (E.D.N.Y. 1987) (quoting *Jordan v. U.S. Dep't of Justice*, 691 F.2d 514, 524 (D.C. Cir. 1982)).

If anything, VA's EAJA bar has the potential to increase the cost of veterans' benefits by increasing the amount and cost of fee-award litigation. If VA prevails, parties will be forced to litigate the qualifications of counsel, the profit/not-for-profit nature of entities involved in the representation, alleged ancillary benefits received by counsel, and other nonstatutory issues that the government may later raise. The Administrative Conference of the United States ("ACUS") has stated that EAJA disputes have already "generated a significant amount of contentious litigation," and that the evidence suggests that "fee litigation often results in more complicated proceedings than are merited." 1 C.F.R. § 305.92-5 (1992). Sound policy would seek to decrease such expenses and would incentivize the government to eliminate the wrongful conduct that gave rise to the dispute in the first instance rather than seeking to eliminate compensation to the legal counsel that identified it.

V. Fees and Expenses Do Not Provide a "Windfall" and Are Needed to Support Quality Clinical Programs

VA asserts that the fee awards amount to a "windfall," Appellee's Br. 13, but this is incorrect. Courts have already rejected the windfall theory in other contexts, finding that the government's role as a provider of public services is distinct from its role as a defendant in a case and has "no bearing on the question of reimbursing individual citizens for individual

wrong brought upon them." *Shadis v. Beal*, 685 F.2d 824, 833 (3d Cir. 1982).

The true concern is whether VA's EAJA bar would create a windfall for the government. "The possibility of a fee award at the conclusion of the litigation may be a clinic's most powerful instrument in settlement negotiations." Comment, *Court Awarded Attorneys' Fees in Recognition of Student Lawyering*, 130 U. Pa. L. Rev. 161, 177 (1981). "Without consistent application of the awards provisions in all circumstances, clients of clinical programs are deprived of the bargaining power possessed by persons who have secured other forms of representation." *Id.* This result is "manifestly unfair to the clinic's client" and creates "an unjustifiable windfall to the defendant." *Id.*

VA also asserts that clinical programs do not need fee awards. However, lack of sufficient funding is listed frequently as a challenge facing clinical programs. Ass'n of Am. L. Sch., AALS Comm. Rep., Report of the Committee on the Future of the In-House Clinic, 42 J. Legal Educ. 508, 522 (1992). Law school clinics do in fact rely on attorneys' fees awards to cover a percentage of their clinic costs. For example, as detailed in the "MacCrate Report," the sources of funding for in-house clinical programs in 1991-1992 showed that 2.7% of the funding came from attorneys' fees. Section of Legal Educ. & Admissions to the Bar, Am. Bar Ass'n, Legal Education and Professional Development—An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap 250 (1992). With education budgets already contracting, removing EAJA fees would make running clinical programs even more difficult.

VI. VA's Proposed Bar Would be Unmanageable to Apply and Enforce

Finally, VA's proposed bar is unmanageable for both legal clinics and courts. It raises

a variety of vague new questions that would mire courts and legal clinics in litigation. For example, what qualifies as an educational benefit that disqualifies a fee award? Do externships and other arrangements provide educational benefits? How much subsidiary benefit would a law student, paralegal, or junior attorney have to receive to make the successful litigation hours noncompensable? How would that be proven? How do scholarship, tuition, endowment, and revenue levels affect the analysis? VA's EAJA standard seemingly requires analysis and accounting of all of these factors to establish entitlement to a fee award. The administrative burden of this analysis would create substantial disincentives to law school clinics seeking to provide assistance to otherwise pro se clients and reduce the additional burden that pro se litigants place on courts.

VII. Conclusion

VA seeks a result antithetical to the text of the EAJA statute and the policy behind it. The Court should reject VA's EAJA bar and award the fees and expenses to Mr. Rogers.

Respectfully Submitted,

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