Corporate Goliaths in the Costume of David: The Question of Association Aggregation under the Equal Access to Justice Act -- Should the Whole be Greater than its Parts?

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CORPORATE GOLIATHS IN THE COSTUME OF DAVID: THE QUESTION OF ASSOCIATION AGGREGATION UNDER THE EQUAL ACCESS TO JUSTICE ACT—SHOULD THE WHOLE BE GREATER THAN ITS PARTS?

JOSEPH J. WARD*

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Imagine this scenario: ACMEINC, BIGCO, and MEGACORP all manufacture platinum widgets and distribute them worldwide. All three of these mammoth corporations have individual net worths well over $4 billion. All three corporations are also members of the Organization of Widget Makers (OWM), an association of widget makers consisting of both large and small widget manufacturers. Although OWM’s net worth as an association is only $5 million, many of its in-

* Staff Attorney, Florida Fourth District Court of Appeal. J.D., Florida State University College of Law, 1998. The phrase “Corporate Goliaths in the Costume of David” was coined by Judge Reynoldo G. Garza to explain that aggregation of the individual net worths of an association’s members must be required when determining if an association is eligible for attorneys’ fees under the Equal Access to Justice Act. Texas Food Indus. Ass’n v. United States Dep’t of Agric., 81 F.3d 578, 585 (5th Cir. 1996) (Garza, J., dissenting).
individual members have net worths equal to those of ACME INC, BIGCO, and MEGACORP.

One day the United States sued the members of OWM for unfair labor practices. OWM ultimately prevailed at trial. After the trial, OWM claimed entitlement under the Equal Access to Justice Act for reimbursement of the fees and costs it expended in defending against the government’s suit.

Should OWM be able to recover fees under the Act, despite the fact that many of OWM’s members have individual net worths greatly exceeding the Act’s $7 million eligibility ceiling, or did Congress, in setting such an eligibility ceiling, intend for the Act to assist only small entities whose scarce resources might otherwise prevent them from challenging wrongful government action?

I. INTRODUCTION

The Equal Access to Justice Act (EAJA) allows the prevailing party in a suit that challenges government action to recover attorneys’ fees and costs unless the government can prove that its action was substantially justified or that special circumstances exist which should preclude such an award. In the almost two decades since the EAJA was enacted in 1980, scholars and courts have debated and refined nearly all of the criteria for a successful claim under the Act. However, scholars and courts have paid scant attention to the issue

2. Section 2412(d)(1)(A) states:
   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.
However, scholars and courts have paid scant attention to the issue of who qualifies as a party eligible for a fee award under the Act. This is particularly surprising since the determination of whether an applicant for EAJA fees qualifies as a party constitutes the threshold inquiry in an EAJA claim and is arguably the most important element of all.\(^5\)

Recently, several federal circuit courts have addressed whether the net worth of the individual members of an association claiming entitlement to fees under the EAJA should be aggregated when determining whether the association qualifies as a party. The Sixth Circuit Court of Appeals ruled that aggregation is required when an association’s members receive significant benefits from the litigation pursued by the association.\(^6\) In contrast, the Fifth Circuit held that, regardless of who received benefits from the litigation, an association’s eligibility for an EAJA fee award depends only on the association’s net worth and size, not the aggregate net worth and size of the association’s individual members.\(^7\) Likewise, the Ninth Circuit Court of Appeals held that the ineligibility of an individual member of an association who benefited from the litigation does not preclude the association from obtaining a fee award under the EAJA.\(^8\) The Ninth Circuit also expressed concern over providing a windfall to litigants with vast financial resources.\(^9\)

This Comment focuses on the proper definition of a “party” for purposes of the EAJA and examines the appropriateness of aggregating the net worth and number of employees of the individual members of a claimant association when determining the association’s entitlement to fees under the Act. With the recent split among the Fifth, Sixth, and Ninth Circuits on the issue of association aggregation and the high level of litigation involving the EAJA over the last decade, a United States Supreme Court pronouncement on the aggregation issue has become ever more likely.\(^10\)

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5. For a discussion of the elements of an EAJA claim, see infra Part III.
7. See Texas Food Indus. Ass’n v. United States Dep’t of Agric., 81 F.3d 578, 582 n.7 (5th Cir. 1996).
8. See Love v. Reilly, 924 F.2d 1492, 1494-95 (9th Cir. 1991).
10. See Gregory C. Sisk, The Essentials of the Equal Access to Justice Act: Court Awards of Attorney’s Fees for Unreasonable Government Conduct (Part One), 55 LA. L. REV. 217, 221 (1994) [hereinafter Sisk, Essentials I] (stating that “the EAJA remains a constant focus of judicial attention, with new appellate decisions interpreting its provisions and applying its standards appearing in nearly every volume of the Federal Reporter,” and that “[a]s evidenced by its ubiquitous presence in the federal case reporters during the last decade, Section 2412 of Title 28 has become one of the most heavily and intensely litigated sections of the United States Code.”).
Part II discusses the legislative history and congressional intent of the EAJA. Part III focuses on the five criteria that must be met before costs or fees may be awarded under the Act. Part IV examines the split among the federal courts of appeal as to whether aggregation of an association's members is required when determining the association's eligibility for fees under the EAJA. Part V analyzes the rationales for aggregation and whether aggregation is appropriate. Part VI predicts how the U.S. Supreme Court might rule on the question of association aggregation and suggests that a legislative solution may best resolve the issue. Finally, Part VII concludes by calling for a proper resolution of the association aggregation conundrum before the EAJA's fundamental purpose of ensuring justice for those with little financial resources is overlooked and forgotten.

II. THE LEGISLATIVE HISTORY AND PURPOSE OF THE EAJA

The EAJA's fundamental purpose is to level the playing field between private parties and the government. The EAJA ensures that justice is not subverted because it is too expensive for private parties with small financial resources to litigate against the government.

11. As stated in the House Report on the Equal Access to Justice Act, Extension and Amendment, when the EAJA was reenacted in 1985:

The primary purpose of the Act was to ensure that certain individuals, partnerships, corporations, businesses, associations, or other organizations will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved in securing the vindication of their rights. The Act reduces the disparity in resources between individuals, small businesses, and other organizations with limited resources and the Federal Government.


[Enacting the Equal Access to Justice Act, Congress wished to ease the burden upon small businesses of engaging in litigation with the federal government... Indeed, the Equal Access to Justice Act was passed as one of the titles in an act that assisted small businesses in a number of ways.

Id. at 1082 n.2.

12. The purpose of the EAJA is summarized as follows:

(a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.

(b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situations.

(c) It is the purpose of this title —

(1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorneys' fees, expert witness fees, and other costs against the United States

Through the EAJA, Congress intended to reduce or prevent "excessive regulation and the unreasonable exercise of [g]overnment authority" by providing attorneys' fees to private parties who successfully challenge government conduct in litigation.\(^{13}\) The Act was derived from Congress's desire to protect small businesses, which were thought to be targets of arbitrary regulation by the federal government "because they do not have the resources to fully litigate ... ."\(^{14}\)

As one commentator noted, "Congress presumably sought to achieve three interconnected goals [through the EAJA]: (1) to provide an incentive for private parties to contest government overreaching; (2) to deter subsequent government wrongdoing; and (3) to provide more complete compensation for citizens injured by government action."\(^{15}\) The Act provides incentives for private civil defendants to litigate rather than be coerced into complying with the government's position because of the United States' greater resources and expertise in litigation.\(^{16}\) Referring to the EAJA's purpose of discouraging the government from unreasonable conduct, one court described the Act as an "anti-bully" law.\(^{17}\) Because some evidence suggests that the

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13. H.R. REP. NO. 96-1418, at 12 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4991; see also Sisk, Essentials I, supra note 10, at 220 (noting that while other statutes provided attorneys' fees "to encourage private enforcement of important statutory policies, the EAJA blazed a new path by adopting fee-shifting as an instrument to monitor government regulation and to deter unjustifiable government policies and enforcement actions"). While other statutes authorize attorneys' fees, those statutes only provide for fees in causes of action under the specific statute involved. See id. at 229. The EAJA is thus "unparalleled among fee-shifting statutes in its breadth of application." Id.

14. H.R. REP. NO. 96-1418, at 10 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4988; accord Harold J. Krent, Fee Shifting Under the Equal Access to Justice Act—A Qualified Success, 11 YALE L. & POLY REV. 458, 463 (1993) ("The government can marshal more resources in litigation than can most private noninstitutional parties. Indeed, the government's sheer size may give it an unfair advantage in litigation, much like that which General Motors or Exxon enjoy over smaller adversaries. Private parties may not be able to afford protracted litigation against the government ... because of this comparative lack of resources." (footnote omitted)); Nancy A. Streeff, Comment, Gavette v. Office of Personnel Management: The Right to Attorney Fees Under the Equal Access to Justice Act, 36 AM. U. L. REV. 1013, 1013 (1987). Congress desired to convey the following message to small litigants: "if you're right on the facts and right on the law—and its important to you—you can litigate and you don't need to back down just because it's the federal government." Catherine M. Brennan, Beating a Bully: Small Business Owner Wins Legal Fees from Department of Labor, DAILY REC., Nov. 2, 1996, at 23A.


16. See H.R. REP. NO. 96-1418, at 10 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4988; see also Lieberwitz, supra note 15, at 48 (noting that the EAJA is based on the cost-benefit analysis of a business that accedes to the government's position when faced with federal prosecution because the business concludes that the costs of compliance are less than the costs of challenging the position through litigation).

17. See Battles Farm Co. v. Pierce, 806 F.2d 1098, 1101 (D.C. Cir. 1986), vacated, 487 U.S. 1229 (1988); see also Krent, supra note 14, at 478 (commenting how some perceive
government specifically targets small businesses, the Act expresses an inherent "pro-defendant" bias for fee shifting. The EAJA provides for fees and costs in nearly every civil claim brought by or against the federal government. By affording such a broad basis for relief, the EAJA represents a monumental exception to the common law American Rule.

The American Rule, applied by the federal courts since 1796, generally prohibits courts from awarding attorneys' fees to the prevailing party without an applicable common law or statutory exception. Under the American Rule, litigants are responsible for their own attorneys' fees regardless of the outcome of the litigation. The United States is the only common law country in which the prevailing party does not automatically receive attorneys' fees from the losing party. The American Rule allows the prevailing party to collect attorneys' fees only when the losing party acted in bad faith or when the prevailing party's suit benefited others. Although the rule still pervades the American judicial system, there are currently over 200 federally created statutory exceptions to the American Rule.

public trust and noting that Congress could seek restoration in the public's faith in government via one-way fee shifting.

18. See Commissioner, INS v. Jean, 496 U.S. 154, 165 (1990) ("[T]here is evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue." (citing H.R. Rep. No. 96-418, at 12 (1980))).

19. See Lieberwitz, supra note 15, at 44 n.307 (noting that prior to the EAJA, virtually no statute provided for the ready recovery of fees by defendants).


21. See Lieberwitz, supra note 15, at 4 n.18 (noting that the U.S. Supreme Court first announced the American Rule in Arcambel v. Wisemann, 1 U.S. (3 Dall.) 306 (1796)).


24. See Arlene S. Ragozin, The Waiver of Immunity in the Equal Access to Justice Act: Clarifying Opaque Language, 61 WASH. L. REV. 217, 217 n.7 (1986). Primary justifications for the American Rule include the following: (1) one should not be penalized for merely defending or prosecuting a lawsuit because litigation is inherently uncertain; (2) awarding fees to prevailing parties might discourage those with little resources from seeking to vindicate their rights in court; (3) the determination of what constitutes reasonable attorneys' fees would substantially burden the judicial system; and (4) attorneys might sacrifice their clients' best interests in order to avoid irking the judge, who will ultimately determine the amount of their fees. See Jay E. Rosenblum, The Appropriate Standard of Review for a Finding of Bad Faith, 60 GEO. WASH. L. REV. 1546, 1548-49 (1992).


26. See McCure & Steele, supra note 23, at 300.

27. See Brigitte Fresco, Lundin v. Mecham: Defining the Scope of the Equal Access to Justice Act, 62 GEO. WASH. L. REV. 795, 796 (1994) (noting that the statutory exceptions may have swallowed the American Rule, particularly since the EAJA, "one of the broadest exceptions to the American Rule," allows recovery of attorneys' fees in all civil litigation). Other federal statutes that provide for the recovery of attorneys' fees by prevailing parties
As arguably the broadest exception to the American Rule, the EAJA allows a court to award attorneys' fees to a prevailing party if the government's position is not substantially justified and special circumstances do not exist that would make an award unjust. Section 2412(b) of the EAJA, which provides that "[t]he 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," has been interpreted as a codification of the common law exceptions to the American Rule. This broad exception to the American Rule stemmed from Congress's belief that private litigants who challenge the government serve the public by defining the limits of federal authority. Applying this "common benefit" or "private attorney general" doctrine, Congress decided that it was unfair for private parties litigating universal rights to bear all the costs of their litigation efforts because private enforcement of statutory policies that affect society as a whole is vitally important.

Implementing the doctrine of the private attorney general, the District of Columbia Circuit Court in Wilderness Society v. Morton awarded attorneys' fees against the federal government even though no express statutory authorization of such an award existed when the plaintiffs brought their claim. In Alyeska Pipeline Service Co. v. Wilderness Society, the United States Supreme Court subsequently reversed the award of attorneys' fees, essentially rejecting the application of the private attorney general doctrine under these circumstances.

The Supreme Court's decision in Alyeska did not sit well with Congress, which viewed the availability of attorneys' fees as an important element of ensuring justice. Congress held a series of hearings to examine the judiciary's authority to award reasonable attor-
neys' fees and related expenses and the possibility of expanding such awards to appropriate prevailing parties. These hearings examined the restrictive effect of *Alyeska* on the courts' ability to make awards to private attorney generals and other prevailing parties. Congress ultimately enacted legislation designed to counter the *Alyeska* Court's reaffirmation of the American Rule. Through this legislation, Congress carved out statutory exceptions to the American Rule by promoting fee shifting arrangements in which the losing party pays the prevailing party's litigation expenses. The EAJA was included in this legislation, and it "penetrated the veil of government immunity" to a greater a degree than any other statute.

As originally promulgated, the EAJA contained a sunset provision that limited the EAJA to an initial trial run of three years, and on October 1, 1984, the EAJA expired. However, since Congress generally believed the EAJA successfully leveled the litigation field between private parties and the government, Congress revived and

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42. See id.

43. Barry S. Rutcofsky, Note, *The Award of Attorneys Fees Under the Equal Access to Justice Act*, 11 HOFSTRA L. REV. 307, 307 (1982). State fee-shifting statutes patterned after those created by Congress have been enacted in increasing numbers. A 1983 survey found a total of 1974 state fee-shifting statutes, and a survey conducted 10 years later identified 3918 state fee-shifting statutes. See Susan M. Olson, *How Much Access to Justice from State "Equal Access to Justice Acts"?*, 71 CHI.-KENT L. REV. 547, 552 (1995). Twenty-nine states had mini-EAJAs on their books within a decade after the EAJA became effective, and in 1995 Washington became the most recent state to follow suit. See id. at 554-55. However, these mini-EAJAs produced only modest redistribution of resources from the government to private litigants. See id. at 549.

44. However, the EAJA exists as a default provision and does not apply if another statute specifically provides for fees. See, e.g., EEOC v. O & G Spring & Wire Forms Specialty Co., 38 F.3d 872, 881 (7th Cir. 1994) (noting that the EAJA does not apply to suits under Title VII).


permanently enacted the Act in 1985. With the EAJA permanently in place, Congress brought civil litigation in the United States more in line with the English Rule, where the losing party pays the attorneys' fees as an appropriate shifting of litigation expense.\footnote{See Act of Aug. 5, 1985, Pub. L. No. 99-80, § 6(b)(1), 99 Stat. 183, 186 (1985).}

Since the EAJA's reenactment, litigants have recovered fees under the Act in litigation involving agency rule promulgation,\footnote{See, e.g., Texas Food Indus. Ass'n v. United States Dep't of Agric., 81 F.3d 578 (5th Cir. 1996).} unfair labor practice claims,\footnote{See, e.g., Marcus v. Shalala, 17 F.3d 1033 (7th Cir. 1994) (challenging regulations governing disability benefits). Social Security disability claimants whose benefits were terminated during the 1980s frequently used the EAJA with success. See Olson, supra note 43, at 555 n.41. However, the amount of fees requested by prevailing parties was typically reduced by district courts during that time period. In Commissioner, INS v. Jean, the Supreme Court noted that "out of 502 applications [for EAJA awards] in 1989, the 413 that were granted requested a total of $2,419,123 in fees and expenses, of which only $1,850,906 were awarded." Commissioner, INS v. Jean, 496 U.S. 154, 161 n.9 (1990).} denials of government benefits,\footnote{See, e.g., Love v. Reilly, 924 F.2d 1492 (9th Cir. 1991) (seeking an injunction to stop a pesticide ban); see also Karen Litscher Johnson, The Equal Access to Justice Act: It Can Pay to Get Your Way, CBA REC., Nov. 1994, at 42 (noting that "fighting the federal government can pay").} and environmental matters.\footnote{See Krent, supra note 14, at 459.} Scholars have noted that the EAJA seems to be most successful at encouraging three types of claims: (1) claims small in dollar amount, but large in chance of success in which the cost of litigating would otherwise dissuade anyone from pursuing the claims; (2) nonmonetary claims; and (3) claims initiated by the targets of governmental enforcement efforts.\footnote{See Maureen Armour, Rethinking Judicial Discretion: Sanctions and the Conundrum of the Close Case, 50 SMU L. REV. 493, 559 (1997).}

III. THE FIVE COMPONENTS OF A VALID EAJA CLAIM

The EAJA does not function in the same way as a typical fee-shifting provision because prevailing in litigation does not automatically result in an award of attorneys' fees.\footnote{See Krent, supra note 14, at 459.} Before EAJA fees may be awarded, five criteria must be met: (1) the claimant must qualify as a party; (2) the party must have prevailed; (3) the government must be unable to demonstrate a substantial justification for its position; (4) the government must be unable to demonstrate special circumstances that would make the award of fees unjust; and (5) the fee must be reasonable.\footnote{See 28 U.S.C. § 2412 (1994 & Supp. 1996).}

A. Qualification as a Party

The threshold inquiry under the EAJA is whether a claimant is a party. The EAJA defines "party" as:
(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.\textsuperscript{56}

A prevailing litigant must prove its eligibility for an EAJA award under the standards set forth in § 2412, which reflects Congress's intent to provide fees only to those claimants who would otherwise be deterred from vindicating their rights in court by the burgeoning costs of litigation.\textsuperscript{57} A claimant that does not meet this initial threshold may not proceed with a claim for fees under the Act.\textsuperscript{58} The determination of whether a claimant qualifies as a party entitled to fees is arguably the most important criterion for an applicant to meet under the Act.

B. The Party Must Have Prevailed

Once a claimant qualifies as a party, the next step is to determine whether the claimant was a prevailing party.\textsuperscript{59} The only definition of "prevailing party" provided by the EAJA applies exclusively to eminent domain proceedings.\textsuperscript{60} Therefore, a complete definition must be sought elsewhere.

The meaning of prevailing party under the EAJA is similar to that of other fee-shifting statutes in that the party seeking fees must have attained some relief on the merits of the underlying claim.\textsuperscript{61} In Texas State Teachers Association v. Garland Independent School District,\textsuperscript{62} the Supreme Court held that in order to be considered a prevailing party, a party must simply succeed on "any significant issue in [the]


\textsuperscript{58} However, Congress included some exceptions in the EAJA. Section 2412 (d)(2)(B) exempts the following from net worth criteria, but not from the 500 employee limit criterion: organizations described in section 501(c)(3) of the Internal Revenue Code of 1986, 26 U.S.C. § 501(c)(3) (1994), and cooperative associations as defined in section 15(a) of the Agricultural Marketing Act, 12 U.S.C. § 1141j(a) (1994).


\textsuperscript{60} See id. § 2412(d)(2)(H) (Supp. 1996) (defining a prevailing party as "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 . . . .").

\textsuperscript{61} See Sisk, Essentials I, supra note 10, at 262.

litigation which achieve[d] some of the benefit the parties sought in bringing suit.” Hence, a plaintiff prevails when relief gained by the litigation “materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.”

Prior to this determination by the Supreme Court, lower courts employed two competing standards in determining whether a party had in fact prevailed: the “central issue” standard and the “significant issue” standard. The central issue standard required a party to win on the most important issue raised in litigation before it was considered a prevailing party. Conversely, in order to prevail under the significant issue standard, a party needed to win on only one or more important issues that benefited the party, but not necessarily the most important one. The Garland Court resolved the conflict between the two standards by approving the significant issue standard of determining whether a party prevailed.

Subsequent to Garland, the Supreme Court clarified the meaning of “prevailing party” by stating that attainment of only nominal damages does not deprive a party of prevailing status because the judgment, no matter how small, still materially alters the legal relationship between the parties. Moreover, a party may still prevail even if the lawsuit becomes moot as long as the party's suit caused the government's action.

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63. Id. at 789.
64. Neal & Co. v. United States, 121 F.3d 683, 685 (Fed. Cir. 1997) (quoting Farrar v. Hobby, 506 U.S. 103, 111-12 (1992)). Thus, a claimant with an original claim of $6,899,606 who receives $792,143 in damages (11.5% of its original claim), qualifies as a prevailing party because the award, although small compared to the original claim, constitutes a sizable damage judgment that materially alters the parties' relationship. See id.
65. See Fresco, supra note 27, at 808-09.
66. See id. at 809 & n.110 (citing Simien v. City of San Antonio, 809 F.2d 255, 258 (5th Cir. 1987)); see also Martin v. Heckler, 773 F.2d 1145, 1149 (11th Cir. 1985) (“The prevailing party test is ‘whether he or she has received substantially the relief requested or has been successful on the central issue . . . .'” (quoting Watkins v. Mobile Hous. Bd., 632 F.2d 565, 567 (5th Cir. 1980))).
67. See Fresco, supra note 27, at 809 & n.111 (citing Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)) ([P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.”); Kreimes v. Department of Treasury, 764 F.2d 1186, 1188 (6th Cir. 1985).
68. See Fresco, supra note 27, at 809-10 (explaining that the significant issue standard looks solely at whether “the party [won] on one or more important issue[s], though not necessarily on the most important issue that achieved some benefit”). The central issue standard was therefore rejected by the Court in Garland. See id.
70. See Fresco, supra note 27, at 811.
C. The Government Must Be Unable to Demonstrate a Substantial Justification for Its Position

The third element of a valid EAJA claim consists of two sub-elements. Because the EAJA provides that fees may be awarded only if the United States' position was substantially justified, the government's position and its justification for that position must be examined.

1. The Position of the Government

Identification of the government's position in litigation constitutes "[t]he threshold inquiry in determining whether the government's litigation position was substantially justified . . . ." The EAJA provides that the 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 . . . .

Before 1985 the courts debated the position of the government to refine the substantial justification analysis. The courts looked at two possible meanings of what constituted the government's position: the government's litigation position, or both the government's litigation position and the government's underlying conduct that gave rise to the suit being litigated. When Congress reenacted the EAJA in 1985, Congress explicitly provided that the government's position included both the government's litigation position and its underlying conduct. Congress also amended the EAJA to require that the determination of whether the government's position was substantially justified be made through the record of the civil actions in which the fees and expenses are sought. The amended definition also precludes fees in instances when the prevailing party has "unreasonably

74. See Sisk, Essentials II, supra note 4, at 6.
75. See White v. United States, 740 F.2d 836, 842 (11th Cir. 1984). The litigation position looks solely to the government's legal theory and litigation strategy in court. See Sisk, Essentials II, supra note 4, at 6-7.
76. See Keasler v. United States, 766 F.2d 1227, 1231 (8th Cir. 1985); see also Sisk, Essentials II, supra note 4, at 7 ("The government's underlying conduct may include the enactment of a statute or promulgation of a regulation, the rendering of an administrative decision, the initiation of an enforcement measure, or the taking of other action by an agency or federal official . . . .").
77. See Sisk, Essentials II, supra note 4, at 7.
protracted the proceedings.”79 One example of such unreasonable protraction of the proceedings would occur if the party prolonged settlement negotiations when the government offered reasonable concessions.80

The amended definition of the government's position better reflects the EAJA's purpose of ensuring that the government articulates a colorable legal position for its actions and weighs the reasonableness of its conduct before ever taking action.81 Generally, the pre-litigation position of the government will be the focus of a substantial justification inquiry because even a reasonable defense during litigation will not excuse the government from EAJA fee liability if its underlying conduct was unjustified.82 However, when the government's underlying position is substantially justified, liability may still be found if misconduct during litigation is deemed sufficiently severe.83 Thus, the government's entire conduct must be examined for a proper substantial justification analysis,84 and the government's position should be measured as a whole.85

2. Substantial Justification for the Government's Position

In order to minimize the possibility of producing a chilling effect on the discharge of governmental duties, Congress declined to prescribe mandatory fee awards under the EAJA when the government loses in litigation.86 Instead, Congress opted for a less threatening basis of awarding fees and costs embodied by the substantial justification standard.87 Substantial justification represents an affirmative defense that may be invoked by the government and for which the government bears the burden of proof.88 In Pierce v. Underwood,89 the

81. See id. at 8.
82. See id. at 9 (citing Marcus v. Shalala, 17 F.3d 1033, 1036 (7th Cir. 1994)).
83. See id.
84. See id. A party who succeeds in obtaining a fee award under the EAJA for work done on the merits of the case is also entitled to compensation for fees incurred in seeking the award of fees themselves. See Commissioner, INS v. Jean, 496 U.S. 154, 161-62 (1990).
85. See id. at 11.
87. See Sisk, Essentials I, supra note 10, at 226. The substantially justified standard represents a compromise between the view that prevailing parties should always recover their attorneys' fees and the view that prevailing defendants should only recover fees when the plaintiff's action was frivolous, unreasonable, or without foundation. See Hill, supra note 45, at 241 n.73. Congress rejected the former view because of concerns that it might chill reasonable governmental enforcement efforts, and the latter view was rejected because "it simply would not overcome the strong disincentives to the exercise of legal rights which now exist in litigation with the Government.” S. REP. No. 96-253, at 6 (1979).
Supreme Court determined that substantially justified does not mean justified to a high degree, but justified in substance. In order for the government's position to be deemed substantially justified, the position must be "essentially one of reasonableness."

According to Commissioner, INS v. Jean, a court must look beyond any single issue that could support a finding that the government's position was not substantially justified and, instead, consider the totality of the circumstances of the government's conduct. This decision stems from a concern that the substantial justification standard would otherwise invite "judicial second-guessing and substitution by the courts of their judgment for the judgment of government attorneys," thereby chilling government enforcement of statutory regulations. The Jean decision also addressed the concern that the EAJA's inherent presumption against the government's position overly favors private parties and "impos[es] on the United States burdens borne by no other litigant, private or public."

If the government's overall position is substantially justified, minor deficiencies on subsidiary issues will not cause the entire position to be unreasonable or unjustified. The simple fact that the government is defeated on the merits of the case does not raise any presumption that the government's position was unreasonable or other-

90. See id. at 565.
91. H.R. REP. NO. 96-1418, at 10 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4989 ("Where the Government can show that its case had a reasonable basis both in law and fact, no award shall be made."); accord Pierce, 487 U.S. at 565 (holding that the government's position is substantially justified if it is "justified to a degree that could satisfy a reasonable person"). This standard is essentially the same as the "reasonable basis both in law and fact" test applied by most federal appellate courts. See id. at 565. But see id. at 578 (Brennan, J., concurring) (disagreeing with the majority's interpretation of substantially justified because "the 1985 House Committee Report pertaining to the EAJA's reenactment expressly states that 'substantially justified' means more than 'mere reasonableness'").
93. See id. at 158; see also Fresco, supra note 27, at 815 ("Courts also consider whether the government's actions departed from standard procedures or established policies that singled out one group and whether the government cooperated in resolving the litigation.").
94. H.R. Hearings, supra note 39, at 39 (statement of Alice Daniel, Ass't Att'y Gen., Civil Div., Dep't of Justice).
95. See Lieberwitz, supra note 15, at 40.
96. The prevailing party's allegations that the government acted unreasonably establish a presumption that attorneys' fees should be assessed against the government unless the government disproves the presumption by showing a substantial justification for its action. See id. at 45. The Justice Department particularly objected to this presumption because it runs counter to "the common law presumption that public officials act lawfully and in good faith in performing their public duties." Id. at 46 (citing H.R. Hearings, supra note 39, at 42, (statement of Alice Daniel, Ass't Att'y Gen., Civil Div., Dep't of Justice)).
97. H.R. Hearings, supra note 39, at 76 (statement of Mary Frances Derfner, Dir., Attorneys' Fees Project, Lawyers Comm. for Civil Rights Under the Law).
wise lacked substantial justification. A reviewing court must therefore distinguish between issues in which the lower court found the government's position to have been mistaken and those issues in which the government's position was found to be unreasonable. However, a court should carefully examine cases where a judgment on the pleadings was rendered, a directed verdict was issued, or a prior suit on the same claim was previously dismissed because such cases raise a specter that the government was unreasonable in pursuing the litigation.

Inconsistency in the government's position, where the government "flip-flops" its position during the course of litigation, may also be an indication of unreasonable conduct. However, when the state of the law surrounding a particular issue raised by the government is unsettled or uncertain, the government's position should be afforded greater latitude when determining whether it was substantially justified. Hence, to pass the reasonable justification test, the government must show that the following exists: (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory proffered by the government; and (3) a reasonable connection between the facts alleged and the legal theory advanced. Thus, the proper inquiry for substantial justification purposes examines what the government was substantially justified in believing the law to have been at the time the action was taken. The importance of this consideration stems from the legislative intent underlying the EAJA, which "was never intended to chill the government's right to

99. See id. at 24 (noting, however, that a review of the court's decision on the merits and its reasons for ruling against the government is an important consideration when determining whether to award fees under the EAJA).

100. See id. at 40-41. Another commentator noted:

The substantial justification standard in effect requires parties to relitigate their underlying dispute. Eligible parties must demonstrate to the judge or hearing officer that the government was not only wrong in the underlying litigation, but that it was inexcusably wrong. To make that showing, private parties must analyze all the legal questions and factual disputes anew in an effort to persuade the decisionmaker of the government's lack of substantial justification.

Krent, supra note 14, at 481.


102. See Sisk, Essentials II, supra note 4, at 52.

103. See id. at 61.

104. See Hanover Potato Prods., Inc. v. Shalala, 989 F.2d 123, 128 (3d Cir. 1993). An example of a position by the government not substantially justified occurs when the government goes forward with a complaint on the basis of a single, uncorroborated affidavit and in the face of significant adverse evidence. See Hess Mechanical Corp. v. NLRB, 112 F.3d 146, 150 (4th Cir. 1997).


106. See Kolman v. Shalala, 39 F.3d 173, 177 (7th Cir. 1994) ("The test for substantial justification is whether the [government] had a rational ground for thinking it had a rational ground for its action.").
litigate...whether or not the [government's] position later turns out to be wrong," such as when good faith arguments are proffered by the government in cases of first impression. 107

D. The Government Must Be Unable to Demonstrate Special Circumstances That Would Make an Award of Fees Unjust

Even if the government is unable to demonstrate a substantial justification for its position, it may still avoid paying attorneys' fees if it can demonstrate special circumstances that would make an award of fees in a particular case unjust. 108 The special circumstances provision acts "as a ‘safety valve’ to protect good faith governmental litigation seeking novel extensions or interpretations of the law." 109 Examples of special circumstances that might preclude the award of attorneys' fees under the EAJA include "whether counsel's attitude and approach to the issues were inappropriate, and whether the [private party's counsel] unnecessarily protracted the proceedings by unwarranted discovery or other unprofessional delay, [and] whether the government counsel's attitude was helpful to the court." 110

E. The Reasonableness of the Fee

Even if a claimant meets the preliminary requirements for an award under the EAJA, only a reasonable fee may be collected. 111 The amount of a reasonable fee may be determined by multiplying the number of hours reasonably expended on litigation by a reasonable hourly rate. 112 The EAJA limits the base hourly rate at which an at-

110. United States v. First Nat'l Bank, 732 F.2d 1444, 1448 (9th Cir. 1984).
111. Section 2412(d)(2)(A) defines the fees and expenses which may be awarded under the EAJA as 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.) ....
Attorneys' fees award may be calculated to $125 per hour. However, applicants can argue that they merit more than the base dollar per hour limit if they can invoke a "special factor, such as the limited availability of qualified attorneys for the proceeding involved." In addition, the statutorily allowed rate is frequently bolstered by a cost of living adjustment measured by the Department of Labor's "all items" Consumer Price Index for All Urban Consumers (CPI-ALL), which is published by the Bureau of Labor Statistics.

When a party has not obtained favorable results in a particular aspect of litigation, work done on that part of the case may not be included in the reasonable fee calculation. Consequently, no fee may be granted for work done regarding claims on which a party did not prevail, despite the reviewing court's generally wide discretion in calculating the amount of a reasonable fee under the Act.

Although all five elements must be met before a claimant may collect attorneys' fees under the EAJA, the initial determination of whether a claimant qualifies as a party under the Act arguably constitutes the most important element since a claimant cannot seek attorneys' fees unless the initial hurdle of party status is successfully overcome. Recently, a controversy has developed regarding whether the association qualifies as a party under the EAJA. Five cases in particular, Love v. Reilly, Grason Electric Co. v. NLRB, National Truck Equipment Ass'n v. National Highway Traffic Safety Administration, Texas Food Industry Ass'n v. United States Department of Agriculture, and National Ass'n of Manufacturers v. United States


114. Krent, supra note 14, at 505 (noting that the special factor enhancement is infrequently granted by courts due to concerns that, "[b]ecause there is arguably a shortage of qualified attorneys at the [statute's] dollar-per-hour range in most major markets across the country, following the plain language of the enhancement provision might permit enhancements in almost every case.").

115. See, e.g., Moore v. Gober, 10 Vet. App. 436, 441 (Vet. App. 1997) (employing the CPI-ALL index as the appropriate cost of living index for calculating attorneys' fees under the EAJA); see also Krent, supra note 14, at 506 (noting that when the fee cap was $75 per hour courts routinely awarded a cost of living increase in almost all EAJA cases and that "litigation has arisen with increasing regularity over the proper index and subcategory to use in calculating the cost-of-living increase").


117. See id.

118. 924 F.2d 1492 (9th Cir. 1991).

119. 951 F.2d 1100 (9th Cir. 1991).

120. 972 F.2d 669 (6th Cir. 1992).

121. 81 F.3d 578 (6th Cir. 1996).
Department of Labor, illustrate the split among the circuit courts of appeals on this emerging issue.

IV. THE SPLIT AMONG THE COURTS AS TO ASSOCIATION AGGREGATION

The complex dynamics of the EAJA requires careful legal analysis. Although the Act has been the subject of numerous court battles, and "[t]he economic lure of a fee award has caused litigants to test every limitation and exception in the statute," the issue of association aggregation has only recently received considerable attention and has yet to be resolved. However, four courts have addressed the enigmatic issue, albeit with conflicting results.

A. Love v. Reilly and Grason Electric Co. v. NLRB—The Ninth Circuit's Focus on the Real Party in Interest Produces Mixed Results

In Love v. Reilly, three plaintiffs, including the Northwest Food Processors Association (Association), sought and obtained a preliminary injunction partially staying an order issued by the Environmental Protection Agency (EPA) to suspend the use of the pesticide dinoseb. The EPA appealed, but the injunction was ultimately upheld by the Ninth Circuit. The Association then sought attorneys' fees under the EAJA.

The Love court initially determined that the Association was an eligible party for EAJA fees because it had a net worth of $265,000 and only seven employees at the time the action was filed. The court next addressed the government's argument that because the members of the Association received benefits from the litigation pursued by the Association, the members constituted the real parties in interest, and their individual net worths should therefore be aggregated when determining EAJA fee eligibility. The court deflected the government's aggregation argument by noting that the Association's members would only be the real parties in interest if they were liable for the Association's attorneys' fees. Since nothing in the record pointed to such an agreement, the court concluded that the Association qualified as a party eligible for fees under the EAJA.
In *Grason Electric Co. v. NLRB*, six members of a multi-employer association prevailed in an unfair labor practice case brought against them by the National Labor Relations Board (NLRB) and then pursued attorneys' fees under the EAJA. Because all members of the association financed the litigation and not just the parties to the appeal, the government argued that the NLRB should aggregate the assets of all of the association's member employers in determining eligibility for EAJA fees. The NLRB agreed with the conclusion of the Administrative Law Judge (ALJ), who had aggregated the net worth of the association's members. Although the ALJ determined that it would be unjust to award attorneys' fees to the six employers because the association was able to afford legal services by pooling its resources, the court stated that it was contrary to general policy to deny fees to parties when they arrange to participate in a type of insurance plan because of their inability to afford legal costs. The court likened the NLRB's argument to that of an assertion that government agencies should not have to pay attorneys' fees to individual members of a group legal plan when the assets of every party who contributed to the plan exceed the net worth ceiling of the EAJA. The court determined that "[d]enying fees to such associations would increase the costs to the individual members." However, the court also cited *Unification Church v. INS* for the proposition that Congress did not intend "to subsidize large entities who could easily afford legal services."

Since the six applicant employers each requested a portion of the total costs of litigation in *Grason Electric*, when the costs of the litigation may have been borne by all forty-eight members of the association, the court concluded that "it would be inappropriate to award 100% of the fees to the [six employers] before this court." The court thus remanded the case to the NLRB for a determination of whether the association or the six individual employers paid for the litigation.

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133. 951 F.2d 1100 (9th Cir. 1991).
134. See id. at 1101. The NLRB conducted the adversary adjudication. See id. The National Labor Relations Act (NLRA) created the NLRB to regulate collective bargaining and to prevent unfair labor practices. See Joseph Covelli, *Note, Brown v. Pro Football, Inc.: At the Intersection of Antitrust and Labor Law, Supreme Court’s Decision Gives Management the Green Light*, 27 STETSON L. REV. 257, 267 n.64 (1997).
135. See *Grason Electric*, 951 F.2d at 1102. The NLRB was the agency that conducted the adversary adjudication. See id. at 1101.
136. See id. at 1102.
137. See id. at 1103.
138. See id. at 1105.
139. See id.
140. Id.
141. 762 F.2d 1077 (D.C. Cir. 1985).
142. *Grason Electric*, 951 F.2d at 1105.
143. Id. at 1106.
costs "so that no one is denied actual costs and no one receives a windfall."\textsuperscript{144}

B. National Truck Equipment Ass'n v. National Highway Traffic Safety Administration—The Sixth Circuit Requires Aggregation

In \textit{National Truck Equipment Ass'n v. National Highway Traffic Safety Administration},\textsuperscript{145} the National Truck Equipment Association (Truck Association), a trade organization representing about 1400 manufacturers, sought judicial review of an order promulgated by the National Highway Traffic Safety Administration (NHTSA).\textsuperscript{146} The NHTSA's order, which imposed steering-wheel safety standards for all trucks under 10,000 pounds, would have required the Truck Association's members either to devise safety and crash tests to ensure their adherence, or to procure hard-to-obtain manufacturer certifications.\footnote{Id. (noting that if the litigation expenses were paid jointly by all 48 members of the association, then it would be a windfall to award 100\% of the fees to the six individual employers presenting claims in the case).} The Truck Association argued that the costs of either of the two measures would be overly burdensome for the majority of its members.\textsuperscript{148} After remand by the Sixth Circuit Court of Appeals, the Truck Association filed a motion for attorneys' fees and costs as a prevailing party under the EAJA.\textsuperscript{149}

In determining whether the Truck Association qualified as a prevailing party, the Sixth Circuit initially noted that in 1991 the Truck Association had twelve employees and a net worth of $842,320.\textsuperscript{150} The court stated that if it were to look solely at those facts, the Truck Association would qualify as a prevailing party under the EAJA.\textsuperscript{151} However, the court went further by noting that "[i]f the individual net worths of all of [the] petitioner's members were combined, the resulting aggregate total would exceed $7,000,000."\textsuperscript{152} Moreover, at least one individual member of the Truck Association had a net worth in excess of $7,000,000 itself.\textsuperscript{153} As a case of first impression, the Sixth Circuit proceeded to answer the question of aggregation.

As an initial matter, the court stated that the aggregation inquiry should focus on the net assets and employees of a company or organization and that this inquiry "is directly related to the [EAJA's] defi-
nition of a 'prevailing party.'"\textsuperscript{154} The court cited Model Rule 0.104(g), which stated that "[a]n applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award."\textsuperscript{155}

Finding that individual members derived significant benefits from affiliating with the Truck Association, the court concluded that the net worth of the Truck Association's individual members should be aggregated for determination of EAJA fee eligibility.\textsuperscript{156} In so holding, the court pointed out that Congress clearly intended "for the EAJA to serve as an 'equalizer' for those litigants who could otherwise not afford costs of litigation against the federal government."\textsuperscript{157} Since Congress explicitly exempted agricultural cooperatives, tax-exempt organizations, and local labor unions, but was silent as to the aggregation of other organizations, the court adopted "the statutory canon expressio unius est exclusio alterius."\textsuperscript{158} Hence, the court concluded that "[t]he obvious meaning is that in devising those exceptions, Congress intended aggregation in circumstances not covered by the exceptions."\textsuperscript{159}

The court denied the award of EAJA fees to the Truck Association because the aggregated net worth of the Truck Association's individual members exceeded the amount required to qualify for fees under the Act.\textsuperscript{160} The crucial consideration for the court in reaching its decision to aggregate was that "[w]hen businesses have the economic power to pursue litigation against the government without being deterred by the costs, the congressional purposes of the EAJA are undermined by an award to those businesses."\textsuperscript{161} Since the Truck Association's membership contained a number of companies that could afford the costs of protecting their own interests, the court recognized that awarding EAJA fees to those companies would defeat the EAJA's fundamental purpose.\textsuperscript{162}

\textsuperscript{154} Id. at 672.


\textsuperscript{156} See National Truck, 972 F.2d at 673.

\textsuperscript{157} Id. at 673-74 (noting that only agricultural cooperatives, local labor unions, and tax-exempt organizations were not intended by Congress to be aggregated under the EAJA net worth equation).

\textsuperscript{158} Id. at 674 (the expression of one thing is to the exclusion of the other).

\textsuperscript{159} Id.

\textsuperscript{160} See id.

\textsuperscript{161} Id. at 674.

\textsuperscript{162} See id.
C. Texas Food Industry Ass'n v. United States Department of Agriculture—The Fifth Circuit Does Not Aggregate

In Texas Food Industry Ass'n v. United States Department of Agriculture, the National-American Wholesale Grocers' Association/International Foodservice Distributors Association (NAWGA), a trade association comprised of over 200 wholesale grocery distribution companies, brought an action on behalf of its members to delay implementation of an interim final rule promulgated by the United States Department of Agriculture (USDA). The district court ruled in favor of NAWGA, finding that the USDA violated the Administrative Procedure Act (APA) in promulgating the rule. NAWGA, which financed the litigation out of its general operating budget, then applied for attorneys' fees under the EAJA. The USDA contested NAWGA's eligibility for an EAJA award, arguing that the net worth and size of NAWGA's individual members should be aggregated when an association primarily represents its members' interests in litigation. The district court rejected the USDA's aggregation argument and awarded fees and expenses in the amount of $163,083.75 to NAWGA, despite the fact that NAWGA employed thirty-six full-time employees and had a net worth of approximately $3.3 million.

The Fifth Circuit examined the USDA's argument that an implicit aggregation requirement is applicable when determining the eligibility of other associations because the EAJA explicitly exempts agricultural cooperatives and non-profit organizations from EAJA's net worth limit. The court looked at the plain meaning of the statute and determined that "[n]owhere does it limit EAJA's application only to associations whose members individually are eligible for EAJA fees. Instead, it imposes a ceiling only on the net worth and size of the association itself." The court also rejected the USDA's contention that an implicit aggregation rule is necessary to avoid a result "that is plainly at variance with the policy of the legislation as a whole." The court noted that the plain language of the EAJA reveals that the statute's purpose is to make associations eligible for awards on the basis of each association's qualifications, not the qualifications of the individual members of an association. The court pointed out that an implicit

163. 81 F.3d 578 (5th Cir. 1996).
164. See id. at 579.
165. See id.
166. See id.
167. See id. at 580 (citing 28 U.S.C. § 2412(d)(2)(B)(ii)).
168. See id.
169. See id. at 580-81 (citing 28 U.S.C. § 2412(d)(2)).
170. Id. at 581.
171. Id. at 582.
172. See id.
aggregation rule, by denying benefits of an EAJA award to an association's wealthy, ineligible members, would unfairly exclude from EAJA's benefits an association's otherwise eligible small businesses who would then be unable to pursue their claims against the government. The court therefore affirmed the district court's award of EAJA fees to NAWGA.

Judge Reynaldo G. Garza dissented from the court's opinion and asserted that allowing a trade association representing billion dollar corporations to receive attorneys' fees under the EAJA "ignores the intent of Congress to lessen the burden for small economic entities to seek review of or defend against unreasonable governmental actions." Judge Garza admitted that, at first look, NAWGA appears to qualify for an EAJA award. However, the judge pointed out that when strict adherence to the words of a statute produces an absurd result, the court should look beyond the words to the statutory purpose and give effect to the congressional intent underlying the statute. The judge noted that NAWGA's “members include Supervalu Inc. ($12.57 billion in revenues and 42,000 employees), Fleming Companies, Inc. (sales of $12.93 billion and 22,900 employees), SYSCO Corp. ($8.9 billion and 23,000 employees), and Kraft Foods, Inc. (sales of $120 million and 300 employees).”

Citing the commentary to Model Rule 0.104, Judge Garza wrote that “[t]he intent of Congress in passing the EAJA was to aid truly small entities rather than those that are part of a larger group of affiliated firms.”

Judge Garza reasoned that because Congress expressly exempted certain groups from net worth ceilings for EAJA eligibility, it could be presumed that Congress did not intend to exempt all associations from the net worth aggregation requirement. Moreover, Judge Garza wrote: “Even if the agricultural exemption were insufficient to establish by implication a statutory aggregation rule, at the very least it creates an ambiguity, allowing this Court to consider the policy and purpose of EAJA. The purpose of EAJA is served by an aggregation rule.”

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173. See id.
174. See id.
175. Id. at 582-83 (Garza, J., dissenting).
176. See id. at 583.
177. See id. (citing United States v. American Trucking Ass'n, 310 U.S. 534, 543 (1940)).
178. Id. at 583 n.1.
180. See id.
181. Id. at 584 n.4.
Reasoning that Congress, in all likelihood, was not worried that a trade association financed by large corporate members would be deterred from litigation, Judge Garza cited SEC v. Comserv Corp.,182 an Eighth Circuit case, in which the court held that "EAJA awards should be available where the burden of attorneys' fees would have deterred the litigation challenging the government's actions, but not where no such deterrence exists."183 According to Judge Garza, the majority's reasoning in Texas Food would permit "any large industrial group ... [to] set up and fund an association separate from itself that would readily meet EAJA's limits on net worth and employees even though its individual members or members in the aggregate would not."184 The judge also disagreed with the majority's assertion that aggregation would be unfair to eligible members of an association.185 Accordingly, Judge Garza argued that awarding EAJA fees to NAWGA was improper without aggregating the net worths and number of employees of NAWGA's individual members because the "EAJA was not intended to fund the litigation of corporate Goliaths in the costume of David."186

D. The District Court for the District of Columbia Has the Latest Word

In the recent case of National Ass'n of Manufacturers v. United States Department of Labor,187 the Federal District Court for the District of Columbia decided that aggregation should not be employed when determining EAJA fee eligibility.188 In National Ass'n of Manufacturers (NAM), the Association challenged several components of the Department of Labor's (DOL) rules governing the H-1B visa program, which allowed American "companies to employ aliens with 'specialty occupation' skills that could benefit the employer."189 The court granted partial summary judgment to the Association on six of fifteen issues, after which the Association applied for attorneys' fees and costs under the EAJA.190

The DOL contended that because the lawsuit was brought on behalf of the Association's members, the members' individual net worth
worths should be used in determining the Association's eligibility for EAJA fees. The DOL's contention sprang from the fact that the Association's members included "giant international corporations whose net worth and employee payroll greatly exceed the EAJA cap." The DOL pointed to the EAJA's legislative history in support of its aggregation argument.

The court distinguished the facts of NAM from that of Unification Church v. INS, wherein three members of the church sued the Immigration and Naturalization Service (INS) to allow these plaintiffs to remain in the United States. While the plaintiffs' attorney was hired by the individual plaintiffs, an agreement among the plaintiffs provided that the church would be solely responsible for paying the attorney's fees. Based on that agreement, the Unification Church court decided that the real party in interest in the proceedings was the church itself. Because the church exceeded the 500 employee limit for recovery under the EAJA, the plaintiffs were held not eligible for an award of fees. The NAM court distinguished Unification Church by noting that no such fee arrangement existed between the association's members in NAM. The NAM court found that although some of the individual corporations might benefit from the association's litigation, the association, not its individual members, was the only real party in interest because the individual members played no part in the decision-making process of the case. Accordingly, the court looked solely to the association's net worth and employee size in determining its eligibility for EAJA fees and held that the association was eligible for fees under the Act.

In reaching its decision, the NAM court emphasized the plain language of the EAJA's description of who qualifies as a party, stating that "[n]owhere does Congress instruct the courts to aggregate the net worth and employment totals of associations who function on behalf of larger corporations. Congress certainly had the opportunity to include such a requirement, but chose not to." Since § 2412(d)(2)(B) of the EAJA explicitly provides for a ceiling on net worth for individ-

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191. See id.
192. Id. The court also noted that the "[association's] members include Du Font, Motorola, Boeing, and Chrysler." Id. at 193 n.3.
193. See id. at 194.
194. 762 F.2d 1077 (D.C. Cir. 1985).
195. See id. at 1079.
196. See id. at 1082.
197. See id.
198. See id. at 1092.
200. See id.
201. See id.
202. Id. at 195 (footnote omitted).
ual associations but does not specifically require aggregation, the court found no ambiguity and decided to follow the plain meaning of the statutory language. 203

The court rejected the DOL's argument that not aggregating the association's individual members' net worths frustrates the true objective of the EAJA. 204 The court stated that "Congress was certainly aware that national associations composed of a number of larger corporations could bring claims seeking awards pursuant to the EAJA." 205 In addition, Congress could have provided a provision for aggregation if it had wished to do so. 206 The court also rejected the DOL's argument that the EAJA's specific exemption of agricultural cooperatives and other non-profit organizations from the net worth ceiling leads to the conclusion that such exemptions would not have been included by Congress had it not desired aggregation to apply to all other associations. 207

V. THE APPROPRIATENESS OF AGGREGATION

Although attorneys' fees should be awarded to EAJA claimants to discourage governmental agencies from bringing unsubstantiated or frivolous lawsuits against private parties and small businesses, the question of whether fees should be awarded to associations raises special concerns about the EAJA's underlying purpose and the effect such awards have on governmental enforcement of congressional policy.

A. The Proliferation of Associations

An association consists of a collection or organization of persons or entities that have joined together to pursue a common goal or achieve a common objective. 208 Associations exist in great numbers in the United States and serve numerous functions for their members, including "establishing safety standards, continuing education, public information, professional standards, research and statistics, political education, and community service." 209 The EAJA includes associations as potentially eligible parties for fee awards. 210 Associations

203. See id.
204. See id.
205. Id.
206. See id. ("This court therefore elects to give Congress'[s] words their plain meaning, and chooses not to implicitly read in that which is not present.").
207. See id. at 196.
210. Section 2412(d)(2)(B) states:
"[P]arty" 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
potentially eligible for fee awards under the Act include "unincorporated business enterprises that have corporate attributes, professional societies, public interest groups, fraternal clubs, and trade associations."\(^1\)

A trade association consists of a group of businesses within a particular industry that have united to further a common business purpose.\(^2\) Trade associations are particularly troubling for EAJA purposes because they usually represent the interests of their individual members in litigation, and those members often include corporations that would not be eligible for an EAJA fee award if examined individually.\(^3\) Professor Sisk argues that as long as an association has standing in a representational capacity, it should not be excluded from fee award eligibility.\(^4\) He further argues that since the EAJA does not contain language explicitly stating that an entity should be valued based on the value of its individual members, "the entity focus of the EAJA should be respected."\(^5\) However, Professor Sisk concedes that for the purpose of the EAJA, courts should disregard associations controlled by just one or a few members, just as courts pierce the corporate veil when the corporation acts as a controlling entity’s alter-ego.\(^6\)

The EAJA specifically exempts agricultural cooperative associations, non-profit associations, and local labor unions from the net worth ceiling.\(^7\) Agricultural cooperative associations consist of individual farmers organized together for such purposes as marketing agricultural products.\(^8\) Forming an agricultural cooperative provides farmers with greater bargaining power and financial strength than the individual farmers can muster alone.\(^9\) As long as an agricultural cooperative association is operated for the benefit of its

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211. Sisk, Essentials I, supra note 10, at 314 (noting that the broad extent to which groups may qualify for EAJA fee awards as associations since "[a]ny entity composed of a number of persons which has been formed for some special purpose or business, but does not fit comfortably into another category, may qualify as an ‘association’").

212. See id. at 316 (listing examples of common trade association business purposes, such as establishing standards, promoting relations with the government, and educating the public).

213. See id. at 316-17.

214. See id. at 321.

215. Id. at 319 ("[I]t would be a tenuous argument indeed to suggest that a labor union's net worth should reflect an aggregation of its individual members or that an environmental organization becomes ineligible because its litigation goal of protecting a natural preserve would benefit a wealthy individual member who hikes through the affected area.").

216. See id. at 320.


218. See Sisk, Essentials I, supra note 10, at 322.

219. See id.
members on a non-profit basis, the EAJA's net worth ceiling does not apply.\(^{220}\) Although some agricultural cooperatives arguably do not need EAJA fee awards as an incentive to pursue their interests in litigation against the government, Congress determined that such associations serve an important public purpose and should be eligible for fee awards regardless of their net worth.\(^{221}\) Other non-profit organizations receive similar exemption under the EAJA.\(^{222}\)

Local labor unions are exempt from the net worth ceiling because including the national or international union with which a local union is affiliated in the net worth calculus would be contrary to labor policy.\(^{223}\) Requiring a local union's assets to be aggregated with its affiliated national or international union would preclude the majority of local unions from qualifying for EAJA fee awards.\(^{224}\) Such a widespread exclusion of labor unions would conflict with Congress's stated findings in the EAJA's preamble, which specifically include labor organizations among the Act's intended beneficiaries.\(^{225}\) Exempting local unions from the net worth ceiling recognizes that local unions are considered legal entities unto themselves and are not mere sub-parts of the national and international union bodies.\(^{226}\)

Although the EAJA specifically exempts certain associations from the net worth ceiling, the question remains whether those associations not explicitly exempted should be implicitly exempted as well, or whether Congress's silence as to those associations should be interpreted to mean that all associations not explicitly exempted are subject to aggregation. In making this determination, two important considerations must be addressed. Anyone attempting to determine Congress's intent must consider whether denying aggregation furthers the purpose of the Act, or whether it unduly burdens the government, the ultimate bearer of fees awarded under the Act.

\(^{220}\) See id.
\(^{221}\) See id. at 323.
\(^{222}\) Section 2412(d)(2)(B) states:

\[
[A]n \text{ organization described in section 501(c)(3) of the Internal Revenue Code of 1986... exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act... may be a party regardless of the net worth of such organization or cooperative association.}
\]


\(^{223}\) See Miller v. Hotel & Restaurant Employees & Bartenders Union, Local 2, 107 F.R.D. 231, 237 n.4 (N.D. Cal. 1985), rev'd on other grounds, 806 F.2d 1371 (9th Cir. 1986) (holding that eligibility for an EAJA award should be based on the local union's net worth alone).

\(^{224}\) See Sisk, Essentials I, supra note 10, at 326.


\(^{226}\) See Sisk, Essentials I, supra note 10, at 327 n.711 (quoting International Bhd. of Elec. Workers, 121 N.L.R.B. 143, 146-49 (1958)).
B. Does Awarding Fees to an Association Without Aggregating the Individual Net Worths of Its Members Further the EAJA's Underlying Purpose?

Under the cardinal rule of statutory construction, courts should interpret a statute according to its plain and ordinary meaning. Although the temptation to consult the statute's legislative history may be great, legislative history should only be analyzed if the statute is ambiguous. However, "in rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling." In such instances, "statutes should be interpreted harmoniously with their dominant legislative purpose." However, when the statute's plain meaning contradicts the legislative intent, the legislative intent should control.

When the literal reading of a statutory term would "compel an odd result," the court should look to congressional intent to attribute the proper scope to the term, particularly when "[t]he circumstances of the enactment of [the statute in question] may persuade a court that Congress did not intend words of common meaning to have their literal effect." Under this line of reasoning, although the Fifth Circuit's reasoning in *Texas Food Industry Ass'n v. United States Department of Agriculture* that the plain language of the EAJA indicated Congress did not intend to require aggregation under this line of reasoning, "[i]t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."
An essential consideration when resolving the aggregation issue is whether the purpose of the EAJA is contravened by permitting associations to pursue attorneys' fees when the members collectively have the necessary resources to pursue the claims without subsidy.\(^{235}\) The EAJA's restrictions on the eligibility of private parties for fee awards reflect Congress's expressed purpose of encouraging small businesses to litigate against the government.\(^{236}\) Clearly, associations with large and wealthy members do not fall within the "small business" category contemplated by Congress. Including such associations within the EAJA definition of "party" unduly extends the intended breadth of the Act.\(^{237}\) Such an extension imposes attorneys' fees when they "are ill adapted and unnecessary or counterproductive."\(^{238}\)

Free riders are another important consideration relating to the windfall problem.\(^{239}\) If a lawsuit includes parties eligible for EAJA fees and parties ineligible for fees, "the parties eligible for the EAJA fees should not be able to take a free ride through the litigation at the government's expense."\(^{240}\)

Permitting large associations to reap the benefits of the EAJA award of attorneys' fees runs counter to the EAJA's express purpose of preventing the government from coercing compliance with its position due to the private party's lack of resources targeted by govern-

\(^{235}\) See Russo, supra note 57, at 284 (noting that the EAJA's provision defining who qualifies as a party "will no doubt be subject to abuse . . . [because] 'some large businesses which have hundreds of millions in assets and a comparable amount in liabilities . . . might qualify as a small business under this definition.'" (quoting Marcus, Payment to Prevailing Businesses Scored, NAT'L L.J., July 14, 1980, at 7)).

\(^{236}\) See Lieberwitz, supra note 15, at 38; Unification Church v. INS, 762 F.2d 1077, 1082 (D.C. Cir. 1985) (recognizing "a congressional intention to limit the scope of subsection (d) [of the EAJA] to individuals or to small entities that find particularly burdensome the ever-rising costs of litigation." (citing H.R. REP. No. 96-1418, at 10 (1980), reprinted in 1980 U.S.C.C.A.N. 4953, 4988)); Kut-Kwick Corp., 273 N.L.R.B. 838, 839 (1984) (noting that "the purpose of the [EAJA] is the aid of truly small businesses, rather than those that are part of larger groups or affiliated firms").

\(^{237}\) See Unification Church, 762 F.2d at 1082 (noting that in passing the EAJA, Congress desired "not to subsidize through subsection (d) [of the Act] the purchase of legal services by large entities easily able to afford legal services"). The public suffers the costs of improvident use of judicial resources when large associations are permitted to qualify as parties and bring EAJA fee claims. In effect, the public subsidizes the associations, and this produces a result wholly inconsistent with the purpose of the Act.

\(^{238}\) H.R. Hearings, supra note 39, at 76 (statement of Mary Frances Derfner, Dir., Attorneys' Fees Project, Lawyers Comm. for Civil Rights Under Law); accord Krent, supra note 14, at 464 (noting that there are sufficient incentives for many private parties to challenge wrongful government action despite the prospect of fee shifting and that contingency fee arrangements are often an incentive for counsel to take a claim).

\(^{239}\) See, e.g., Louisiana ex rel. Guste v. Lee, 853 F.2d 1219, 1225 (6th Cir. 1988).

\(^{240}\) Id. at 1225 (declining to aggregate the net worth of the individual members of a class action).
ment action. Large associations, unlike small private litigants, are not deterred from action because they do not find it “more economically sound to ‘endure [the] injustice than to contest it.’” Equal access to justice is not promoted by permitting large associations to collect attorneys’ fees under the EAJA for the simple reason that such associations do not lack the resources to contest unjustified government action. Hence, the EAJA’s purpose of ensuring the balance of justice is not served by permitting large associations to collect attorneys’ fees when some of their members may have higher net worths than those of many countries.

Awarding fees to associations without aggregating the net worths of the associations’ individual members also conflicts with the purpose of federal labor law. The important national labor policy of preventing industrial strife is undermined if fees are awarded against government agencies, such as the NLRB, when the recipient association is a financial juggernaut having members with net worths well over the ceiling imposed by the EAJA. The National Labor Relations Act (NLRA) was intended to level the playing field between employers and employees in much the same manner that the EAJA was.

241. See S. REP. NO. 96-253, at 7 (1993) (“The exception created by [the EAJA] focuses primarily on those individuals for whom cost may be a deterrent to vindicating their rights.”).


243. See Arthur J. Fried, Attorneys’ Fees Against the State: The Equal Access to Justice Act, N.Y.L.J., Apr. 2, 1990, at 1 (noting that the income and resource eligibility criteria of a New York statute mirrors the criteria of the EAJA by “target[ing] those who lack the resources necessary to vindicate their civil and legal rights”).

244. For example, several of the members of NAWGA have net worths at or above $10 billion. See Texas Food Indus. Ass’n v. United States Dept’ of Labor, 81 F.3d 578, 583 (5th Cir. 1996). The same is true for members of the National Truck Equipment Association. National Truck Equipment Ass’n v. National Highway Traffic Safety Admin., 972 F.2d 669, 671 (6th Cir. 1992). As the District of Columbia Circuit Court realized, awarding EAJA fees to such litigants “would open the door for the wholesale subversion of Congress’s intent to prevent large entities from receiving fees under subsection (d). We cannot, consistent with our duty to implement the will of Congress, allow such a situation.” Unification Church v. INS, 762 F.2d 1077, 1082 (D.C. Cir. 1985); accord Noel Produce, Inc., 273 N.L.R.B. 769, 769 (1984) (finding that the legislative intent behind the EAJA was to “limit the bill’s application to those persons and small businesses for whom costs may be a deterrent to vindicating their rights.” Parties that meet the eligibility standard only because of technicalities of legal or corporate form, while having access to a large pool of resources from affiliated companies, do not fall within this group of intended beneficiaries.” (footnotes omitted)).

245. See Covelli, supra note 134, at 267 n.64.

intended to level the field between individuals and the government.247

Allowing employers to reap the benefits of the EAJA without aggregating the individual worth of the group members bestows an improper and unnecessary advantage on employers because it lessens the economic threat of unfair labor practice claims. The imbalance of financial resources between employers and employees would only be magnified by allowing associations consisting of large employers to reap the benefits of EAJA fees. Awarding fees to such associations may discourage agencies such as the NLRB from pursuing unfair labor practice claims, thereby diminishing the frequency and force with which such agencies act to protect the rights of employees across the country. In addition, seeing labor law tilt so drastically in favor of employers is certain to arouse suspicion and resentment in the eyes of the individual worker, which only exacerbates labor tensions with management.

C. Do Fee Awards Without Aggregation Unduly Burden the Government?

Although the EAJA serves the valuable function of creating a means for private litigants to obtain relief against unjustified prosecutions and inappropriate actions by the government, attorneys' fees should not be imposed under the EAJA when doing so would sacrifice fairness248 and unjustly burden the government.249 Fee awards under the EAJA may discourage the government from pursuing legitimate claims against large associations because the EAJA's attorneys' fees provision would encourage those associations with extra incentive to challenge the governmental action.250 If the challenging association

247. See 29 U.S.C. § 151 (1994). The EAJA furthers the NLRA's fundamental purpose of preventing unrest and discontent in the workplace by satisfying the small employer's sense of justice and by maintaining an intent to prevent financially strong employers from qualifying for EAJA fees and thereby gaining a windfall.

248. See Sisk, Essentials I, supra note 10, at 226 ("[T]he EAJA serves 'a salutary function in creating the appearance of fairness' by providing more complete compensation to those who have suffered a breach of the public trust through the arbitrary and unreasonable use of government power." (quoting Krent, supra note 14, at 478)). This appearance of fairness should apply to the government's perspective with equal force and effect.

249. This is especially true when it is considered that "EAJA applications are granted by district courts at a surprisingly high rate." Sisk, Essentials II, supra note 4, at 41 (citing Krent, supra note 246, at 484) (finding that when an EAJA application was filed after a party prevailed in civil litigation with the government, an award was made in 70-85% of the cases); see also Susan G. Mezey & Susan M. Olson, Fee Shifting and Public Policy: The Equal Access to Justice Act, 77 JUDICATURE 13, 18 (1993) (finding a high rate of successful fee applications in individual benefits cases). It is not difficult to imagine the further burden that would be imposed on the government if associations were improperly permitted to bring EAJA claims without aggregation.

250. Arguments that EAJA awards have occurred far less than Congress originally estimated and that agencies and courts are construing the Act too narrowly are insufficient
wins the lawsuit, it qualifies for fees under the EAJA, and even if the association loses, it would be large enough to absorb the cost of litigation without significant ill effect.251 Allowing associations to qualify as parties under the EAJA without aggregation of their members’ individual net worths thus bestows a win-win situation for the associations and a no-win situation for the government.252

By allowing associations to attack the government’s coffers, government expenditures on litigation are increased at a time when the cost of litigation in America has skyrocketed.253 Nearly two thousand EAJA awards are paid by the federal government every year.254 Millions of dollars in EAJA fees are awarded to EAJA applicants at the ultimate expense of taxpayers.255 EAJA awards prompt an additional round of litigation after the underlying dispute has been settled, and this produces additional litigation expenses.256 The potential for an

251. See Sisk, Essentials I, supra note 10, at 221. Commentators suggest that the EAJA has had only limited success in encouraging parties to seek vindication of their rights against government wrongdoing. See id. If this suggestion is true, the fact that many larger parties have no need for the dangling of EAJA fee award carrots to entice them into litigating their rights no doubt reflects the only “qualified success” of the EAJA.

252. Such an interpretation “exemplifies the predominance of anti-government over anti-litigation ideology.” Olson, supra note 43, at 548; accord Krent, supra note 14, at 465 (noting how the EAJA likely encourages suits against the government that would not otherwise be brought since a “risk-adverse party is not likely to bring suit if it believes it has a negligible chance to collect attorney’s fees, but would if it stands a fifty percent chance of recovering its own fees”).

253. See Fresco, supra note 27, at 795 (“The cost of litigation in America has skyrocketed due in large part to attorneys’ fees that dominate litigation expenses.”).

254. See Krent, supra note 14, at 458.

255. See id. at 459. Krent notes that despite the large number of awards paid, fee awards are “likely to be trivial, or at least quite modest, in comparison to the financial and social goals to be advanced by government-wide policy. For example, the Social Security Administration—the most frequent target of EAJA suits—pays approximately $5 million annually in EAJA fees under a program in which billions of dollars are paid to beneficiaries each year . . . .” Id. at 472. However, no matter how “trivial” or “modest” the EAJA awards may seem compared to vast government budgets, to the average taxpayer, $5 million is far from modest or trivial.

256. See id. at 479. Interestingly, Krent proposes that the EAJA may actually create a “perverse incentive” to litigate from the government’s perspective. Krent cites anecdotal evidence that “suggests that some government attorneys view an award of attorney’s fees as stigmatizing.” Id. at 493. In addition, because few attorneys believe their litigation posi-
EAJA award dangles like a carrot in front of claimants, making settlement of the underlying action less likely, depleting government resources, and adding to the expenses taxpayers must bear in EAJA related litigation.\textsuperscript{257} Defending EAJA fee applications forces the government to devote significant resources to litigation that could be better utilized elsewhere,\textsuperscript{258} particularly since the government successfully deflects fee requests relatively infrequently.\textsuperscript{259} Permitting large associations to collect attorneys' fees under the EAJA thus flies in the face of the Act's statutory purpose since "Congress did not wish to inhibit the government's legitimate efforts to enforce the law."\textsuperscript{260}

VI. HOW THE SUPREME COURT MAY RULE AND HOW CONGRESS SHOULD RESPOND

Although the Supreme Court has heard several claims for EAJA fee awards, it has never clearly addressed the issue of aggregation. However, since the Fifth Circuit's recent decision in *Texas Food* directly conflicts with the Sixth Circuit's decision in *National Truck*, the Supreme Court is more likely to review the issue in the near future.\textsuperscript{261}

Since the current Court is dominated by textualists and has increasingly employed a plain meaning approach to statutory interpretation cases,\textsuperscript{262} it is likely that the Court would decide against inter-
interpreting the EAJA as containing an implicit aggregation requirement. The likelihood of this result is augmented by the fact that several members of the Court are pro-business and would no doubt prefer to award fees to associations than to take the chance that the government could somehow bully businesses into submission.\textsuperscript{263} Applying a plain meaning approach, the Court would likely follow the \textit{Texas Food} court in looking solely to the plain language of the statute, rather than considering the legislative history or statutory purpose of the Act.\textsuperscript{264} The Court would thus likely hold that the individual net worths of an association's members need not be aggregated when determining whether the association qualifies as a party eligible for an EAJA fee award. Unfortunately, such a decision would stand the EAJA on its head, subverting the Act's underlying purpose by permitting fee awards to those not in need of such financial assistance.\textsuperscript{265}

Accordingly, Congress has the responsibility to ensure that the judicial branch does not obliterate the ideals of the EAJA. If the EAJA is to uphold its creators' intent of providing incentive to private entities with relatively small financial resources to defend

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the legislature when it included a particular word or phrase in a statute." \textit{Id.} Conversely, textualists employ "a different set of tools, including dictionary definitions, rules of grammar, and canons of construction, in an effort to derive the putatively objective meaning of the statutory word or phrase." \textit{Id; accord Roger Colinvaux, What Is Law? A Search for Legal Meaning and Good Judging Under a Textualist Lens, 72 IND. L.J. 1133, 1141 n.35 (1997) (noting that "today's Supreme Court offers an immature jurisprudence given its increasing reliance on dictionaries").}

\textsuperscript{263} A common majority of today's Court consists of Chief Justice Rehnquist, Justice Scalia, Justice Thomas, Justice O'Connor, and Justice Kennedy. This generally conservative majority tends to favor business interests, while frowning on government overreach. Moreover, even some of the generally liberal justices are considered pro-business to some extent. \textit{See Edward A. Fallone, Neither Liberal Nor Laissez Faire: A Prediction of Justice Ginsburg's Approach to Business Law Issues, 1993 COLUM. BUS. L. REV. 279, 280 (noting Justice Ginsburg's tendency to take a "moderate" to "conservative" approach to issues that concern corporate America," notwithstanding her generally liberal views on social issues); Brent L. Hoffman, Justice Stephen G. Breyer, Business Friend and Environmental Foe?: An Analysis of Justice Breyer's Judicial and Non-Judicial Works Concerning Environmental Regulation, 100 DICK. L. REV. 211 (1995). Hoffman writes that "[m]any of Breyer's critics and advocates alike have labeled Breyer as a general supporter of business interests" and that "Breyer has been hailed as a champion of big business." \textit{Id. at 216}.}

\textsuperscript{264} \textit{See Texas Food Indus. Ass'n v. United States Dep't of Agric., 81 F.3d 578, 582 (5th Cir. 1996).}

\textsuperscript{265} For an analysis of the preferability of requiring aggregation, see supra Part V. Judge Learned Hand's statement in \textit{Cabell v. Markham} certainly applies to this issue:

Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

\textit{Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945).}
their rights in court against improper infringement by the government, Congress should amend the EAJA so that it explicitly requires association aggregation.266

VII. CONCLUSION

Attorneys' fees should not be granted to an association under the EAJA when the association's members have individual net worths exceeding that of the net worth ceiling provided under the Act's definition of a "party." Although the issue of association aggregation is a relatively new issue and has not been the subject of extensive litigation, the federal courts have reached conflicting results. The time is ripe for the Supreme Court or Congress to take up the question of association aggregation and resolve the issue before other court decisions further undermine the EAJA's purpose.

If the congressional intent underlying the EAJA is to have effect, aggregation of the individual net worths of the members of an association must be required. Only then will the financial incentive of attorneys' fee awards end up where it belongs: solely in the hands of those whose limited resources would otherwise prevent them from surmounting the financial roadblocks barring the path to the litigation of their interests in court. Only then will equal access to justice truly be realized.

266. Alternatively, Congress could wait for the Supreme Court to rule on the issue. However, it would be preferable for Congress to take the proverbial "bull by the horns" and resolve the controversy before the lower federal courts subvert the intent behind the EAJA any further by refusing to require aggregation.