

No. 10-\_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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FRANCIS GATIMI, JANE GATIMI, & COLLINS GATIMI,  
*Petitioners,*

v.

ERIC H. HOLDER, JR.,  
*Respondent.*

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**On Petition For A Writ Of Certiorari  
To The United States Court of Appeals  
For The Seventh Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

A provision of the Equal Access to Justice Act (“EAJA”) applicable to federal court proceedings reviewing agency immigration determinations, 28 U.S.C. § 2412(d)(1)(A), provides in relevant part that a court “shall award to a prevailing party other than the United States fees and other expenses” unless “the court finds that the position of the United States was substantially justified.” In this case, the United States Court of Appeals for the Seventh Circuit reviewed and reversed an immigration determination on multiple grounds. But the court denied a subsequent request for attorney’s fees under the EAJA in its entirety.

This petition for a writ of certiorari presents the following two questions:

1. Did the Seventh Circuit correctly hold that, in an immigration case, for purposes of determining eligibility for an award of attorney’s fees under the EAJA, the “position of the United States” includes the decision of the Board of Immigration Appeals but does not include the underlying decision of the Immigration Judge?

2. Did the Seventh Circuit correctly hold that the EAJA permits wholesale denial of an application for attorney’s fees, even though the “position of the United States” was “substantially justified” as to only one of several issues presented, because in the court’s view that issue was “more prominent”?

**TABLE OF CONTENTS**

|  | <b>Page</b> |
|--|-------------|
| QUESTIONS PRESENTED .....  | i           |
| TABLE OF AUTHORITIES.....  | iv          |
| OPINIONS BELOW .....   | 1           |
| JURISDICTION .....   | 1           |
| STATUTORY PROVISIONS INVOLVED.....   | 1           |
| STATEMENT OF THE CASE .....  | 3           |
| REASONS FOR GRANTING THE WRIT .....  | 5           |
| I. THE SEVENTH CIRCUIT’S HOLDING THAT THE “POSITION OF THE UNITED STATES” IN IMMIGRATION CASES DOES NOT INCLUDE THE DECISION OF THE IJ IS IN CONFLICT WITH OTHER CIRCUITS, AND CANNOT BE SQUARED WITH THE EAJA’S PLAIN LANGUAGE, ITS LEGISLATIVE HISTORY, OR THIS COURT’S PRECEDENTS. .... | 8           |
| II. THE SEVENTH CIRCUIT’S APPROACH TO WHETHER THE POSITION OF THE UNITED STATES WAS “SUBSTANTIALLY JUSTIFIED” EXACERBATES A NOW DEEP AND INTRACTABLE CIRCUIT SPLIT.....  | 12          |
| III. THIS CASE PROVIDES AN EXCELLENT VEHICLE TO ADDRESS BOTH OF THESE DISPUTED EAJA-RELATED ISSUES, FREQUENTLY RECURRING AND IMPORTANT TO THE ADMINISTRATION OF JUSTICE IN THIS COUNTRY’S IMMIGRATION COURTS. ....   | 17          |
| CONCLUSION .....   | 19          |

**TABLE OF CONTENTS**  
**(continued)**

|  | <b>Page</b> |
|--|-------------|
| Oral Decision of the Immigration Judge<br>(Sept. 17, 2007) .....   | 1a          |
| Decision of the Board of Immigration Appeals<br>(Aug. 4, 2008) .....   | 14a         |
| Opinion of the United States Court of Appeals<br>for the Seventh Circuit (Aug. 20, 2009)<br>(Merits).....                          | 22a         |
| Opinion of the United States Court of Appeals<br>for the Seventh Circuit (May 17, 2010)<br>(Fees and Costs).....                   | 35a         |
| Order of the United States Court of Appeals<br>for the Seventh Circuit (July 12, 2010)<br>(denying rehearing <i>en banc</i> )..... | 45a         |

## TABLE OF AUTHORITIES

|  | Page(s)   |
|--|-----------|
| <b>CASES</b>   |           |
| <i>CEMS, Inc. v. United States</i> ,<br>65 Fed. Cl. 473 (2005).....                                    | 15        |
| <i>Cinciarelli v. Reagan</i> ,<br>729 F.2d 801 (D.C. Cir. 1984).....                                   | 16        |
| <i>Commissioner, INS v. Jean</i> ,<br>496 U.S. 154 (1990).....   | 6, 7, 10  |
| <i>Ellis v. United States</i> ,<br>711 F.2d 1571 (Fed. Cir. 1983).....                                 | 16        |
| <i>Goldhaber v. Foley</i> ,<br>698 F.2d 193 (3d Cir. 1983).....  | 16        |
| <i>Golembiewski v. Barnhart</i> ,<br>382 F.3d 721 (7th Cir. 2004).....                                 | 4         |
| <i>Hackett v. Barnhart</i> ,<br>475 F.3d 1166 (10th Cir. 2007).....                                    | 12        |
| <i>Haitian Refugee Center v. Meese</i> ,<br>791 F.2d 1489 (11th Cir. 1986).....                        | 14        |
| <i>Hensley v. Eckerhart</i> ,<br>461 U.S. 424 (1983).....  | 7, 13, 17 |
| <i>Hernandez-Aquino v. Ashcroft</i> ,<br>48 F. App'x 240 (9th Cir. 2002)<br>(unpublished opinion)..... | 16        |
| <i>Johnson v. Gonzales</i> ,<br>416 F.3d 205 (3d Cir. 2005).....                                       | 12        |
| <i>Liu v. Ashcroft</i> ,<br>380 F.3d 307 (7th Cir. 2004).....  | 9         |
| <i>Nken v. Holder</i> ,<br>2010 WL 2640255 (4th Cir. June 24, 2010)<br>(per curiam).....               | 16        |

**TABLE OF AUTHORITIES**  
(continued)

|   | <b>Page(s)</b> |
|---|----------------|
| <i>Perales v. Casillas</i> ,<br>950 F.2d 1066 (5th Cir. 1992).....                  | 12             |
| <i>Roanoke River Basin Ass'n v. Hudson</i> ,<br>991 F.2d 132 (4th Cir. 1993) .....  | 15             |
| <i>Russell v. National Mediation Board</i> ,<br>775 F. 2d 1284 (5th Cir. 1985)..... | 13, 14         |
| <i>Thangaraja v. Gonzales</i> ,<br>428 F.3d 870 (9th Cir. 2005) .....               | 6, 11          |
| <i>United States v. Dolorosa Street</i> ,<br>190 F.3d 977 (9th Cir. 1997) .....     | 16             |
| <i>United States v. Rubin</i> ,<br>97 F.3d 373 (9th Cir. 1996) .....                | 16             |
| <i>Vacchio v. Ashcroft</i> ,<br>404 F.3d 663 (2d Cir. 2005) .....                   | 12             |
| <i>Wedra v. Thomas</i> ,<br>623 F. Supp. 272 (S.D.N.Y 1985) .....                   | 15             |
| <b>STATUTES</b>   |                |
| 8 U.S.C. § 1252(b)(1).....  | 4              |
| 8 U.S.C. § 1362 .....   | 19             |
| 28 U.S.C. § 1254(1) .....   | 1              |
| 28 U.S.C. § 2412 .....  | 1              |
| 28 U.S.C. § 2412(d)(1)(A).....  | 7              |
| 28 U.S.C. § 2412(d)(1)(C).....  | 7              |
| 28 U.S.C. § 2412(d)(2)(D) .....   | 3, 6, 10       |
| <b>REGULATIONS</b>  |                |
| 8 C.F.R. § 1003.1(b)(3).....  | 4              |

**TABLE OF AUTHORITIES**  
(continued)

|   | <b>Page(s)</b> |
|---|----------------|
| 8 C.F.R. § 1240.15.....   | 4              |
| <b>OTHER AUTHORITIES</b>  |                |
| Department of Homeland Security,<br>Office of Immigration Statistics,<br>“2009 Yearbook of Immigration Statistics”<br>(Aug. 2010) (last visited Oct. 1, 2010).....                    | 18             |
| H.R. Rep. No. 99-120 (pt. 1) <i>reprinted in</i> 1985<br>U.S.C.C.A.N. 132 .....   | 10             |
| Jaya Ramji-Nogales et al., <i>Refugee Roulette:<br/>Disparities in Asylum Adjudication</i> , 60 Stan.<br>L. Rev. 295 (2007) .....   | 18, 19         |
| TRACImmigration, “Immigration Judges,”<br><a href="http://trac.syr.edu/immigration/reports/160/">http://trac.syr.edu/immigration/reports/160/</a><br>(last visited Oct. 1, 2010)..... | 18             |

## PETITION FOR WRIT OF CERTIORARI

Francis Gatimi, Jane Gatimi, and Collins Gatimi respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

### OPINIONS BELOW

An order of removal entered by an Immigration Judge (“IJ”) (Pet. App. 1a-13a) and an order entered by the Board of Immigration Appeals (“BIA”) dismissing an appeal from the IJ’s order (Pet. App. 14a-21a) are unreported.

The opinion of the United States Court of Appeals for the Seventh Circuit granting the Gatimis’ Petition for Review of the IJ’s and BIA’s orders (Pet. App. 22a-34a) is reported at *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009) (“*Gatimi I*”). The Seventh Circuit’s order denying the Gatimis’ request for fees and costs under the EAJA (Pet. App. 35a-44a) is reported at *Gatimi v. Holder*, 606 F.3d 344 (7th Cir. 2010) (“*Gatimi II*”). The Seventh Circuit’s order denying rehearing *en banc* (Pet. App. 45a) is unreported.

### JURISDICTION

The Seventh Circuit’s order denying the Gatimis’ request for attorney’s fees under the EAJA was entered on May 17, 2010. Pet. App. 35a. The Seventh Circuit’s order denying rehearing *en banc* was issued on July 12, 2010. Pet. App. 45a. This Petition is thus timely. This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1).

### STATUTORY PROVISIONS INVOLVED

The statutory provisions involved include two subparts of 28 U.S.C. § 2412. The first, § 2412(d)(1), states:

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

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record

(including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

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

The second, § 2412(d)(2)(D), states:

“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.

#### **STATEMENT OF THE CASE**

The Gatimis (Mr. Gatimi, Mrs. Gatimi, and their daughter), natives of Kenya, sought asylum in the United States. An IJ denied their application, holding that Mr. Gatimi had not faced past persecution, that Mr. Gatimi was not a member of a “particular social group,” and that Mrs. Gatimi did not have a well-founded fear of future persecution in

the form Female Genital Mutilation (“FGM”) if removed to Kenya. The Gatimis appealed the IJ’s decision to the BIA. 8 C.F.R. §§ 1003.1(b)(3) & 1240.15. The BIA dismissed the appeal, relying on two of the three bases articulated by the IJ: that Mr. Gatimi was not a member of a particular social group and that Mrs. Gatimi did not have a well-founded fear of persecution.

The Gatimis petitioned the Seventh Circuit Court of Appeals for review of the agency’s decisions. 8 U.S.C. § 1252(b)(1). In a published opinion, the Seventh Circuit held that Mr. Gatimi had indeed faced past persecution, describing the IJ’s contrary conclusion as “absurd.” Pet. App. 25a. The court also rejected the BIA’s underlying “formula” for determining membership in a particular social group, which included a requirement that members be “socially visible,” stating that the formula “makes no sense” and had not been explained by the BIA. *Id.* at 28a. Finally, the court rejected the agency’s conclusion that Mrs. Gatimi did not have a well-founded fear of FGM, adding that on this point the IJ had “lapsed into incoherence.” *Id.* at 25a. And while the BIA had stated that there was no evidence to support the claim, the Seventh Circuit disagreed, explaining that, indeed, “the only evidence in the record” was “contrary” to the BIA’s decision. *Id.* at 33a.

Given the “strong language” in the Seventh Circuit’s opinion critical of the agency’s work, *see Golembiewski v. Barnhart*, 382 F.3d 721, 724 (7th Cir. 2004), the Gatimis filed a timely application for attorney’s fees under the EAJA. But in a published decision authored by Judge Posner, the Seventh

Circuit rejected the Gatimis’ application in its entirety. Pet. App. 44a. While the court concluded that the BIA’s decision was part of the “position of the United States,” it held that the underlying decision of the IJ regarding Mr. Gatimi’s past persecution—which it had previously described as “absurd”—was merely “the mistake of a subordinate agency official,” was “not automatically the ‘position of the United States,’” was “a stumble on the way to the formulation of that position,” and was thus “not an adequate basis for an award of fees.” *Id.* at 38a.

On the two remaining issues, which the BIA had decided and the Seventh Circuit had reversed (Mr. Gatimi’s “particular social group” claim and Mrs. Gatimi’s fear of future persecution in the form of FGM), the court held that the position of the United States was “substantially justified” only as to the first. *Id.* at 39a. However, rather than granting the award of fees in full—or at least allocating it across the issues—the court concluded that the “particular social group” issue was the “more prominent” of the two. Accordingly, the court reasoned that the entire request for fees under the EAJA had to be denied. *Id.* at 43a. Rehearing *en banc* was later denied. *Id.* at 45a.

The Gatimis now petition this Court for a writ of certiorari.

### **REASONS FOR GRANTING THE WRIT**

This petition presents two questions implicating well-established circuit splits regarding the proper application of the EAJA. Each by itself justifies a grant of certiorari. Presented together, in this well-suited vehicle, they certainly merit this Court’s attention.

1. In this case, the Seventh Circuit (in conflict with the Ninth Circuit and in tension with others) took an unduly crabbed view of what constitutes the “position of the United States” for purposes of an EAJA analysis in immigration matters. If, as the statute says, the “position of the United States” includes “the action or failure to act by the agency upon which the civil action is based,” 28 U.S.C. § 2412(d)(2)(D), in immigration cases it must necessarily encompass the IJ’s decision. Yet, although the Seventh Circuit recognized that the IJ’s decision as to past persecution of Mr. Gatimi was “absurd”—thus necessitating further litigation—it nonetheless held that the IJ’s decision was not part of the “position of the United States” for purposes of determining an award of fees under the EAJA. Pet. App. 38a. In contrast, the Ninth Circuit has explicitly held that the position of the United States includes the IJ’s decision. *Thangaraja v. Gonzales*, 428 F.3d 870, 873 (9th Cir. 2005). And more generally, the Second, Third, Fifth and Tenth Circuits have held that underlying agency misconduct must be included in the “position of the United States.”

As this Court recognized in *Commissioner, INS v. Jean*, 496 U.S. 154, 159 n.7 (1990), the EAJA mandates a “single evaluation” of agency conduct to determine the position of the United States. Relevant legislative history confirms as much. This Court should grant certiorari and reverse the judgment of the Seventh Circuit on this ground.

2. The Seventh Circuit’s decision here also exacerbates an already intractable circuit split concerning the related question of how to analyze an

award of EAJA fees where the position of the United States is “substantially justified” as to less than all issues raised. The EAJA’s “shall award” language is mandatory. *See* 28 U.S.C. § 2412(d)(1)(A). A court may “reduce . . . or deny an award” only if the prevailing party engaged in conduct that unduly protracted the litigation. *Id.* § 2412(d)(1)(C). Yet, although the Seventh Circuit here conceded that the position of the United States was not substantially justified as to all matters, the court held that because the position of the United States was substantially justified as to what the court deemed the “more prominent” issue, an EAJA award could be denied altogether. Carving up the government’s position into multiple pieces in this way is at odds with this Court’s guidance in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *Jean*, 496 U.S. 154.

The result of this novel approach is that the circuits are now split three ways. The Fourth, Fifth, and Eleventh Circuits have held that courts should grant a full EAJA award unless the United States’s entire position was “substantially justified.” The Ninth Circuit has chosen to allocate an EAJA award where the United States was partially justified. (This approach also finds support in a recent unpublished opinion from the Fourth Circuit.) The Seventh Circuit’s decision here charts a third course, holding that courts may deny an award outright, even where the position of the United States is concededly not justified on one or more issues, if a court finds that the United States’s position on what the court deems to be the “more prominent” issue was justified. On this question, too, this Court’s guidance is urgently needed.

3. Finally, on both issues, this case offers a good opportunity to provide much-needed clarity. Asylum proceedings number in the thousands every year, and the question of attorney’s fees comes up frequently. The EAJA’s proper interpretation is especially important in this area because it offers an incentive for attorneys to take up just causes on behalf of those who frequently have no means to pay for legal counsel.

For any of these reasons, the Court should grant this petition for certiorari.

**I. THE SEVENTH CIRCUIT’S HOLDING THAT THE “POSITION OF THE UNITED STATES” IN IMMIGRATION CASES DOES NOT INCLUDE THE DECISION OF THE IJ IS IN CONFLICT WITH OTHER CIRCUITS, AND CANNOT BE SQUARED WITH THE EAJA’S PLAIN LANGUAGE, ITS LEGISLATIVE HISTORY, OR THIS COURT’S PRECEDENTS.**

The Seventh Circuit first erred by excluding from its analysis of whether to award EAJA fees issues resolved by the IJ. Specifically, while the Seventh Circuit disagreed with three determinations made by the agency in this immigration case, it held that because one of them (whether Mr. Gatimi was subject to past persecution) was decided incorrectly only by the IJ, and not the BIA, it could not support an award of EAJA fees because it was not the “position of the United States.” Instead, the court reasoned, the IJ’s decision on this issue—even though “absurd” and “inconsistent”—was merely “a stumble on the way to the formulation of that position,” a “mistake of

a subordinate agency official,” and “not an adequate basis for an award of fees.” Pet. App. 38a.

This decision is troubling. The BIA did not anywhere “reject” the IJ’s finding regarding past persecution, but simply failed to address it at all. And when the BIA’s decision merely supplements the IJ’s, “the IJ’s opinion, as supplemented by the BIA’s opinion becomes the basis for review.” *E.g., Liu v. Ashcroft*, 380 F.3d 307, 311 (7th Cir. 2004). So the IJ’s “absurd” view regarding past persecution was certainly before the Seventh Circuit. The Gatimis’ counsel, for example, could hardly ignore the issue in briefing before the Seventh Circuit, lest the Gatimis fail to address a potentially dispositive argument against them. Had the BIA “rejected” the IJ’s “absurd” view, the Seventh Circuit would have been limited to reviewing the decision of the BIA, and the Gatimis would not have had to brief the issue. But that is not what happened. The court was therefore remiss in holding that the BIA’s failure to address the issue somehow placed the IJ’s work beyond the scope of the EAJA.

The Seventh Circuit’s approach cannot be reconciled with the text of the statute, this Court’s precedents, or relevant legislative history. As to the text, in 1985, Congress amended the EAJA, adding the following definition of what constitutes the “position of the United States”:

“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.

Pub. L. 99-80, 99 Stat. 185, § 2(c)(2)(B), 28 U. S. C. § 2412(d)(2)(D). As this Court has recognized, by deliberately employing the singular term “position,” Congress unmistakably intended that the analysis of what the “position of the United States” was in a matter involve “only one threshold determination for the entire civil action.” *Jean*, 496 U.S. at 159.

The legislative history of the 1985 amendments supports this view. The House Report issued with the 1985 EAJA Amendment states definitively that the EAJA was designed to “provide attorneys’ fees when an unjustifiable agency action forces litigation, and the agency then [tries] to avoid such liability by reasonable behavior during the litigation.” H.R. Rep. No. 99-120 (pt. 1), at 11 *reprinted in* 1985 U.S.C.C.A.N. 132, 140. The report thus confirmed that the position of the United States

includes actions and omissions of an agency which formed the basis of the adversary adjudication. An omission which may be relevant includes the failure of an agency *or its staff* to act based on a statutory, regulatory, or constitutional duty.

*Id.* (emphasis added). Even more specifically, the report made clear that this includes the action of both “any agency” and “*any official of the United States acting in his or her official capacity.*” *Id.* at 12; 1985 U.S.C.C.A.N. at 141 (emphasis added). Thus, while the Seventh Circuit dismissed the work of the IJ in

this case as a “mistake of a subordinate agency official,” Pet. App. 38a, the legislative history confirms that Congress intended such mistakes to be included as part of the “position of the United States.” This is also eminently reasonable as a policy matter. IJs should not be permitted to give immigrants the run-around, forcing the expenditure of resources by these usually impoverished individuals, knowing that the immigrants will never recover those expenditures so long as the BIA does not expressly adopt as its own the IJs’ work before it gets to a federal court of appeals.

Thus, perhaps not surprisingly, the Seventh Circuit’s approach cannot be squared with that of other circuits, which have hewed more closely to the text, legislative history, and precedent. In particular, the Ninth Circuit has made clear that, for purposes of analysis of an EAJA claim, “the BIA *and IJ* decisions we review are as much the ‘position of the United States’ as is the [government’s] litigation position” before a court of appeals. *Thangaraja*, 428 F.3d at 873 (emphasis added). All three—the IJs, the BIA, and the Department of Homeland Security (the litigating agency)—are part of the executive branch. *See id.* at 874. Accordingly, the Ninth Circuit has held that “the ‘position of the United States’ as defined by EAJA encompasses” not only the government’s “litigation position” in the court of appeals, but also “the underlying agency decision rendered by the BIA *or an IJ*, as the manner in which responsibilities are divided within the executive branch is immaterial to determining what the statutory language requires.” *Id.* (emphasis added).

The Seventh Circuit’s approach is also in tension with that of the Second, Third, Fifth, and Tenth Circuits, all of which have held more generally that underlying agency misconduct must be included in the “position of the United States.” *See Perales v. Casillas*, 950 F.2d 1066, 1073 (5th Cir. 1992) (“[T]he underlying misconduct giving rise to the suit must be also evaluated.”); *Johnson v. Gonzales*, 416 F.3d 205, 210 (3d Cir. 2005) (“[T]he Government must meet the substantially justified test twice—once with regard to the underlying agency action and again with regard to its litigation position in the proceedings arising from that action.”); *Vacchio v. Ashcroft*, 404 F.3d 663, 675 (2d Cir. 2005); *Hackett v. Barnhart*, 475 F.3d 1166, 1174 (10th Cir. 2007) (explaining that EAJA fees generally should be awarded where the government’s underlying action was unreasonable even if the government advanced a reasonable litigation position).

This tangled mess requires this Court’s intervention. The Court should grant certiorari to clarify that an IJ’s work constitutes part of the “position of the United States” for purposes of the EAJA.

## II. THE SEVENTH CIRCUIT’S APPROACH TO WHETHER THE POSITION OF THE UNITED STATES WAS “SUBSTANTIALLY JUSTIFIED” EXACERBATES A NOW DEEP AND INTRACTABLE CIRCUIT SPLIT.

The Seventh Circuit’s opinion also exacerbates what was, even before this opinion, a well-entrenched circuit split as to what to do when a court concludes that the position of the United States was “substantially justified” as to less than all of the

issues litigated. This circuit split, too, requires this Court's intervention.

Before the Seventh Circuit's decision in this case, two principal positions had prevailed. Because, as this Court has recognized, a "lawsuit cannot be viewed as a series of discrete claims," *Hensely*, 461 U.S. at 435, the Fourth, Fifth, and Eleventh Circuits correctly held that where the position of the United States was only justified as to one of several issues presented, a court should grant a full EAJA award. In *Russell v. National Mediation Board*, 775 F. 2d 1284 (5th Cir. 1985), the Fifth Circuit explained that the legislative changes to the EAJA enacted in 1985 compelled an award for the entire amount of fees and costs unless the losing party was substantially justified in *all* of its litigation positions:

[W]hen Congress meant to apportion fees, it did so explicitly . . . . Cases under the old EAJA holding that fees may be apportioned when the government's litigation position is substantially justified as to some claims but not others are inapposite here. . . . The language and legislative history of Pub. L. No. 99-80 make clear that the new EAJA is designed to enable those oppressed by unreasonable government action to vindicate their rights without having to worry about attorney fees. Were we to accept the Board's argument, we would defeat that purpose in cases such as this, where a large portion of the successful attorney's time is spent dealing with the litigation

position. We hold that in computing Russell's attorney fees on remand, the district court should consider the time spent presenting the entire case on the merits, not just the time spent contesting the government's underlying action.

*Id.* at 1291-92.

A year later, the Eleventh Circuit reached the same conclusion in *Haitian Refugee Center v. Meese*, 791 F.2d 1489, 1500 (11th Cir. 1986). In that case, the court held that the government was justified in some aspects of the litigation, but not in other issues that "involved the same factual bases" and were "intertwined with the remaining legal theories." Accordingly, the court ruled that "the attorneys should be fully compensated for their work on the case as a whole." *Id.*

And the Fourth Circuit has also held that, even if one minor issue lacked substantial justification, a court should try to determine the effect that error had on the entire litigation:

[A] more egregious example of misconduct might, even if confined to a narrow but important issue, taint the government's "position" in the entire case as unreasonable, whereas a totally insupportable and clearly unreasonable position by the government on an *inconsequential* aspect of the litigation might not. Similarly, a broader government position that, considered in a vacuum, would not be clearly egregious might still, in the overall

context of the case, constitute an unreasonable position because of its impact. Although an unreasonable stance taken on a single issue may thus undermine the substantial justification of the government's position, that question can be answered only by looking to the stance's effect on the entire civil action.

*Roanoke River Basin Ass'n v. Hudson*, 991 F.2d 132, 139 (4th Cir. 1993) (emphasis added). Various district courts, too, have embraced this approach. See, e.g., *Wedra v. Thomas*, 623 F. Supp. 272, 276 (S.D.N.Y. 1985) (claims on which plaintiff was unsuccessful shared "a common core of facts" with its successful claims); *CEMS, Inc. v. United States*, 65 Fed. Cl. 473, 478 (2005) ("[T]he United States cannot escape responsibility for paying EAJA fees unless all its claims were substantially justified.").

Even if the work of the IJ cannot be considered as part of the position of the United States, this majority view would compel a full EAJA award in the instant case. The Seventh Circuit correctly held that the agency's position was not substantially justified as to one of two issues the BIA decided and the Seventh Circuit reversed: Mrs. Gatimi's fear of FGM. Had the agency not taken its unjustified position, the Gatimis would have been granted asylum and would not have had to litigate any of the issues raised here. The agency's unjustified position was thus the "but for" cause of the instant litigation, and the statute therefore requires an award of their fees and costs to the Gatimis, who prevailed in this litigation.

On the other hand, the Ninth Circuit has held that an EAJA award should be allocated when the position of the United States is only partially “substantially justified.” In *United States v. Rubin*, 97 F.3d 373, 375 (9th Cir. 1996), the court held that “[t]here may well be situations in which the government is justified initially but its subsequent unjustified actions merit an award of attorney’s fees for the *unjustified portion* of the conduct.” (Emphasis added.) Since then, that court has followed *Rubin* twice, each time allocating an EAJA award. See *United States v. Dolorosa Street*, 190 F.3d 977 (9th Cir. 1997); *Hernandez-Aquino v. Ashcroft*, 48 F. App’x 240 (9th Cir. 2002) (unpublished opinion). After the Seventh Circuit’s decision in this case, the Fourth Circuit also issued an unpublished decision that allocated an EAJA award. *Nken v. Holder*, 2010 WL 2640255 (4th Cir. June 24, 2010) (per curiam); see *id.* at \*2 n.2 (distinguishing *Gatimi II*).<sup>1</sup>

These were the two sides of the circuit split facing the Seventh Circuit. But it joined neither one, preferring instead to carve out a third approach: the wholesale denial of an EAJA award if the position of the United States was “substantially justified” as to at least one of the issues presented, so long as that issue was (in the court’s view) “more prominent” than

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<sup>1</sup> Numerous courts allocated such awards before the 1985 amendments. *E.g.*, *Cinciarelli v. Reagan*, 729 F.2d 801, 804-05 (D.C. Cir. 1984); *Goldhaber v. Foley*, 698 F.2d 193, 197 (3d Cir. 1983); see also *Ellis v. United States*, 711 F.2d 1571, 1576 (Fed. Cir. 1983) (favoring allocation when the government was partially justified). But we know of no other circuit to have done so since then.

the others. Pet. App. 43a.<sup>2</sup> This approach is inconsistent with this Court’s decision in *Hensley*, which warned the “lawsuit cannot be viewed as a series of discrete claims” as the Seventh Circuit did here. 461 U.S. at 435. And worse, it deepens what was already an entrenched split of authority in the Courts of Appeals. For these reasons, too, the Court should grant certiorari.

**III. THIS CASE PROVIDES AN EXCELLENT VEHICLE TO ADDRESS BOTH OF THESE DISPUTED EAJA-RELATED ISSUES, FREQUENTLY RECURRING AND IMPORTANT TO THE ADMINISTRATION OF JUSTICE IN THIS COUNTRY’S IMMIGRATION COURTS.**

Finally, this case presents a unique opportunity to take up both the related questions of what counts as the “position of the United States” in an immigration matter, and how to analyze whether that position was “substantially justified.” The issues were fully vetted with the Court of Appeals and also briefed in an *en banc* petition (which was denied). And their correct resolution is crucially important to the

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<sup>2</sup> The Seventh Circuit initially did not address allocation because the Gatimis did not ask for it, requesting a full award instead. See Pet. App. 43a-44a. But the Gatimis did not have to ask the court to allocate the EAJA award because the majority view supported, and still supports, awarding EAJA fees in full. After *Gatimi II*, when it became clear that the Seventh Circuit would not follow the majority view, the Gatimis promptly asked for an allocation in their *en banc* petition, which was denied. Thus, the Gatimis put the allocation issue before the Seventh Circuit at the earliest practicable time.

administration of the justice system for individuals seeking relief in immigration courts in this country.

Resolving the questions presented in this petition is likely to affect thousands of immigration proceedings every year. According to the Department of Homeland Security's data, during the 2009 fiscal year over 10,000 people were granted defensive asylum (*i.e.*, asylum asserted before an IJ as defense against removal). *See* Department of Homeland Security, Office of Immigration Statistics, "2009 Yearbook of Immigration Statistics" 43 (Aug. 2010), [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois\\_yb\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf) (last visited Oct. 1, 2010). And although the Department's data does not reveal how many people applied for defensive asylum during immigration court proceedings, independent studies indicate that immigration courts deny more than half of defensive applications. *See* TRACImmigration, "Immigration Judges," <http://trac.syr.edu/immigration/reports/160/> (last visited Oct. 1, 2010). A conservative estimate thus suggests that at least 20,000 asylum applications are resolved each year in immigration courts. Indeed, in the decade between 1994 and 2005, IJs "disposed of 'on their merits' somewhere between 25,000 and 35,000 requests each year." *Id.*

For asylum applicants, who are frequently unable to afford an attorney, being represented by counsel often means the difference between staying in the United States or forcible repatriation to a country where they face persecution (or worse). According to one exhaustive study, "whether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case." Jaya Ramji-

Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 340 (2007). Represented petitioners are almost three times as likely (45.6% as opposed to 16.3%) to receive asylum. *See id.* But while immigrants in removal proceedings have a right to obtain legal counsel, unlike in criminal proceedings that right is only guaranteed if counsel is procured “at no expense to the Government.” 8 U.S.C. § 1362. Nearly a third of asylum applicants proceed without counsel. *See Ramji-Nogales, supra*, at 325.

To bridge the gap between those fortunate enough to be able to afford an attorney and those who must fend for themselves, the EAJA offers a fee-shifting incentive for attorneys to take up just causes. For this incentive to work well, attorneys eligible for fees and costs under the EAJA must be able to recover them from the government. This petition thus offers an excellent vehicle for resolving multiple circuit splits in an area where clarity can impact thousands of administrative and judicial proceedings every year.

### CONCLUSION

For all these reasons, the petition should be granted.

Respectfully submitted,

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