## AMICUS STATEMENT

Veterans Legal Advocacy Group[1]—or VetLAG—is a § 501(c)(3) nonprofit organization that litigates challenging appeals before the Court of Appeals for Veterans Claims and the Court of Appeals for the Federal Circuit. We rely on EAJA fees to support our mission of ensuring the United States keeps its promises to America's veterans. The *Athey*[2] decisions will hurt many veterans who rely on the EAJA to hire an attorney to challenge government abuses.

We are a leading § 501(c)(3) organization that has represented thousands of veterans. So we qualify to discuss the substantial public interest in the EAJA and its impact on access to justice. Our lawyers founded VetLAG to address an inequitable inefficiency in the market for veterans seeking counsel. It is common in veterans law for claimants to appeal multiple, disparate claims together. Most veterans have no counsel before the VA, so attorneys representing clients before the Veterans Court often have little input over what claims their clients have brought. Many veterans with challenging but meritorious appeals cannot find private counsel and end up hiring VetLAG because firms are unwilling to work for them under the EAJA due to its required contingency basis for an award. And so our clients

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[1] All parties were notified more than ten days before due of VetLAG's intent to file an amicus brief and have consented to its filing. No counsel for a party authored this brief in whole or in part, and no person other than the amicus curiae and their counsel contributed money intended to fund the preparation or submission of this brief.

[2] *Athey v. United States*, 149 Fed. Cl. 497 (2020), *aff'd by*, *Athey v. United States*, 2021 WL 4282593, Fed. Cir., Sep. 21, 2021.

often have appeals in which they are unlikely to succeed on all—or even the majority of—claims. We could not afford to challenge many agency abuses if EAJA fees dried up simply because we only won some claims on appeal.

## ARGUMENT SUMMARY

The EAJA makes attorneys available to plaintiffs in cases against the government who might not otherwise afford an attorney. It encourages attorneys to represent claimants who cannot pay fees by allowing EAJA fees for successfully prosecuting a claim. The EAJA exists "to ensure that litigants will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved."[3] The *Athey* decision stops plaintiffs relying on the EAJA from bringing suits against the government and frustrates that intent.

And that is why VetLAG is troubled by the *Athey* decision. The *Athey* courts exercised no considered judgment of "the case" and instead unlawfully relied on a tally of successful versus unsuccessful claims to find the United States' position was substantially justified. They never discussed the resources spent on, the quality of, or the value of the class's claims. They instead accepted the premise that the government winning on most claims is enough to find the government's position substantially justified. This simplistic reduction-to-numbers approach conflicts with equal access to justice.

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[3] *Smith v. McDonough,* 995 F.3d 1338, 1344 (Fed. Cir. 2021) (citing *Patrick v. Shinseki*, 668 F.3d 1325, 1329 (Fed. Cir. 2011) (some quotations omitted).

## ARGUMENT

Without considering the legal claims' quality, the Court of Federal Claims decided the government's position was "substantially justified" because it won more claims than it lost. The Federal Circuit approved the trial court's numerical approach to determining whether the United States government's position is "substantially justified" and not subject to 28 U.S.C. § 2412(d). But their interpretation of "substantially justified" is mistaken. Rather than rely on whether the United States won more claims than it lost, the lower courts should have considered the totality of the circumstances to conclude whether the government's position was substantially justified. Doing so results in a more nuanced, less winner-takes-all outcome. It also preserves the EAJA incentive for counsel to represent plaintiffs with multiple claims—some likelier winners than others—who might otherwise not be able to hire an attorney to challenge an agency's unlawful acts.

We urge the Court to grant certiorari to answer whether the United States' position is substantially justified simply because the executive succeeded on more claims than not. The lawful approach is to examine the *totality of the circumstances* in deciding whether the government's position was reasonable. For example, in *Loomis v. the United States,* an EAJA case in which the United States alleged its position was substantially justified because it won on most of the issues the Court of Federal Claims rejected a numerical calculus and held:

> In the present case, defendant prevailed on most of the issues plaintiff raised. If

> we segmented these issues and considered substantial justification within the limited scope of each of those segmented issues, defendant would be substantially justified as to most issues. Following the guidelines set out in *Jean,* however, we consider the defendant's position based on the totality of circumstances against the position's "impact on the entire civil litigation."[4]

This approach tracks with Supreme Court precedent in *Hensley*:

> Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.[5]

Success often has little to do with how many claims an appellant wins and much more to do with the claims' nature. The *Athey* class lost most of the peripheral issues but won the central, crucial issue: whether the VA had to pay its employees COLA increases on returned leave. Although the VA

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[4] 74 Fed. Cl. 350, 354 (2006) (citing *CEMS, Inc. v. United States,* 65 Fed. Cl. 473, 477 (2005) and *Comm'r v. Jean*, 496 U.S. 154 (1990)).

[5] *Hensley v. Eckerhart,* 461 U.S. 424, 435–36 (1983).

prevailed on most *issues* in the case numerically, the plaintiffs prevailed on the overall principle and in the monetary damages count. The class won the claim that most mattered and the one on which the parties spent the bulk of their time. The Claims Court awarded over $600,000 to the class.[6] And, of 29 agencies, all but the VA settled on the issue on which the *Athey* plaintiffs succeeded. But one defendant Veterans Affairs refused to settle and lost, tending to prove its position was unjustified. That is why the Claims Court's conclusion is extraordinary. It held that we must look at the whole litigation but then ignored that 28 of 29 agencies admitted defeat on the exact issue the lone holdout defendant eventually lost.[7]

*Athey* would decrease the checks on the VA's power if applied to veterans' appeals. Veteran appellants often appeal disparate claims together, some underdeveloped and challenging but meritorious. For example, a veteran might appeal a VA denial of service connection for two conditions that would gain her only $1,000 in benefits and a third claim, for an earlier effective date for a service-connected disability, that would net her $200,000 in retroactive monetary benefits. If the veteran lost on the two service-connection claims but won on the effective date claim, under *Athey*, a court would not award EAJA fees because the government prevailed on more claims than the appellant. Her attorney might have worked many more hours and spent much more time and resources litigating the successful claim. But because she lost most of the claims, she

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[6] *Athey v. United States,* 132 Fed. Cl. 683, 687 (2017).
[7] 149 Fed. Cl. at 511-512.

would not be awarded fees under the EAJA. This sets a damaging precedent. If two service-connection claims are complex, a rational-thinking attorney would pass on challenging *any* of an agency's unlawful acts, including if the VA egregiously abused Constitutional due process rights. Difficult appeals often stem from the gravest agency overreaches. But *Athey* makes challenging those executive abuses irrational in many instances.

A real-life example shows *Athey's* danger. A large veterans law firm solicited a veteran to represent him at the Veterans Court. The veteran called VetLAG and stated that the large firm would only represent him if he dropped two of his appealed claims and pursued the remaining one. VetLAG reviewed the case and found that the two claims the large firm wanted to drop would be hard to win at the Veterans Court—with EAJA fees unlikely to be awarded—but were likely to succeed if remanded to the agency. The VA's legal errors on those claims were due process violations and winning them would result in a large sum. On the other hand, the claim the large firm wanted to pursue would not garner many benefits and was unlikely to succeed at the VA. But that claim was more administrative and an easy win—with EAJA fees unlikely to be awarded—at the Veterans Court. The big firm was thus pursuing only the easy claim to avoid risking losing fees for work done on the difficult more important claims. And that was before *Athey*.

Firms are reluctant to work difficult appeals under a contingency-fee-based statute even without *Athey*. VetLAG exists just for this reason, but it still needs the courts to award EAJA fees in most cases to continue operating. The veteran in the preceding

example hired VetLAG and then won a remand and eventually retroactive benefits for his difficult claims. We represented him because we knew we likely would win the easy claim, allowing us to risk litigating the more important and difficult claims. But *Athey* increases the risk of failing to be awarded fees and thus multiplies attorneys' reluctance to prosecute complicated appeals. If the *Athey* rule applied to the case of the veteran above, he would never have prevailed on his claims because no attorney would have taken his case. And the agency would have gotten away with violating his due process rights.

The lower courts' interpretation of "substantially justified" lessens attorneys' incentives to represent clients with complicated appeals. If *Athey* stands, veterans will bring many fewer appeals, especially those that are challenging yet meritorious, knowing that a "by-the-numbers" approach means that their attorneys cannot receive EAJA fees if they lose most of their claims. Another likely effect would be that plaintiffs might choose to spread their claims across many cases, ensuring that there is no "majority" of claims to lose in single-issue cases. That outcome would clog the already-overburdened VA and Veterans Court.

The *Athey* decision reaches well beyond veterans law. The case is specifically about labor issues. And *Athey* could seep into all the Federal Circuit's subject matter jurisdiction over claims against executive abuses. If other circuits pick up the *Athey* decision, the result could make challenging other agency decisions, such as Social Security appeals, more difficult.

The EAJA's purpose "is to eliminate ... the financial disincentive to challenge unreasonable governmental actions."[8] But *Athey's* chilling effect curtails access to legal representation for challenging unjustified executive action.

## CONCLUSION

If the *Athey* holding is upheld, America could see a new era of unchecked agency power resulting from claimants challenging only the most evident and simple agency overreaches. The Court should hold that merely counting the number of claims the government has not lost is not determinative of whether the government's position is substantially justified. The Court should overturn the Federal Circuit's decision and remand this case to the Court of Federal Claims for a new decision aligned with the EAJA.

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[8] *Comm'r v. Jean* at 163.

April 15, 2022 Respectfully,

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