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Unjust Access to the Equal Access to Justice Act: A Proposal to Close the Act's Eligibility Loophole for Members of Trade Associations

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UNJUST ACCESS TO THE EQUAL ACCESS TO JUSTICE ACT: A PROPOSAL TO CLOSE THE ACT'S ELIGIBILITY LOOPHOLE FOR MEMBERS OF TRADE ASSOCIATIONS

I. INTRODUCTION

The "American Rule" mandates that prevailing litigants generally must bear the burden of their own attorneys' fees.[1] While the American Rule is well settled among American courts,[2] there are several statutory exceptions to the Rule that permit litigants to recover their attorneys' fees under certain conditions.[3] One such

1. An American court first recognized the American Rule in 1796. *See* Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796). In *Arcambel*, the Court denied the prevailing party's request for attorneys' fees. The Court opined that "[t]he general practice of the United States is in opposition to [granting a prevailing party's request for attorneys' fees]; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute." *Id.* For a discussion of the history of the American Rule, see John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984). In contrast to the American Rule, the "English Rule" generally allows the prevailing litigant to recover attorneys' fees from the losing litigant. For a brief discussion of the English Rule, see Mary Frances Derfner, *The True "American Rule": Drafting Fee Legislation in the Public Interest*, 2 W. NEW ENG. L. REV. 251, 251 n.1 (1979).

2. The Supreme Court endorsed the American Rule as early as 1975. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 260-62 (1975) (holding that prevailing parties in federal litigation may not recover their attorneys' fees unless Congress has expressly authorized a fee-shifting statute pertinent to the case at bar); *see also* Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 561-62 (1986) (noting the vitality of the American Rule despite its numerous statutory exceptions).

3. Courts traditionally have acknowledged four general exceptions to the American Rule. *See Delaware Valley*, 478 U.S. at 562 n.6. The principal exception is congressional authorization for the courts to require one party to pay attorneys' fees to the other party. *See id.* A second general exception to the American Rule is courts' authority to enforce their own

exception to the American Rule is the Equal Access to Justice Act (EAJA).[4] Under the EAJA, courts may award reasonable attorneys'

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orders by assessing attorneys' fees against a party that willfully violates a court order. *See id.* Another general exception to the American Rule is courts' authority to award fees against a losing party that has acted in "bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* Finally, courts may use their equitable powers to award attorneys' fees in commercial litigation to plaintiffs who recover a "common fund" for themselves and others through antitrust or securities litigation. *See id.*

Apart from these four general exceptions, there are at least one hundred codified statutory exceptions to the American Rule. *See id.*; *see also* Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1994) (permitting a party to recover attorneys' fees from the United States in an action based on the government's improper withholding of agency records); Privacy Act of 1974, 5 U.S.C. § 552a(g)(2)(B) (1994) (allowing a prevailing party to recover its attorneys' fees from the United States in an action based on the government's wrongful disclosure of personal records); Government in the Sunshine Act, 5 U.S.C. § 552b(i) (1994) (providing that a prevailing party may recover attorneys' fees from the United States in an action based on the government's failure to conduct certain meetings in a manner open to public observation); Fair Housing Act, 42 U.S.C. § 3613(c)(2) (1994) (providing for an award of attorneys' fees against a party who has refused to rent or sell housing to another party based on race, religion, or gender); Americans with Disabilities Act, 42 U.S.C. § 12205 (1994) (permitting a prevailing party to recover attorneys' fees incurred while litigating against disability-based discrimination); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1994) (authorizing an award of attorneys' fees for a party who has successfully sought a judicial remedy for group-based employment discrimination practices); Clean Air Act, 42 U.S.C. §§ 7604(d), 7607(f) (1994) (providing that a court issuing a final order in a suit under the Clean Air Act can award litigation costs to any party whom the court deems worthy of such an award); CAL. CIV. PROC. CODE § 1021.5 (West 1988) (permitting recovery of attorneys' fees by private parties who bring actions that result in the enforcement of an important right affecting the public interest). For a more thorough discussion of these statutory exceptions to the American Rule, see Gregory C. Sisk, *A Primer on Awards of Attorney's Fees Against the Federal Government*, 25 ARIZ. ST. L.J. 733, 769-83 (1993).

4. 5 U.S.C. § 504 (1994), 28 U.S.C. § 2412 (1994), *amended by* Act of Dec. 17, 1997, 28 U.S.C.A. § 2412 (West Supp. 1997). Congress first enacted the EAJA as a rider to a small business assistance bill. *See* Small Business Act, Pub. L. No. 96-481, § 201, 94 Stat. 2321, 2325 (1980). As first enacted, the EAJA contained a sunset provision that rendered the EAJA null and void at the end of a three-year trial period. *See id.* at 2327 (rendering the EAJA void as of Oct. 1, 1984). Shortly after the three-year trial period ended, Congress passed several amendments to the EAJA. *See* H.R. 5479, 94th Cong. (1984) (amending, inter alia, the EAJA's definition of an EAJA eligible party to include individuals with a net worth of no more than $2 million); *see also* 130 CONG. REC. H32213 (daily ed. Oct. 11, 1984) (statement of Rep. Kastenmeier). President Ronald Reagan found select EAJA provisions objectionable, however, and vetoed the amended bill. *See* Memorandum of Disapproval of H.R. 5479, 20 WEEKLY COMP. PRES. DOC. 1814-15 (Nov. 8, 1984) (expressing the President's disapproval of the bill's definition of "the position of the United States").

After the President vetoed the amended bill, Congress revised the bill in accordance with the President's proposed changes. *See* 131 CONG. REC. S20348 (daily ed. July 24, 1985) (statement of Sen. Grassley). Thereafter, President Reagan signed the revised bill, *see* Extension of the Equal Access to Justice Act, 21 WEEKLY. COMP. PRES. DOC. 966-67 (Aug. 5, 1985), and on August 5, 1985, re-enacted the EAJA as a permanent statute. *See* Equal Access to

fees[5] to parties that have successfully litigated[6] against the federal government in an action in which the government's position[7] was not "substantially justified."[8]

A party must satisfy several eligibility requirements before obtaining an award of EAJA funds.[9] Once a party satifies these requirements, the EAJA mandates that a court award attorneys' fees to that party.[10] Despite this mandate, some courts have challenged the propriety of awarding attorneys' fees to certain ostensibly qualified parties. When multiple parties have joined to litigate a claim against the federal government, courts have refused to grant an EAJA award to otherwise eligible parties in the presence of "mixed eligibility"[11] conditions. Such conditions arise when, in addition to the EAJA-eligible petitioner, there existed in the underlying litigation either (1) an EAJA-ineligible co-plaintiff, or co-defendant, who funded the underlying litigation;[12] or (2) an EAJA-ineligible co-plaintiff, or co-

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Justice Act, Pub. L. No. 99-80, 99 Stat. 186 (1985).

5. The EAJA provides for an award of "[attorneys'] fees and other expenses." 28 U.S.C.A. § 2412(d)(2)(A). These "other expenses" include the reasonable cost of expert witnesses, studies, analyses, engineering reports or tests that a court may find to be critical to a prevailing party's lawsuit. *See id.* Moreover, the EAJA deems unreasonable any sum of attorneys' fees that an attorney has billed at a rate in excess of $125 per hour, unless a court finds 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." *Id.* The allowance for a higher billing rate based on the "limited availability of qualified attorneys" is restricted to cases in which an attorney has some distinct skill, as opposed to a distinct level of competence. *See* Pierce v. Underwood, 489 U.S. 552 (1988).

6. A party may qualify under the EAJA regardless of whether the party was a plaintiff or defendant in the litigation underlying a claim for attorneys' fees. *See* 28 U.S.C. § 2412(b).

7. *See infra* note 37 and accompanying text.

8. 28 U.S.C. § 2412(d)(1)(A) provides as follows:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees . . . 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.

Id.

9. *See infra* Part II.B.2 for a discussion of the EAJA's eligibility criteria.

10. *See* 28 U.S.C. § 2412(d)(1)(A).

11. "Mixed eligibility" refers to the presence of both an EAJA-eligible party and an EAJA-ineligible party in an action against the federal government.

12. *See, e.g.*, Unification Church v. Immigration & Naturalization Serv., 762 F.2d 1077 (D.C. Cir. 1985).

defendant, who could have funded the underlying litigation.[13]

Presently, three circuit courts of appeals are split over the proper treatment of a single-party variation on the mixed eligibility problem. The Fifth and Ninth Circuit Courts of Appeals disagree with the Sixth Circuit Court of Appeals over the EAJA-eligibility of an individually eligible party that has litigated on behalf of one or more EAJA-ineligible parties that were absent in the underlying litigation.[14] The Sixth Circuit has held that an EAJA award is inappropriate under such conditions because it would frustrate Congress's purposes for enacting the EAJA.[15] In contrast, the Fifth and Ninth Circuits have held that such a scenario should not affect the petitioning party's EAJA eligibility.[16] Most recently, in *Texas Food Industry Ass'n v. United States Department of Agriculture*,[17] the Fifth Circuit held that a trade association which is comprised of multi-billion dollar corporations,[18] but which itself possesses a net worth of $3.3 million, constitutes an eligible party under the EAJA and, thus, may collect attorneys' fees under the EAJA.[19]

This Note advocates that EAJA-ineligible businesses, such as the corporate giants in *Texas Food*, should not be permitted to use their EAJA-eligible trade associations as vehicles for avoiding the cost of litigating against the federal government. Congress enacted the EAJA to provide greater access to the courts for only those parties that lack the financial means to gain such access on their own.[20] This Note recognizes that the EAJA, as enacted, restricts courts' ability to

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13. *See, e.g.*, Louisiana *ex rel.* Guste v. Lee, 853 F.2d 1219 (5th Cir. 1988).

14. *Compare* Texas Food Indus. Ass'n v. United States Dep't of Agric., 81 F.3d 578 (5th Cir. 1996) (holding that a trade association's EAJA-ineligible members do not preclude the association from recoving attorneys' fees), *and* Love v. Reilly, 924 F.2d 1492 (9th Cir. 1991) (same), *with* National Truck Equip. Ass'n v. National Highway Traffic Safety Admin., 972 F.2d 669 (6th Cir. 1992) (holding that courts should consider the net worth of each member of a trade association for purposes of EAJA attorneys' fees awards).

15. *See* discussion *infra* Part III.B.2.

16. *See* discussion *infra* Part III.B.1.

17. 81 F.3d 578 (5th Cir. 1996).

18. Members of the trade association included Supervalu Inc. ($12.57 billion in annual revenues), Fleming Companies, Inc. (annual sales of $12.93 billion), SYSCO Corp. ($8.9 billion in annual sales), and Kraft Foodservice, Inc. (annual sales of $120 million). *See id.* at 583 n.1 (citing STANDARD AND POOR'S REGISTER OF CORPORATIONS, DIRECTORS, AND EXECUTIVES (1994)).

19. *See id.* at 585.

20. *See infra* notes 26, 28 and accompanying text.

remedy through judicial review the EAJA's eligibility loophole for members of trade associations.[21] Therefore, this Note proposes that Congress, rather than the courts, take affirmative steps toward rectifying the EAJA's trade association loophole by amending the EAJA in a manner that would disallow EAJA-ineligible businesses to hide behind the EAJA qualifications of their trade associations.

Part II of this Note provides an overview of the EAJA's historical development and "fee-shifting"[22] provisions. Part III describes courts' approaches to the EAJA's mixed eligibility problem with an emphasis on those courts that have treated the single-party variation of this problem. Part IV analyzes the arguments that the Fifth, Sixth, and Ninth Circuits have advanced in support of their positions regarding the single-party mixed eligibility problem. In addition, Part IV concludes that the Sixth Circuit's position is most consistent with Congress's purposes for enacting the EAJA and, thus, should serve as a model for resolving the EAJA's single-party mixed eligibility problem. Finally, Part V of this Note proposes an EAJA amendment that would preclude an EAJA-ineligible party from using its trade association as a vehicle for circumventing the EAJA's eligibility requirements.

II. OVERVIEW OF THE EAJA

A. Purpose of the EAJA

In 1980, Congress enacted a small-business assistance bill[23] in response to widespread sentiment that administrative agencies were burdening small businesses with excessive regulation.[24] Congress

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21. *See* discussion *infra* Part IV.B (discussing the effects of the EAJA's "clear and unambiguous" language on courts' ability to depart from that language).

22. This note uses the term "fee-shifting" to refer to a court's order that a losing litigant pay the award of attorneys' fees of the prevailing litigant.

23. *See* Small Business Act, Pub. L. No. 96-481, 94 Stat. 2321 (1980).

24. Congress believed that federal agencies disproportionately targeted small businesses that lacked the financial means to contest agency policies and lawsuits. *See Award of Attorneys' Fees Against the Federal Government: Hearings on § 265 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 96th Cong. 56 (1980) (testimony of Rep. McDade) (addressing oppression of "the small business owner"); *see also* H.R. REP. No. 96-1418, at 10 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4953, 4988 (stating that the bill's primary concern is "individuals for whom cost may be a deterrent to vindicating

sought to curb this excessive regulation, in part, through the use of the bill's fee-shifting provisions.[25] Congress believed that a fee-shifting statute would deter excessive regulation in two ways. First, a fee-shifting statute would decrease a party's costs of opposing excessive regulation.[26] Congress believed that, as a result of these

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their rights").

Congress characterized its goals more broadly in its statement of findings and purpose:

> 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.... [B]ecause 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.... It is the purpose of this title to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees... against the United States ....

Small Business Act, Pub. L. No. 96-481, § 202, 94 Stat. 2321, 2325 (1980).

25. Senator Domenici, a sponsor of the EAJA bill, stated:

> The basic problem this bill seeks to overcome is the inability of many Americans to combat the vast resources of the federal government in administrative adjudications. In the usual case the party has to weigh the high cost of litigation or agency proceedings against the value of the rights to be asserted. Individuals and small businesses are in far too many cases forced to knuckle under to regulations even though they have a direct and substantial impact because they cannot afford the adjudication process. In many cases the government can proceed in expectation of outlasting its adversary. The purpose of the bill is to redress the balance between the government acting in its discretionary capacity and the individual.

Award of Attorneys' Fees Against the Federal Government: Hearings on § 265 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 96th Cong. 16 (1980).

While Congress's primary goal in enacting the EAJA may have been to alleviate the government's excessive regulation of small businesses, legislative history suggests a broader secondary goal. By reducing the cost of challenging excessive regulation and, thus, encouraging such challenges, Congress hoped that the EAJA would help to streamline effective legislation:

> An adjudication or civil action provides a concrete, adversarial test of Government regulation and thereby insures the legitimacy and fairness of the law. An adjudication, for example, may show that the policy or factual foundation underlying an agency rule is erroneous or inaccurate, or it may provide a vehicle for developing or announcing more precise rules.

S. REP. NO. 96-253, at 5-6 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4953, 4988-89.

26. *See* § 202, 94 Stat. at 2325; *see also* H.R. REP. NO. 96-1418 (stating that the bill's primary concern is "individuals for whom cost may be a deterrent to vindicating their rights"); 126 CONG. REC. H28654 (daily ed. Oct. 1, 1980) (statement of Rep. Baldus); 125 CONG. REC. S21,444 (1979) (statement of Sen. Kennedy); *id.* at S21,443 (statement of Sen. Nelson); *id.* at S21,435-36 (statement of Sen. Culver); *id.* at S21,435 (statement of Sen. DeConcini).

decreased costs, small entities would be more inclined to vindicate their rights by resisting excessive regulation.[27] Congress believed that a fee-shifting statute also would deter excessive regulation by increasing the government's administrative costs associated with such regulation.[28] Congress believed that the prospect of paying a prevailing adversary's attorneys' fees would substantially inhibit administrative agencies from instituting excessive regulation.[29]

B. Fee-Shifting Under the EAJA

1. Types of Fee-Shifting

In the event that the government subjects parties[30] to unjustified governmental conduct,[31] the EAJA permits such parties to recover from the federal government[32] reasonable attorneys' fees incurred while litigating against the government.[33] The EAJA provides for three types of fee-shifting. The EAJA's first fee-shifting provision, 28 U.S.C. § 2412(b),[34] subjects the federal government to any form of

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27. *See* § 202, 94 Stat. at 2325.

28. Under the EAJA, successful EAJA petitioners receive their attorneys' fees directly from the government agency responsible for the petitioners' grievances. *See* 28 U.S.C. § 2412(d)(4) (1994). Thus, Congress believed that government agencies, motivated by a desire to stay within their operating budgets, would have an incentive to avoid issuing the undesirable type of regulation that could generate EAJA liability. *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, 225 (1994).

29. Congress believed that administrative agencies should "have to pay for their overregulatory mistakes themselves ... [a]nd [that] with this in mind perhaps the agencies [would] make fewer such mistakes." *See* 126 CONG. REC. H28653 (daily ed. Oct. 1, 1980) (statement of Rep. Heckler); *id.* at H28650 (statement of Sen. Smith); 125 CONG. REC. S21,444 (1979) (statement of Sen. Bayh); *id.* at S21,443 (statement of Sen. Nelson); *id.* at S21,441 (statement of Sen. Thurmond); *id.* at S21,436 (statement of Sen. Dole).

30. *See* discussion *infra* Part II.B.2 and accompanying notes for the requisite criteria of an EAJA-eligible party.

31. *See* discussion *infra* note 38 for an explanation of the standard for governmental conduct.

32. By allowing for a cause of action against the federal government, the EAJA implicitly provides for a limited waiver of sovereign immunity. As a result of this waiver, the Supreme Court has held that all of the EAJA's provisions must be strictly construed in the government's favor. *See* Ardestani v. Immigration and Naturalization Serv., 502 U.S. 129, 137 (1991); *see also* Perales v. Casillas, 950 F.2d 1066, 1076 (5th Cir. 1992).

33. *See* 28 U.S.C. § 2412(b)(3).

34. 28 U.S.C. § 2412(b) provides in relevant part: "The United States shall be liable for

fee-shifting that was previously available against any other party at common law.[35] The second fee-shifting provision, 28 U.S.C. § 2412(d), provides for a form of fee-shifting which was previously unavailable at common law.[36] Under § 2412(d), courts must award attorneys' fees to any party that prevails in a civil action (other than one sounding in tort) against the United States in which the government's position[37] lacked substantial justification.[38] The EAJA's third fee-shifting provision, 5 U.S.C. § 504, sanctions legal expenses for a prevailing party in any administrative agency adversary adjudication.[39] Like § 2412(d), recovery of fees under § 504 requires that the government's position in the underlying litigation lacked substantial justification.[40]

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such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." *Id.*

35. *See supra* note 3 for a summary of fee-shifting provisions available at common law.

36. *See* Sisk, supra note 28, at 229-31.

37. The "position" of the United States includes not only the position taken by the United States in the underlying civil action, but also the action (or lack thereof) taken by the agency for which the petitioner originally brought the civil action. 28 U.S.C. § 2412(d)(2)(D). Prior to the EAJA amendment clarifying the phrase "government's position," several courts had held that this phrase referred only to the government's position in litigation. *See* Ashburn v. United States, 740 F.2d 843, 849 (11th Cir. 1984); Boudin v. Thomas, 732 F.2d 1107, 1115 (2d Cir. 1984); White v. United States, 740 F.2d 836, 842 (11th Cir. 1984); United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1487 (10th Cir. 1984); Environmental Defense Fund, Inc. v. Environmental Protection Agency, 716 F.2d 915, 920 (D.C. Cir. 1983); Spencer v. NLRB, 712 F.2d 539, 556 (D.C. Cir. 1983); Ellis v. United States, 711 F.2d 1571, 1575 (Fed. Cir. 1983); Tyler Bus. Serv., Inc. v. NLRB, 695 F.2d 73, 75 (4th Cir. 1982).

38. *See* 28 U.S.C. § 2412(d)(1)(A). The EAJA states a vague standard of governmental conduct as the basis for EAJA fee-shifting. The EAJA states that before a court can award attorneys' fees to a party, the court must find that the government's conduct was not "substantially justified." *Id.* The EAJA contains neither a formal definition nor commentary explaining this phrase. As a result, courts have struggled to interpret this phrase through the EAJA's legislative history and various canons of statutory construction. *See* Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part Two)*, 56 LA. L. REV. 1, 18-24 (1995). The Supreme Court most recently has declared that the government's conduct is substantially justified if it possesses a "reasonable basis both in law and fact." *Id.* at 22 (citing Pierce v. Underwood, 487 U.S. 552, 565 (1988)). EAJA commentators have noted that the government's burden of proving that its conduct was substantially justified suggests that "Congress intended the EAJA as a compromise between always shifting and never shifting a prevailing party's fees to the government." ARTHUR EARL BONFIELD & MICHAEL ASIMOW, STATE AND FEDERAL ADMINISTRATIVE LAW 666 (1989).

39. *See* 5 U.S.C. § 504 (1994).

40. *See id.* § 504(a)(1).

2. Eligibility for Fee-shifting

The EAJA's three fee-shifting provisions are available only to parties that satisfy the EAJA's eligibility criteria. To qualify as an eligible party under the EAJA, a party must (i) incur legal expenses;[41] (ii) prevail in the litigation underlying the party's petition for fees;[42] (iii) allege that the government's position in the underlying litigation was not substantially justified; and (iv), with limited exceptions,[43] possess a net worth[44] of less than $7 million if the petitioning party is a business,[45] or less than $2 million if the petitioning party is an

41. *See* 28 U.S.C. § 2412(d)(1)(A) (courts shall award "to a prevailing party . . . fees . . . [that have been] incurred by *that* party") (emphasis added). For a comprehensive analysis of this statutory requirement, see Sisk, *supra* note 29, at 341-60.

42. *See* 28 U.S.C. § 2412(d)(1)(B).

43. Congress has exempted two types of parties from the EAJA's net worth ceiling:

> [A]n organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. § 501(c)(3)) 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 (12 U.S.C. § 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of Title 5.

28 U.S.C.A. § 2412(d)(2)(B) (West Supp. 1997). For a discussion of the rationale behind the agricultural cooperative exemption and how this rationale illuminates Congress's intention with respect to the net worth qualifications of EAJA-petitioning trade associations, see *infra* note 115 and accompanying text.

44. Most courts can readily establish the net worth of a business or an individual by examining an informal balance sheet prepared by the EAJA petitioner. *See* Sisk, *supra* note 28, at 303-04. Sisk notes that requiring businesses to submit an itemized balance sheet to the court is a legitimate requirement in light of the EAJA's requirement that the petitioner submit an application to the court showing that the petitioner is entitled to a fee award. *See id.* (citing 28 U.S.C. § 2412(d)(1)(B)). Sisk also notes, however, two reasons why a more relaxed net worth assessment requirement is appropriate for individuals. First, an informal net worth assessment is appropriate for individuals because very few individual petitioners possess a $2 million net worth. *See id.* Second, should an informal assessment reveal any doubts as to a petitioner's net worth eligibility, the Model Rules for Implementation of the Equal Access to Justice Act in Agency Proceedings, 1 C.F.R. § 315.202(a) (1994), suggest that the adjudicator may "require an applicant to file additional information to determine its eligibility for an award." Sisk, *supra* note 28, at 304-05.

45. The EAJA does not use the term "business" to classify those parties whose net worth may not exceed $7 million. Rather, § 2412(d)(2)(B) divides the net worth criteria according to "individual" status and status as "any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization." 28 U.S.C.A. § 2412(d)(2)(B).

individual.[46] Once the petitioning party has satisfied these criteria,[47] the EAJA mandates a fee award unless the government can prove that its position was substantially justified, or that "special circumstances"[48] exist that would render an award of attorneys' fees unjust.[49]

III. MIXED ELIGIBILITY PROBLEMS UNDER THE EAJA

A. Underlying Litigation Involving both EAJA-Eligible and EAJA-Ineligible Parties

When several parties have jointly litigated against the federal government, evaluating a subsequent EAJA petition may pose a considerable challenge for courts. In the event that the government's adversaries consisted of both EAJA-eligible and EAJA-ineligible parties,[50] a subsequent petition for fees by any eligible party would

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46. 28 U.S.C.A. § 2412(d)(2)(B) governs a party's EAJA eligibility with respect to net worth. Specifically, the subsection provides that:

> [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 organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, . . . except that an 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 or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of Title 5.

Id.

In addition to stating the EAJA's net worth criteria, 28 U.S.C.A. § 2412(d)(2)(B)(ii) also limits EAJA eligibility by specifying the maximum number of people that an EAJA-eligible business may employ. *See id.* Although this criterion is capable of producing the same mixed eligibility problems as the EAJA's net worth criteria, this Note does not address the potential for EAJA eligibility problems arising out of the EAJA's employment criteria.

47. In addition to the aforementioned substantive criteria, a party seeking an EAJA fee award must, within thirty days of the final judgment in the underlying litigation, submit to the court an application for a fee award setting forth the party's eligibility for receiving such an award. *See* 28 U.S.C. § 2412(d)(1)(B).

48. *See infra* Part III.A.2 for a discussion of the EAJA's "special circumstances" clause and how this clause may affect a party's EAJA eligibility.

49. *See* 28 U.S.C. § 2412(d)(1)(A).

50. This Note does not explore the eligibility problems that maybe posed by a group of individually eligible litigants whose net worth in the aggregate exceeds the EAJA's net worth

suggest that the party bore the burden of some of the group's litigation costs.[51] Despite this suggestion, several courts have (1) questioned whether the petitioning party actually incurred any expenses,[52] or (2) have assumed that the petitioner did incur expenses, but nonetheless questioned the propriety of its petition based on the belief that EAJA-ineligible parties have a duty to absorb litigation costs that might otherwise be borne by an EAJA-eligible party.[53] Courts and commentators call the former eligibility inquiry the "real party in interest" approach to the mixed eligibility problem.[54] Courts and commentators call the latter eligibility inquiry the "special circumstances"[55] approach to the mixed eligibility problem.[56]

1. The Real Party in Interest Approach

In *Unification Church v. Immigration & Naturalization Service*,[57] three illegal aliens and the Unification Church jointly brought suit against the Immigration and Naturalization Service (INS) to overturn

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ceiling.

51. Because the EAJA requires that a fee petitioner incur legal expenses, an eligible party's petition implies that it funded a portion of the underlying litigation costs.

52. *See, e.g.*, Unification Church v. Immigration & Naturalization Serv., 762 F.2d 1077 (D.C. Cir. 1985).

53. *See, e.g.*, Louisiana *ex rel.* Guste v. Lee, 853 F.2d 1219 (5th Cir. 1988).

54. The real party in interest doctrine has a substantial history. At common law, a suit could only be brought in the name of the person who had legal title to the right of action. *See* CHARLES ALAN WRIGHT, FEDERAL COURTS 490 (5th ed. 1994). Courts deemed that person the real party in interest. *See id.* In 1973, however, Congress revised the common law notion of the real party in interest doctrine by enacting FED. R. CIV. P. 17(a). Under Rule 17(a), the real party in interest not only may be the person who ultimately will benefit from the litigation, but also the party who, by substantive law, possesses the right sought to be enforced, such as executors, administrators, and various other representatives. *See* Fed. R. Civ. P. 17(a). For a general discussion of the evolution of Rule 17(a), see WRIGHT, *supra*, at 490-93 (5th ed. 1994); *see also* Unification Church v. Immigration & Naturalization Serv., 762 F.2d 1077 (D.C. Cir. 1985); Sisk, *supra* note 28, at 342-47.

55. *See* discussion *infra* Part III.A.2.

56. *See* Sisk, *supra* note 38, at 93-105; *see also* James B. Nobile, Note, *Determining Fees for Fees Under the Equal Access to Justice Act: Accomplishing the Act's Goals*, 9 CARDOZO L. REV. 1091, 1099 n.37 (1988); Niki Kuckes, Note, *Reenacting the Equal Access to Justice Act: A Proposal for Automatic Attorney's Fee Awards*, 94 YALE L.J. 1207, 1212-13 (1985); *cf.* Grason Elec. Co. v. NLRB, 951 F.2d 1100, 1103-05 (9th Cir. 1991) (discussing several variations of the special circumstances approach).

57. 762 F.2d 1077 (D.C. Cir. 1985).

the INS's decision to deport the aliens.[58] After prevailing in the litigation, the plaintiffs petitioned for an EAJA award of attorneys' fees.[59] The three individuals argued that because they were each eligible parties under the EAJA, they were eligible for fees under the EAJA.[60] Upon reviewing an affidavit by the individuals' counsel, however, the district court determined that the individuals' legal fees were fully funded by their co-plaintiff, the Church.[61] Consequently, the district court refused to award EAJA attorneys' fees, holding that the Church was the only real party in interest with respect to fees.[62] The D.C. Circuit affirmed the district court's decision and held that when an arrangement for attorneys' fees among multiple plaintiffs is such that only some of the plaintiffs will be liable for attorneys' fees, the court shall consider the EAJA eligibility of only those EAJA petitioners who will be liable for attorneys' fees if the court denies the petition for an EAJA fee award.[63] The court reasoned that while the district court's use of the real party in interest doctrine was unusual for a case involving attorneys' fees,[64] it was appropriate for carrying out the congressional intent underlying the EAJA.[65]

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58. *See id.* at 1079.
59. *See id.*
60. *See id.* at 1081.
61. *See id.* at 1082.
62. *See id.* at 1081.
63. *See id.* at 1082.
64. *See id.* at 1081. The court in *Unification Church* qualified this statement by citing National Treasury Employees Union v. Department of the Treasury, 656 F.2d 848, 850-51 (D.C. Cir. 1981), which held that, under the Privacy Act, an award of attorneys' fees to a union's outside counsel is inappropriate when the union and counsel have agreed in advance that the union is the real party in interest with respect to such fees. *See Unification Church*, 762 F.2d at 1082-83.
65. *See Unification Church*, 762 F.2d at 1082. The D.C. Circuit amplified its *Unification Church* holding four years later in *American Ass'n of Retired Persons (AARP) v. EEOC*, 873 F.2d 402 (D.C. Cir. 1989). In *AARP*, three plaintiffs consolidated their claims and successfully sued the EEOC. *See id.* at 403. Thereafter, two of the three plaintiffs, Nella S. Gent and the Older Women's League (OWL), petitioned for attorneys' fees under the EAJA. *See id.* The district court referred the petition to a magistrate judge who found that AARP, which did not petition for fees, had played the dominant role in the litigation and had been the only plaintiff that incurred legal fees. *See id.* The magistrate concluded as a matter of law that because AARP was the only party to have incurred legal fees, and because AARP had not proven its eligibility for EAJA attorneys' fees, Gent and OWL did not qualify for fees. *See id.*

The D.C. Circuit reversed the magistrate's order and held that under *Unification Church*, there may be multiple real parties in interest. *See id.* at 406. The court distinguished *Unification Church* as a case involving a clear arrangement among multiple plaintiffs that one plaintiff

2. The Special Circumstances Approach

In addition to the real party in interest approach, courts have used the EAJA's "special circumstances" clause[66] to address the mixed eligibility problem. In *Louisiana* ex rel. *Guste v. Lee*,[67] Louisiana and five environmental groups successfully sued the United States Army Corps of Engineers for violating the National Environmental Policy Act[68] (NEPA).[69] The plaintiffs, with the exception of Louisiana, subsequently sought an award of EAJA attorneys' fees.[70] The government opposed the plaintiffs' EAJA petition based on

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would fund the litigation. *See id.* at 405. The court also set forth four factors for courts to consider when deciding whether there are multiple real parties in interest. *See id.* at 405-06. These factors include: (1) whether there is one counsel representing a number of plaintiffs of various sizes or wealth; (2) whether there is one counsel of record for each plaintiff and the duration which that attorney has been counsel for the particular plaintiff; (3) whether the various attorneys made appearances and representations on behalf of their respective clients; and (4) whether any plaintiffs retained pro bono or legal aid society counsel. *See id.*

The court in *United States v. Lakeshore Terminal and Pipeline Co.*, 639 F. Supp. 958 (E.D. Mich. 1986), also approached the net worth issue in light of the real party in interest doctrine. In *Lakeshore*, the United States sued Lakeshore Terminal and Pipeline Co. for a declaratory judgment that would entitle the government to possession of a petroleum facility. *See id.* at 959. The district court found for the defendant, who in turn petitioned the court for attorneys' fees pursuant to the EAJA. *See id.* The court found that the defendant was an ineligible party under the EAJA and denied the defendant's petition. *See id.* at 962. The court held that the defendant's parent company was the real party in interest. The court based its decision on several factors that tended to show that the parent company controlled, and would directly benefit from, the litigation. *See id.*

For an application of the real party in interest approach in the context of a bankruptcy proceeding, see *In re* Davis, 899 F.2d 1136 at 1144-45 n.18 (11th Cir. 1990) (opining that in an adversary proceeding against the federal government, the creditors, rather than the debtor, are the "real party in interest," and, thus, a trustee's petition for EAJA fees should be evaluated according to the qualifications of the creditors).

66. 28 U.S.C. § 2412(d)(1)(A) allows courts to render ineligible a party that is otherwise eligible for an EAJA award whenever there are special circumstances that would make an EAJA award unjust. *See, e.g.*, Oguachuba v. Immigration and Nationalization Serv., 706 F.2d 93, 94 (2d Cir. 1983) (holding that a flagrant contempt for United States law and a decision not to acquiesce in deportation constitutes a "special circumstance" contemplated by 28 U.S.C. § 2412(d)(1)(A)). *But see*, Grason Elec. Co. v. NLRB, 951 F.2d 1100, 1103-05 (9th Cir. 1991) (holding that the EAJA's legislative history reflects no intention to classify a party's financial status as a "special circumstance" capable of defeating an EAJA award).

67. 853 F.2d 1219 (5th Cir. 1988).

68. 42 U.S.C. § 4321 (1982).

69. *See Guste*, 853 F.2d at 1220-21. The plaintiffs argued that the Corps violated NEPA by not completing an environmental impact statement before renewing six permits for shell dredging along the Gulf coast and coastal lakes of Louisiana. *See id.*

70. *See id.* at 1221.

Louisiana's participation in the litigation.[71] The government argued that because the six plaintiffs possessed the same goal of enforcing NEPA, Louisiana's strong financial position and presence in the litigation created a special circumstance, obligating Louisiana to bear the cost of the litigation.[72] The Fifth Circuit agreed with the government and held that an EAJA-eligible party may not take a "free ride through the judicial process"[73] at the government's expense if an EAJA-ineligible party is able to prosecute the federal government at that party's own expense.[74]

B. A Variation on the Mixed Eligibility Problem: Litigation Involving an EAJA-Eligible Party Who Represents the Interests of EAJA-Ineligible Parties

Within the context of the mixed eligibility problem, there is a more subtle EAJA eligibility issue. Occasionally, a single EAJA-eligible party will initiate litigation against the government that is clearly in the interest of EAJA-ineligible parties. This situation may arise when trade associations litigate against the government on

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71. *See id.* at 1223.

72. *See id.* The United States analogized the case at bar to *Sierra Club v. United States Army Corps of Engineers*, 776 F.2d 383 (2d Cir. 1985). *See Guste*, 853 F.2d at 1223. The United States then urged the *Guste* court to adopt Judge Meskill's reasoning in the *Sierra* dissent:

> The EAJA was passed for a specific purpose: to ensure that parties would not be prevented from contesting government action simply because they could not afford to litigate the matter.... When a group of twelve plaintiffs, one of whom has a net worth of over $1 million, join together, congressional concern about access to the courts is not implicated. Indeed, it seems incongruous to hold that if the ineligible plaintiff alone challenged [the government], fees could not be awarded under the EAJA, but because the ineligible plaintiff was joined by less wealthy friends, fees may be awarded.

Id. at 1223-24 (quoting *Sierra*, 776 F.2d at 394).

73. *Guste*, 853 F.2d at 1225. An individual gains a "free ride" when it benefits from the litigation regardless of whether it bears the cost of such litigation. *See* Love v. Reilly, 924 F.2d 1492, 1495 (9th Cir. 1991).

74. *See Guste*, 853 F.2d at 1225. The *Guste* court then related the free-rider problem at bar to the economic deficiency associated with indemnity when there is a failure to consolidate the overlapping claims of multiple parties into a class action. *See id.* For a discussion of these free-rider inefficiencies as they relate to consolidation of claims, see RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 537-38 (3d ed. 1986).

behalf of their EAJA-ineligible members.[75] The three circuit courts of appeals that have confronted this issue have proceeded in one of two ways. Two circuits have held that the EAJA specifically permits trade associations to recover fees, and, thus, the EAJA ineligibility of an association's members has no bearing on the eligibility of the association itself.[76] In contrast, another circuit has rejected the EAJA petition of an otherwise eligible trade association comprised of EAJA-ineligible members, holding that Congress intended for the EAJA to benefit only those litigants that could not otherwise gain access to the courts.[77]

1. The Trade Association as a Whole: the Ninth and Fifth Circuits

In *Love v. Reilly*,[78] the Ninth Circuit held that a trade association's individually ineligible members will not preclude that association from qualifying for attorneys' fees under the EAJA.[79] In *Love*, Northwest Food Processors Association (NWFPA) petitioned for an EAJA award after successfully obtaining an injunction against the Environmental Protection Agency (EPA), preventing the EPA from banning a particular pesticide.[80] The government appealed the district court's finding that NWFPA was an eligible party under the EAJA.[81]

The government alleged that NWFPA's members, not NWFPA itself, stood to gain from the original civil action, and, thus, according to *Unification Church*,[82] NWFPA was not the real party in interest with respect to an EAJA award.[83] The government further argued that

75. Over twenty-two thousand trade associations are registered with the United States Chamber of Commerce. *See* National Truck Equip. Ass'n v. National Highway Traffic Safety Admin., 972 F.2d 669, 672 n.1 (6th Cir. 1992). Businesses that join these associations possess two overriding interests: preserving their financial vitality and promoting their collective interests. *See generally* International Union, United Auto., Aerospace, and Agric. Implement Workers of America v. Brock, 477 U.S. 274, 289-90 (1986).

76. *See* Texas Food Indus. Ass'n v. United States Dep't of Agric., 81 F.3d 578 (5th Cir. 1996); Love v. Reilly, 924 F.2d 1492 (9th Cir. 1991).

77. *See* National Truck Equip. Ass'n v. National Highway Traffic Safety Admin., 972 F.2d 669 (6th Cir. 1992).

78. 924 F.2d 1492 (9th Cir. 1991).

79. *See id.* at 1494.

80. *See id.* at 1493.

81. *See id.* at 1493-94.

82. 762 F.2d 1077, 1082 (D.C. Cir. 1985).

83. *See Love*, 924 F.2d at 1494.

because NWFPA's members were the real parties in interest, the court should only consider the qualifications of NWFPA's members.[84] The Ninth Circuit rejected the government's characterization of the *Unification Church* holding and stated that, according to *Unification Church*, the real party in interest with respect to an EAJA fee award is the party who incurred the costs of the civil action, regardless of whether that party had a right to bring a claim in the underlying civil action.[85] The court reasoned that, because NWFPA had incurred attorneys' fees and because the EAJA's plain language does not specifically require a court to consider the net worth of an association's members, NWFPA could recover its attorneys' fees.[86]

In *Texas Food Industry Ass'n v. United States Department of Agriculture*,[87] the Fifth Circuit joined the Ninth Circuit in holding that a trade association's EAJA-ineligible members would not preclude the association from recovering EAJA attorneys' fees.[88] In *Texas Food*, National-American Wholesale Grocers' Association (NAWGA) petitioned for an EAJA fee award after prevailing in an

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84. *See id.* The government further alleged that there was a free-rider problem. *See id.* at 1495. The government first contended that some of the plaintiffs were potentially EAJA-ineligible parties. *See id.* The government then claimed that all of the plaintiffs were represented by the same counsel. *See id.* The government further alleged that the eligible plaintiffs would use an EAJA fee award to fund the ineligible plaintiffs' legal fees, and that the potential for such a scenario constituted a special circumstance that would render an award of fees unjust. *See id.*

The Ninth Circuit rejected the government's reasoning. *See id.* The court first noted that the government failed to prove that any of the association's members were individually ineligible under the EAJA. *See id.* The court then noted that the government had failed to show that the other two plaintiffs were not liable for attorneys' fees. *See id.* Thus, while the court did not condemn the government's free-rider defense, it held the defense to a high level of scrutiny.

85. *See id.* The court also rejected the government's analogy to *United States v. Lakeshore Terminal and Pipeline Co.*, 639 F. Supp. 958 (E.D. Mich. 1986) (holding that the defendant was ineligible for an EAJA award because the defendant's parent company controlled, and would directly benefit from, the litigation). *See Love*, 924 F.2d at 1494 n.1. The court noted that the *Lakeshore* court confined its application of the real party in interest doctrine to the context of piercing the corporate veil. *See id.*; *see also supra* note 65 (discussing the *Lakeshore* court's analysis). The Ninth Circuit then noted that, unlike the *Lakeshore* case, the government had not alleged that the interests of NWFPA and NWFPA's members overlapped in the underlying litigation. *See Love*, 924 F.2d at 1494 n.1.

86. *See Love*, 924 F.2d at 1494.

87. 81 F.3d 578 (5th Cir. 1996).

88. *See id.* at 582.

action to delay the Department of Agriculture from implementing a rule governing meat packaging standards.[89] The district court found that NAWGA was eligible for an EAJA fee award and approved NAWGA's EAJA petition.[90]

On appeal, the government argued that both the EAJA's statutory language[91] and Congress's post-enactment explanations of the EAJA[92] clearly indicated Congress's intention that courts consider the EAJA eligibility of trade associations' individual members when assessing the EAJA eligibility of trade associations.[93] The *Texas*

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89. *See id.* at 579. NAWGA demonstrated that the government had failed to comply with the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1994). *See Texas Food*, 81 F.3d at 579. Shortly after the underlying judgment was rendered, the Department of Agriculture reissued an identical rule in compliance with the APA's notice and comment requirements. *See id.*

90. *See id.* at 580. The district court found that NAWGA was eligible for EAJA attorneys' fees based on, inter alia, NAWGA's net worth of $3.3 million.

91. The government cited 28 U.S.C. § 2412(d)(2)(B)(ii) (1994) (current version at 28 U.S.C.A. § 2412(d)(2)(B)(ii) (West Supp. 1997)). *See Texas Food*, 81 F.3d at 581. For a discussion of the government's ineligibility argument based upon the plain language of 28 U.S.C. § 2412(d)(2)(B)(ii) (amended 1997), see *infra* note 93.

92. The government cited the post-enactment testimony of Senator DeConcini, a leading sponsor of the EAJA:

> In the West, and I suspect in other parts of the country, small farmers often band together to form agricultural cooperatives. They have often been considered as a unit particularly in determining their assets for insurance and borrowing purposes. Such aggregate treatment would cause the whole cooperative to exceed the [then] $5 million limitation.

Texas Food, 81 F.3d at 581 n.3 (citing *Reauthorization of the Equal Access to Justice Act: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong. 17 (1983) (testimony of Sen. DeConcini)).

93. In support of its position, the government pointed to the EAJA's net worth exemption for several specified businesses. *See id.* at 581 (citing the net worth exemption for agricultural cooperatives and certain non-profit businesses, pursuant to 28 U.S.C. § 2412(d)(2)(B)(ii) (amended 1997)). From these enumerated exemptions and the statutory canon "expressio unius est exclusio alterius" ("the expression of one thing is to the exclusion of the other"), the government asserted that Congress intended that courts aggregate the net worth of the members of all other types of businesses not specified, such as NAWGA. *See id.* For a discussion and criticism of this argument, see *infra* note 115 and accompanying text. The government then argued that, based on public policy, the association should be ineligible for fees under 28 U.S.C. § 2412 (d)(2)(B)(ii) because the provision implicitly requires aggregation of the net worth and size of a trade association's individual members when the association is representing primarily the members' interest in litigation. *See Texas Food*, 81 F.3d at 582.

The government further argued that, pursuant to *State of Louisiana* ex. rel. *Guste v. Lee*, the presence of ineligible parties in the litigation, NAWGA's members, was a special circumstance that would render unjust an award of fees to an otherwise eligible association. *See id.* at 582 n.7.

Food court found that the EAJA's plain language did not support the government's position with respect to the EAJA's criteria for determining the eligibility of trade associations.[94] In the absence of such support for the government's position, the court refused to accept the government's arguments based on the EAJA's plain language and post-enactment explanations.[95] Thus, the Fifth Circuit affirmed the lower court's decision, holding that, pursuant to the EAJA's plain language, NAWGA qualified for an award of attorneys' fees.[96]

2. The Trade Association as the Sum of its Parts: The Sixth Circuit

In *National Truck Equipment Ass'n v. National Highway Traffic Safety Administration*,[97] the Sixth Circuit held that courts should consider the net worth of each member of a trade association when evaluating whether the association itself is entitled to an EAJA fee award.[98] In *National*, National Truck Equipment Association (NTEA) petitioned for an EAJA award after obtaining judicial review of an administrative order that set steering-wheel safety standards.[99] A Special Master denied NTEA's EAJA petition based on the fact that the government's position was substantially justified.[100] On appeal,

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Like the Ninth Circuit, however, the court in *Texas Food* criticized the government for inappropriately applying a "mixed eligibility" test. *See id.* The court in *Texas Food* also pointed out that *Guste*'s special circumstances test only applies to suits prosecuted by multiple parties, some of which are EAJA-eligible and some of which are EAJA-ineligible. *See id.* Because NAWGA's members were not co-plaintiffs in the underlying action, the court refused to employ *Guste*'s special circumstances test. *See id.*

94. *See Texas Food*, 81 F.3d at 581. The court in *Texas Food* cited the "clear and unambiguous" eligibility criteria of 28 U.S.C. § 2412(d)(2)(B). *See Texas Food*, 81 F.3d at 581.

95. *See Texas Food*, 81 F.3d at 582. In summing up its analytical approach to the government's statutory construction argument, the court in *Texas Food* stated that the "inquiry into the applicability of [the EAJA] must begin and must end with [the EAJA's] clear and unambiguous words . . . ." *Id.*

96. *See id.*

97. 972 F.2d 669 (6th Cir. 1992).

98. *See id.* at 674.

99. *See id.* at 670. Compliance with the proposed safety standards would have required NTEA's members either to obtain special manufacturer certifications or to devise safety and crash tests to ensure its members' adherence to the standards. NTEA argued that neither of these alternatives would have been financially feasible for its members. *See id.*

100. *See id.* at 670-71 (citing 28 U.S.C. § 2412(d)(1)(A), which immunizes the government

the Sixth Circuit disregarded the Special Master's finding that the government's position had been substantially justified.[101] Instead, the court addressed the government's allegation that NTEA included EAJA-ineligible parties and, thus, was ineligible for an EAJA award.[102] Contrary to the findings of the Fifth and Ninth Circuits, the Sixth Circuit found that the EAJA's plain language implies that courts generally should consider the individual net worth of the members of an association when evaluating the EAJA eligibility of an association.[103]

The *National* court observed that the EAJA grants certain organizations an exemption from the EAJA's net worth eligibility criteria.[104] From this observation, the court reasoned that Congress intended for courts to consider the EAJA eligibility of each member of all types of organizations that are not specifically exempted from the EAJA's net worth eligibility criteria.[105] The *National* court found further support for its holding in the EAJA's legislative history.[106] In particular, the court drew support from the Model Rules of Administrative Agency Proceedings.[107] The court noted that the

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from EAJA liability in the event that its position is substantially justified). Although the Special Master based its decision on the fact that the government's position was substantially justified, the Special Master noted that the qualifications of the association's members were irrelevant for the purpose of awarding EAJA fees. *See id.* at 670.

101. *See id.* at 669. Note, however, that the *National* court did not expressly disagree with the Special Master's finding regarding substantial justification.

102. *See National*, 972 F.2d at 671-74.

103. *See id.* at 674.

104. *See id.* at 673 (citing 5 U.S.C. § 501(c)(3) (1988)).

105. *See id.* The *National* court employed the reasoning advocated by the government in *Texas Food*. *See id.*; *see also supra* note 93 and accompanying text (discussing the government's legal position in *Texas Food* and the court's response to the government's position). The *National* court also applied the statutory canon, "expressio unius est exclusio alterius," to 5 U.S.C. § 501(c)(3) and concluded that Congress intended for courts to consider the EAJA eligibility of the members of all business associations not specifically exempted from the net worth criteria contained within § 501(c)(3). *See National*, 972 F.2d at 674. For a critique of the *National* court's reasoning with respect to the latter point, see *infra* note 113 and accompanying text.

106. *See National*, 972 F.2d at 673. The court proceeded from the premise that Congress intended 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.'" *Id.* at 672 (quoting SEC v. Comserv Corp., 908 F.2d 1407, 1415-16 (8th Cir. 1990)).

107. *See id.* at 672-73. The Model Rules were promulgated in 1981 and govern EAJA awards in administrative agency proceedings. *See id.* at 672. The *National* court cited Model

commentary to Model Rule 0.104(g) specifically addressed the potential for EAJA eligibility concerns in the context of a petitioning trade association.[108] The court also noted the commentary's suggestion that the qualifications of a trade association's members may be relevant when the association is litigating primarily on behalf of its members.[109] In light of the Model Rules, their commentary, and the EAJA's statutory language, the court denied NTEA's EAJA petition.[110]

IV. AN ANALYSIS OF THE CIRCUIT COURT DECISIONS CONCERNING THE EAJA ELIGIBILITY OF TRADE ASSOCIATIONS

A. The Plain Language Arguments

The *Love* and *Texas Food* courts justifiably relied on the EAJA's plain language as support for their holdings. The EAJA's plain

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Rule 0.104(f), which requires that when the interests of an EAJA petitioner are closely aligned with other parties, agencies should look beyond the EAJA eligibility of the EAJA petitioner: "The net worth ... of the applicant and all of its affiliates shall be aggregated to determine eligibility." 46 Fed. Reg., 32,900, 32,912 (1981), *quoted in National*, 972 F.2d at 672. The Sixth Circuit amplified this point by noting the commentary to Model Rule 0.104(f): "'The intent of Congress in passing the [EAJA] was to aid truly small entities rather than those that are part of larger groups of affiliated firms . . . .'" *National*, 972 F.2d at 672 (quoting Administrative Conference of the United States, Equal Access to Justice Act: Agency Implementation, 46 Fed. Reg. 32,900, 32,903 (1981)).

The *National* court next cited Model Rule 0.104(g). *See National*, 972 F.2d at 672. Model Rule 0.104(g) provides that EAJA-eligible applicants that litigate primarily on behalf of ineligible applicants are not eligible for an EAJA fee award: "'An 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.'" *See National*, 972 F.2d at 672 (quoting Model Rules, 46 Fed. Reg. at 32,912 (1981)).

108. *See National*, 972 F.2d at 672.

109. *See id.* The commentary to Model Rule 0.104(g) provides:

> [T]rade associations may sometimes become involved in litigation on their own account (e.g., as employers) as well as in the interests of their membership. On reflection, we believe the best way of handling this situation is through the provision on participation on behalf of others. When a proceeding involves a trade association independent of its membership, the association's eligibility should be measured individually, like any other applicant's; when an association is representing primarily the interests of its members, the agency can examine the facts of the particular situation.

Model Rules, 46 Fed. Reg. 32,900, 32,903 (1981).

110. *See National*, 972 F.2d at 674.

language strongly suggests that courts should assess the EAJA eligibility of an association without regard to its members' individual qualifications.[111] The EAJA's subsection that governs a party's eligibility status lists several types of potentially eligible business entities, including any "association . . . the net worth of which did not exceed $7,000,000 at the time the civil action was filed . . . ."[112] Congress had the option of specifying further net worth restrictions on associations' EAJA eligibility, but chose not to include such restrictions.[113]

The *National* court failed in its attempt to rebut the *Love* and *Texas Food* courts' interpretations of the EAJA's statutory language. The *National* court highlighted the EAJA's net worth exclusion for agricultural cooperatives and inferred from that exclusion that the EAJA eligibility of all other associations must depend on their members' individual eligibility.[114] This inferential chain lacks a necessary premise. By itself, the EAJA's exemption of certain types of associations from its net worth ceiling says at most that all other types of associations not specified are not exempt from the net worth ceiling. Contrary to the *National* court's inference, the EAJA does not suggest that each member of an association should be evaluated individually for EAJA eligibility. The *National* court's inference might be more compelling if the EAJA further specified the way in which courts should treat the net worth of each member of agricultural cooperatives. In fact, however, the agricultural cooperative exemption is silent as to whether courts should consider

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111. *See* 28 U.S.C.A. § 2412(d)(2)(B)(ii) (West Supp. 1997) (stating the EAJA eligibility criteria for trade associations, but omitting any consideration of associations' members).

112. *Id.*

113. The court in *Texas Food* aptly acknowledged this point:

> Congress surely understood that "associations" are made up of constituent members, some more wealthy and larger than others, yet who have joined together to further a common business purpose. It is not implausible that Congress would think it appropriate to treat associations qua associations instead of atomizing the body politic of each association, then inspecting and distinguishing each component member to determine whether each is individually eligible.

Texas Food, 81 F.3d at 582. This excerpt from the *Texas Food* opinion offers compelling support for the argument that the EAJA's plain language does not require courts to look beyond the EAJA eligibility of an association.

114. *See National*, 972 F.2d at 673-74.

the net worth of each member of an agricultural cooperative.[115]

115. *See* 28 U.S.C.A. § 2412(d)(2)(B)(ii) (omitting any mention of an associations' membership). Although the EAJA does not specify whether, or how, courts should consider the net worth of each member of an agricultural cooperative, the EAJA's legislative history strongly suggests that Congress contemplated that courts would in fact consider the membership of such associations and would disqualify such associations in the event that the aggregate net worth of such associations' members exceeds $7 million. Most notable in this respect are Senator Hayakawa's statements, which he made while proposing an EAJA amendment that culminated in the net worth exclusion for agricultural cooperatives:

> My amendment would allow agriculture cooperatives whose net worth may exceed $[7] million to qualify for reimbursements under this act without regard to net worth. The reason is as follows:
>
> While [the EAJA's] definition of corporations[, associations,] or organizations [as EAJA parties] appears to work effectively for most groups, it fails to take into consideration the basic characteristic of agricultural cooperatives. Agricultural cooperatives generally operate at cost with respect to their dealings with member/patrons. These members are growers who are not simply investors or stockholders but are participants in the business. All benefits and risks assumed by the cooperative are shared equitably by each of the grower-members. The net worth of the cooperative as an entity is not significant for the purpose of the [EAJA's] definition [of a "party"].

125 CONG. REC. S10,918 (daily ed. July 31, 1979) (statement of Sen. Hayakawa). Senator Hayakawa's statement is notable because it implies that members of Congress believed that the financial status of associations' individual members normally should be emphasized in the context of net worth calculation. Senator Hayakawa conveyed this point by characterizing an agricultural cooperative's exclusive *raison d'être* as serving the interests of its members, and by stating that the net worth of a cooperative as an entity, rather than as an aggregation of its individual members, is insignificant for the purpose of calculating a cooperative's net worth.

Moreover, Senator Thurmond's statement in approval of Senator Hayakawa's proposed amendment demonstrates that members of Congress believed that courts would consider the membership of EAJA-petitioning businesses:

> Proceedings are usually brought against the members [of agricultural cooperatives] collectively in the name of the particular cooperative to which they belong; and *as a group*, they would undoubtedly exceed the $[7],000,000 net worth limitation for associations or organizations .... [T]he great majority of these farmers would qualify under the [EAJA's] [then] current $1,000,000 net worth limitation for individuals.

125 CONG. REC. S10,918 (daily ed. July 31, 1979) (statement of Sen. Thurmond) (emphasis added). In addition to showing that members of Congress believed that courts should consider the EAJA qualifications of associations' members, Senator Thurmond's comments make a far more profound suggestion. His comments suggest that not only are the individual members' eligibility criteria relevant, but also that their net worth should be aggregated "as a group" to determine an association's EAJA eligibility. *See id.* This implicit aggregation requirement poses a much greater barrier to EAJA eligibility because, theoretically, an association comprised strictly of EAJA-eligible parties could be rendered ineligible by the sheer number of its members whose net worths aggregate in excess of the $7 million limit.

B. The Congressional Intent Arguments

As a general rule, in the face of clear and unambiguous statutory language, most courts will not resort to evidence of congressional intent when interpreting a statute.[116] However, when the application of a statute's plain language leads to an unreasonable result, determining, and adhering to, congressional intent may nonetheless be warranted.[117]

Abiding by the EAJA's plain language, the court in *Texas Food* awarded attorneys' fees to an association that consisted of multi-billion dollar corporations[118] and that had litigated against the government solely for the benefit of those corporations.[119] This outcome, while consistent with the EAJA's plain language,[120] is nonetheless inconsistent with the purposes of the EAJA.[121] Congress intended for the EAJA to alleviate the financial concerns of "small business owners"[122] and those individuals "for whom cost may be a deterrent to vindicating their rights."[123] Congress did not intend for a corporation with $13 billion in assets, or any of its billion-dollar associates, to recover through the representation of its trade association[124] attorneys' fees that it could not recover under the

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116. *See* 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.04 (5th ed. 1992).

117. *See* United States v. American Trucking Ass'n, 310 U.S. 534, 543 (1940). The Supreme Court has recognized that when strict adherence to the words of a statute "[leads] to absurd or futile results," the Court should "look[] beyond the words to the purpose of the act." *Id.* Even "when the plain meaning [does] not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole,'" the Court should "follow[] the purpose, rather than the literal words." *Id.*; *see also* Samuels, Kramer & Co. v. Commissioner, 930 F.2d 975, 980-82 (2d Cir. 1991) (modifying the words of a statute to agree with inconsistent legislative intent); Rod Warren Ink v. Commissioner, 912 F.2d 325, 326 (9th Cir. 1990) (stating that courts may look beyond a statute's clear meaning in cases of contrary congressional intent). Moreover, courts are presently showing a trend in favor of considering legislative intent as a primary source of statutory interpretation in addition to a statute's plain language. *See* SINGER, *supra* note 116, § 46.07.

118. *See Texas Food*, 81 F.3d 578, 582 (5th Cir. 1996).

119. *See id.*

120. *See generally* 28 U.S.C. § 2412 (1994), *as amended by* Act of Dec. 17, 1997, 28 U.S.C.A. § 2412 (West Supp. 1997).

121. *See supra* Part II.A.

122. *See supra* note 25.

123. *See supra* note 25.

124. One way in which EAJA-ineligible members of a trade association may indirectly

EAJA.

In light of the fact that the decisions in *Love* and *Texas Food* resulted in EAJA awards that conflicted with congressional intent, it is not surprising that neither the *Love* court nor the *Texas Food* court faithfully addressed the government's legislative intent arguments.[125] The *Love* court, perhaps cognizant of the inconsistency between its holding and the congressional intent underlying the EAJA, failed to broach in any way the issue of congressional intent.[126] Similarly, the court in *Texas Food* purported to recognize the issue of congressional intent, but effectively ignored it: "The [EAJA's] purpose, by its plain language, is to make associations eligible for an award on the basis of each association's independent qualifications."[127] As this statement suggests, the court attempted to parlay its strong plain language rationale into a congressional intent rationale by discerning congressional intent from the plain language of the EAJA rather than from the EAJA's legislative history.

In contrast to the *Love* and *Texas Food* courts' failure to address the issue of congressional intent regarding EAJA eligibility, the *National* court fully addressed the issue of who Congress intended to benefit under the EAJA.[128]

C. Superiority of the National Holding

Although the *National* court effectively disregarded the EAJA's plain language,[129] it nonetheless reached the proper decision. The *National* court failed to establish that the EAJA's net worth exclusions imply anything about whether courts should evaluate the EAJA eligibility of associations' members.[130] However, this failure does not detract from the fact that there is abundant evidence supporting the *National* court's central proposition. Despite the *Texas*

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benefit from an EAJA award to their association is through the lower membership dues that likely would result from lower operating costs. Lower operating costs would presumably result from the lower litigation costs.

125. *See generally Love*, 924 F.2d 1492; *Texas Food*, 81 F.3d 578.
126. *See generally Love*, 924 F.2d 1492.
127. *Texas Food*, 81 F.3d at 582
128. For a description of these parties, see *supra* note 25 and accompanying text.
129. *See supra* Part IV.A.
130. *See supra* Part IV.A.

Food court's statements to the contrary,[131] there is abundant legislative history that suggests that Congress contemplated that courts should consider the individual net worth of associations' members.[132]

Beyond the legislative history that suggests that *National*'s holding is consistent with congressional intent, there are two public policy reasons that support the propriety of *National*'s holding. First, taxpayers, as the ultimate source of EAJA funds, should not be held accountable for funding the attorneys' fees of large corporations that, coincidentally, are members of impecunious trade associations. It is far more appropriate that the shareholders or other beneficiaries of such well-endowed corporations bear the burden of those corporations' operating costs.

A second policy concern relates to the previous consideration: the courts' holdings in *Texas Food* and *Love* create an incentive for presently unassociated EAJA-ineligible businesses to align themselves with an EAJA-eligible association for the purpose of litigating cost-free against the federal government. The growth of such spurious associations can only produce a greater unwarranted expense for the American taxpayer.

V. PROPOSAL

As the courts in *Love* and *Texas Food* correctly observed, the EAJA's plain language seems to compel courts to adjudge trade associations' EAJA eligibility without regard to the individual net worth of such associations' members.[133] The aforementioned policy reasons render this result unappealing.[134] In addition, such a result partially defeats Congress's purposes for enacting the EAJA.[135]

While the *National* court went to great lengths to circumvent the EAJA's plain language, its efforts failed, and the court ultimately supported its holding solely with legislative history.[136] In light of the

131. *See Texas Food*, 81 F.3d at 581.
132. *See supra* note 115.
133. *See supra* Part IV.A.
134. *See supra* Part IV.C.
135. *See supra* Part II.A.
136. *See supra* Part III.B.2.

National opinion's weaknesses and the prevalence of the "plain meaning rule,"[137] it is doubtful that many courts will follow *National*'s holding. Congress should respond to this prospect by amending the EAJA to eliminate the EAJA's extant eligibility loophole for wealthy members of trade associations. The most effective amendment for this purpose would be a simple addition to the EAJA's definition of an eligible party.[138] The amended section might read:

> "party" means . . . any association . . . that neither possesses a net worth in excess of $7 million nor has a member that possesses a net worth in excess of $7 million.

This amendment would still provide EAJA access for every party that Congress intended to have such access, including businesses with a net worth of less than $7 million. In the event that a trade association possesses an EAJA-eligible member, but is disqualified based on the proposed amendment because one of the association's other members was EAJA-ineligible, the EAJA-eligible member could still litigate in its own capacity as an EAJA-eligible individual. In addition, the amendment would deny EAJA access to parties who clearly can afford access to justice, such as the corporate giants in *Texas Food.*

VI. CONCLUSION

EAJA-ineligible parties are presently abusing the EAJA by taking an unwarranted free ride through the justice system at taxpayers' expense. Although courts such as the *National* court occasionally may bend the EAJA's plain language beyond its breaking point to curb perceived abuses of the EAJA, a more reliable solution is

137. *See* SINGER, *supra* note 116, § 46.01. The plain meaning rule states that, in the absence of ambiguous statutory language, courts may not use sources extrinsic to a statute's plain language in an effort to attribute meaning to a statute that is not supported by the statute's plain language. *See id.*; *see also* Pacificorp Capital, Inc. v. United States, 852 F.2d 549, 551 (Fed. Cir. 1988); Swarts v. Siegel, 117 F. 13, 18-19 (8th Cir. 1902) (declaring that there is "no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses").

138. *See* 28 U.S.C.A. § 2412(d)(2)(B) (West Supp. 1997).

necessary. Congress has the ability to provide such a solution by amending the EAJA in accordance with this Note's proposed EAJA amendment. Such an amendment would obviate any future attempts to frustrate the EAJA's eligibility criteria through the use of trade association puppetry.

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