IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-12751-DD

UNITED STATES OF AMERICA, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, LISA JACKSON, Administrator, in her official capacity, and GWENDOLYN KEYES FLEMING, Regional Administrator, Region IV, in her official capacity,
Defendants-Appellants,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA and FRIENDS OF THE EVERGLADES, INC.,
Plaintiffs-Appellees.

On Appeal from the
United States District Court for the Southern District of Florida
Case No. 04-21448-civ-Gold/McAliley

REPLY BRIEF FOR THE FEDERAL GOVERNMENT APPELLANTS

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THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING A SPECIAL FACTOR RATE ENHANCEMENT

As the United States' opening brief showed, the district court's decision to grant a "special factor" attorneys fees award, for approximately three times the statutory limit, was an abuse of discretion. The court erroneously departed from the rate cap provided in the Equal Access to Justice Act ("EAJA"), 28 U.S.C. 2412, relying on factors with an impermissibly broad and general application, and also wrongly disregarded relevant Supreme Court authority and court of appeals authority and the well-established principle that waivers of sovereign immunity, such as that in EAJA, must be construed narrowly.

EAJA provides that the hourly rate for attorneys fees may not exceed $125 per hour "unless the court determines that an increase in the cost of living or a *special factor*, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. 2412(d)(2)(A)(ii) (emphasis added). The Supreme Court has provided guidance in the application of the "special factor" exception, noting that: (1) Congress believed the statutory fee rate was generally adequate, (2) the exception is not to be applied for an attorney's "general legal competence," and (3) "to preserve the intended effectiveness of [EAJA's rate] cap," the special factors envisioned by the exception must not have

broad and general application. *Pierce v. Underwood*, 487 U.S. 552, 572-573 (1988). This Court has recognized that, in *Pierce*, "the Supreme Court adopted a narrow construction of the 'special factors' that would warrant a departure from [EAJA's] statutory hourly rate." *Pollgreen v. Morris*, 911 F.2d 527, 537 (11th Cir. 1990) (quoting *Pierce*, 487 U.S. at 572-573) (internal brackets omitted). The district court ignored this guidance.

A. Knowledge and skills acquired simply by practicing in a particularized area of law are not sufficiently special or exceptional to warrant a departure from EAJA's maximum reimbursement rate -- The United States' opening brief explained that the district court erred in concluding that EAJA's special factor exception was warranted where the only purported knowledge and skills that attorney John Childe possessed were those garnered from practicing in a particularized area of law. Opening Brief ("OBr.") at 11-30. In response, Friends simply restates the conclusory findings of the district court. Br. 13-14, 17, 21-23, 27, 29-30. Friends, however, does not address the fundamental error underlying the court's enhanced award, which is the impermissible breadth of its application. The attributes listed by the district court can apply generally and equally to *any* attorney who practices in any specific area and, therefore, cannot be a proper basis for EAJA's exception.

Our opening brief showed that each trait that the district court relied on to grant the special factor exception derived solely from Mr. Childe's basic practice in the area of environmental litigation. OBr. at 11-30; Govt. Tab 395 at 201; Govt. Tab 405 at 213-214. Neither the court nor Friends identified any other source of knowledge or skills that formed the basis of the court's enhancement. As we explained (OBr. 21-30), particularized, practice-based knowledge and skills can be ascribed to any attorney who has a specialized practice. Accordingly, this category of knowledge or skills cannot qualify for EAJA's special factor exception because it has almost limitless application. *See infra*. And, this Court has recognized that the Supreme Court rejected the application of EAJA's special factor exception for factors that have "broad and general application" or are "applicable to a broad spectrum of litigation," *Jean v. Nelson*, 863 F.2d 759, 775, 776 (11th Cir. 1988), *aff'd on other grounds*, 496 U.S. 154 (1990) (quoting *Pierce*, 487 U.S. at 573) (internal quotation marks omitted). Specifically, this Court explained that, under *Pierce*, "nothing 'routine' or 'generally applicable' to a 'broad spectrum of litigation' can count" as a special factor under EAJA. *Id.* at 776.

The district court here erred not only by relying on factors that are impermissibly general and applicable to any attorney who prepares reasonably for litigation, *Pierce*, 487 U.S. at 573, but also by failing to distinguish in any way

between the type of knowledge or skill that Mr. Childe acquired from his practice and the type acquired by any other reasonably diligent attorney practicing in a particular area of the law.

For example, as part of its conclusory findings, the district court found that Mr. Childe allegedly had: (1) "expertise in the narrow area" of a statute related to his practice; (2) "particular knowledge of [the] interrelationship" between two specific statutes; (3) 28 years of practice; (4) "extensive knowledge of the issues" involving a specific statute; and (5) "profound understanding" of the subject matter underlying this case. Govt. Tab 395 at 201; Govt. Tab 405 at 213-214. Those descriptions, however (*e.g.*, particularized expertise in statutes, issues and subject-matter that makes up one's area of practice), can apply to an untold number of attorneys practicing in any number of legal areas. OBr. 21-30. That is particularly true given the recognized trend toward practice specialization in the legal profession. *See, e.g., Bates v. State Bar of Arizona*, 433 U.S. 350, 403 n.13 (1977) ("[w]ith the increasing complexity of legal practice, perhaps the strongest trend in the profession today is toward specialization"); Chief Justice William H. Rehnquist, *Dedicatory Address: The Legal Profession Today*, 62 Ind. L.J. 151, 153 (1987) (noting increasing specialization within the legal profession); O. Randolph

Rollins, *The Coming of Legal Specialization*, 19 U. Rich. L. Rev. 479 (1985) (same).

Under the district court's analysis of EAJA's special factor provision, Congress' limited exception is wrongly destined to become the rule. *See, e.g.*, *Perales v. Casillas*, 950 F.2d 1066, 1078 (5th Cir. 1992) ("we believe that the Supreme Court in [*Pierce v.*] *Underwood* intended to distinguish nonlegal or technical abilities possessed by, for example, patent lawyers and experts in foreign law, from other types of substantive specializations currently proliferating within the profession. In a sense, every attorney practicing within a narrow field could claim specialized knowledge."); *F.J. Vollmer Co., Inc. v. Magaw*, 102 F.3d 591, 598-599 (D.C. Cir. 1996) ("To be sure, lawyers practicing administrative law typically develop expertise in a particular regulated industry, whether energy, communications, railroads, or firearms. But they usually gain this expertise from experience, not from the specialized training justifying fee enhancement. If expertise acquired through practice justified higher reimbursement rates, then all lawyers practicing administrative law in technical fields would be entitled to fee enhancements. * * * [N]othing in the EAJA or its legislative history indicates that Congress intended this result.") (internal citations omitted).

Such a result cannot be reconciled with EAJA or the Supreme Court's interpretation of the statute. *See* OBr. 11-15. The Court has pointed out that EAJA's special factor exception must be interpreted in a manner that is not broad and will "preserve the intended effectiveness of [EAJA's rate] cap." *Pierce*, 487 U.S. 553-554. That prescription is not accomplished, however, if EAJA's cap is exceeded based only on knowledge or skills acquired from basic, competent practice within a speciality. Here, reversal is required because the district court disregarded the Supreme Court's prescription and granted a fee enhancement on that improper basis.

B. Case complexities alone do not mandate departure from Congress' limit on fee reimbursements -- The underlying theme of Friends' response brief is that EAJA's special factor exception applies here because the merits case was "complex." Br. 2, 14, 17, 22, 23-27, 29, 32. In particular, Friends refers to alleged complexities associated with the statutory framework, case history, subject matter, and issues. *Id.* Notwithstanding Friends' view of the litigation, the complexity or difficulty of a case, without more, cannot warrant exceeding the EAJA rate cap.

In *Pierce*, the Supreme Court held that a special factor exception may not be granted for reasons such as the "novelty and difficulty of issues" in a case because such factors are applicable to a broad range of cases. *Pierce*, 487 U.S. at 573. This

Court has also made that observation. *See Pollgreen v. Morris*, 911 F.2d at 537 ("Although the [*Pierce*] Court refused to enumerate what special factors were appropriate, it rejected the lower court's reliance on the novelty and difficulty of issues, the undesirability of the case, the work and ability of counsel, * * * the results obtained * * * and the contingent nature of the fee.") (quoting *Pierce*, 487 U.S. at 572-573) (ellipses in original) (internal brackets and quotation marks omitted); *United States v. Aisenberg*, 358 F.3d 1327, 1344 (11th Cir. 2004) (relying on *Pierce* to reject a special factor enhancement where the plaintiffs' attorneys incurred economic detriment in "representing unpopular clients and in handling the complex legal, factual, and professional obstacles in this case.").

While it is arguably true that the practice of administrative law in certain areas involves difficult and complex subject matter, issues, and statutory and regulatory schemes, *Pierce* proscribes the application of EAJA's special factor exception if purported complexities do not rise to a level that requires "distinctive knowledge" or "specialized skill" for the litigation of the case. 487 U.S. at 572-573. The First Circuit heeded that proscription in *Atlantic Fish Spotters Ass'n v. Daley*, 205 F.3d 488 (1st Cir. 2000), and declined the plaintiffs' request for a special factor enhancement, pointing out that:

> Modern administrative law involves, in practically every area, a tangle of discrete regulations, various precedents, a bureaucratic vocabulary and some background knowledge about the kinds of events commonly involved (which may, for example, be scientific, business related, or medical). It is almost always helpful for counsel to have had prior experience in the area, usually the more the better. But in most cases an otherwise competent lawyer can -- albeit at the cost of some extra time -- learn enough about the particular controversy to litigate in the area adequately, although perhaps not as well as a long-time specialist.

Id. at 492 (parentheses in original). The Second Circuit employed similar reasoning in *Healy v. Leavitt*, 485 F.3d 63 (2d Cir. 2007). There, the court refused to apply EAJA's special factor exception, explaining that:

> This case, although certainly challenging, is typical of most litigation brought under modern administrative statutes. While one cannot deny the complexity of the Medicare statute and the regulations promulgated thereunder, this regulatory scheme is no more complex than countless other federal regulatory schemes, and attaining proficiency in these areas is not beyond the grasp of a competent practicing attorney with access to a law library and the other accoutrements of modern legal practice.

Id. at 70 (citations and internal quotation marks omitted).

The Tenth Circuit echoed this point in *Chynoweth v. Sullivan*, 920 F.2d 648 (10th Cir. 1990), where the court rejected the plaintiff's argument that social security benefits law was a specialized practice warranting enhancement under

EAJA's exception. The court found that "[a]lthough Social Security benefits law involves a complex statutory and regulatory framework, the field is not beyond the grasp of a competent practicing attorney with access to a law library and the other accoutrements of modern legal practice." *Id.* at 650. The court held that EAJA's "statutory cap may be exceeded only in the 'unusual situation' where the legal services rendered require specialized training and expertise unattainable by a competent attorney through a diligent study of the governing legal principles." *Id.* (citation omitted).

Here, even assuming the merits case involved the complexities that Friends alleges, neither Friends nor the district court demonstrated that the case was so complicated that only an attorney with "distinctive knowledge" or "specialized skill" could litigate the matter. *See* OBr. 31-36. Thus, no special factor enhancement is warranted. And, even if any complexities in this case required such rarified knowledge or skills, we have explained that Friends presented nothing to demonstrate that Mr. Childe's years of practice bestowed such attributes on him. *See* OBr. 30-31.

1. The affidavits on which Friends relies do not support a special factor enhancement -- Friends states that the magistrate in this case "based her findings" on the affidavits of John Childe and Juanita Greene, Conservation Chair

of Friends of the Everglades. Br. 27. Indeed, the magistrate's report and recommendation cites to the affidavits of Mr. Childe and Ms. Greene to support the finding that "for 28 years [Mr. Childe] has specialized in public interest environmental litigation, participating in more than 150 federal environmental cases," and that he has "extensive knowledge of the issues surrounding the Everglades Restoration Act." Govt. Tab 395 at 201. However, as we showed in our opening brief (OBr. 21-30), and *supra* at 3-9, the mere fact that Mr. Childe has practiced in a particular area of the law, and allegedly has extensive knowledge of issues involving a statute in that area of the law, are not an adequate grounds for enhancing EAJA's statutory cap. *See also Chynoweth*, 920 F.2d at 650 ("Incomparable expertise, standing alone, will not justify the higher rate.").

Friends also notes that Ms. Greene's affidavit states that Mr. Childe "has represented Friends in Everglades matters since 1993," and he was asked to represent Friends "because there were no attorneys that Friends knew in the State of Florida with Mr. Childe's experience representing [e]nvironmental groups in Federal Court on CWA issues." Br. 28. Neither of Ms. Greene's statements constitutes a basis for exceeding Congress' cap on fee reimbursements. Mr. Childe's representation of Friends in several matters (Br. 28-29) since 1993 is simply irrelevant where Ms. Greene's statements fail to show that the repeated

representation establishes that Mr. Childe had "distinctive knowledge" or "specialized skill," *Pierce*, 487 U.S. at 572, that would warrant a special factor enhancement.

Ms. Greene's second statement fares no better. Her affidavit indicates that "[t]here were no attorneys that Friends knew of in the State of Florida with Mr. Childe's experience." Br. 28. That statement does not show or explain how Mr. Childe's "experience" translates into "distinctive knowledge" or "specialized skill," or some other attribute "beyond the grasp of a competent practicing attorney with access to a law library and the other accoutrements of modern legal practice," *Chynoweth*, 920 F.2d at 650.

To the extent Ms. Greene's affidavit seeks to make the point that Friends wanted an attorney with the particular kind of experience that Mr. Childe possessed, the D.C. Circuit in *In re Sealed Case 00-5116*, 254 F.3d 233 (D.C. Cir. 2001), rejected the plaintiffs' attempt to obtain a special factor enhancement on a similar ground involving election law. The court held that it "[could] not award Appellants fees exceeding $125 simply because they wanted to hire attorneys who specialize in federal election law, have experience in federal litigation, and were familiar with the administrative record." *Id.* at 236. The court continued, pointing out that "[a]lthough federal election law 'involves a complex statutory and

regulatory framework, the field is not beyond the grasp of a competent practicing attorney with access to a law library and the other accoutrements of modern legal practice.'" *Id.* (quoting *Chynoweth*, 920 F.2d at 650). "[I]n all federal cases, clients presumably want to be represented by an attorney with experience in federal litigation and who is familiar with the record at issue." *Id.* "These are not special factors. * * * Rather, * * * they broadly and generally apply to countless cases litigated in the federal courts." *Id.* (citing *Pierce*, 487 U.S. at 573). The court's rationale is wholly applicable here and renders Ms. Greene's statements an improper basis for applying EAJA's special factor exception.[1/]

2. This Court's position on EAJA's special factor exception --

Friends mischaracterizes the United States' arguments concerning this Court's position on EAJA's special factor exception. Friends states: "EPA contends that in *Jean v. Nelson*, 863 F.2d 759, 774 (11th Cir. 1988), this Court did not directly address how to establish whether an attorney has distinctive knowledge or specialized skill to determine whether a special factor enhancement should be applied." Br. 14 (citing OBr. 18). That is not the argument the United States made.

[1/] Friends relies on the affidavit of Mr. Childe to simply reiterate his practice experience and representation of Friends. Br. 28-29. We have already addressed these points.

In our opening brief, the United States pointed out that:

> This Court has not directly addressed the issue of the type of knowledge that qualifies for a special factor exception under EAJA. The Court, however, did examine the exception in *Jean v. Nelson*, 863 F.2d 759, 774 (11th Cir. 1988), *aff'd on other grounds*, 496 U.S. 154 (1990).

OBr. 18.

Friends does not take issue with either of those statements. Our opening brief goes on to explain (OBr. 18-19) that the majority in *Jean* did not decide the issue of whether a special factor enhancement was appropriate for the plaintiffs' attorneys. Rather, it remanded the issue to the district court. 863 F.2d at 762, 774, 776. We further explain that the *Jean* majority provided guidance, albeit in dicta, on the special factor issue and on interpreting the Supreme Court's analysis of EAJA's special factor exception. OBr. 19. Friends does not dispute any of this.

As to Friends' contention (Br. 14) that the *Jean* Court *did* "directly address how to establish whether an attorney has distinctive knowledge or specialized skill to determine whether a special factor enhancement should be applied," it is important to point out that although the *Jean* Court's dictum directly *examined* the issue of how the district court might establish whether counsel has distinctive knowledge or specialized skill warranting a special factor enhancement on remand,

the Court did not set forth a specific test for deciding the issue. In fact, Friends itself indicates that the *Jean* majority merely provides "guidance" (Br. 15) and "suggest[ions]" (Br. 16) concerning the special factor question.

Friends' final contention is that the *Jean* Court "suggests" that "if the complexity of the case is such that * * * practice specialty is needed, then the special factor under the EAJA can be applied." Br. 17 (citing *Jean*, 863 F.2d at 774). That is incorrect. The *Jean* Court made no such correlation between practice specialties and case complexity.

C. The district court erred in concluding that Mr. Childe's alleged distinctive knowledge or specialized skill was essential to the litigation of this case -- In *Pierce*, the Supreme Court explained that EAJA's special factor provision applies to distinctive knowledge or specialized skills that are "*needful* for the litigation in question -- as opposed to an extraordinary level of the general lawyerly knowledge and ability *useful* in all litigation." *Pierce*, 487 U.S. at 572 (emphases added). Our opening brief shows (OBr. 31-36) that, even assuming that Mr. Childe had knowledge or skill that qualified for EAJA's special factor exception, Friends did not demonstrate that such attributes were "needful," *Pierce*, 487 U.S. at 572, to litigate the merits case. While Friends attempts to challenge the

United States' arguments on this point by repeating the district court's findings (Br. 29-30), that effort is ineffectual.

None of the district court's findings show that any distinctive knowledge or specialized skill was required to litigate Friends' Administrative Procedure Act challenges. *See* OBr. 31-36. Although the court identified technical terms that were used in the litigation, and noted that the case involved "scientific principles" (Govt. Tab 395 at 201; Govt. Tab 405 at 214 n.1), that fact alone does not mean that any rarified knowledge or skill was essential or that Mr. Childe possessed such knowledge and skills. In fact, the district court found that it was the length of the court's summary judgment order that evidenced the need for "highly developed expertise" in this case. *See* Govt. Tab 395 at 201 ("The regulatory and scientific issues raised in this action were extraordinarily complex, as evidenced by the Court's lengthy order on the motions for summary judgment, and required counsel with Mr. Childe's highly developed expertise."). That is clearly an unworkable standard for EAJA's special factor exception. In the absence of any record-based justification for finding that this case *required* counsel with Mr. Childe's alleged knowledge or skills, the district court's fee award cannot be upheld.

Finally, Friends mischaracterizes the United States' argument concerning the district court's failure to identify anything in the record that showed that Mr.

Childe actually possessed the distinctive knowledge or specialized skill to which the court referred. *See* OBr. 30-31, 35-36. Friends refers to the United States' position as arguing that "the district court erred by failing to establish that Mr. Childe provided distinctive knowledge or a specialized skill that were not already provided by attorneys for the Miccosukee Tribe." Br. 19. Friends further refers to the United States' argument as one concerning the "duplication of effort." Br. 19-20. Friends is wrong.

The United States' brief points out that the district court summarily concluded that "Plaintiffs could not have successfully brought this litigation without counsel who had mastery of this complex intersection of science and environmental law," Govt. Tab 395 at 201, and that the court failed to find that Mr. Childe, himself, possessed such "mastery," *id.* OBr. 35-36. *See also* OBr. 30-31. The United States further pointed out that the court's failure was particularly significant because: (1) the Miccosukee Tribe was also a plaintiff in the merits litigation and was represented by its own team of counsel, (2) the Tribe advanced the same administrative law challenges that Friends did (with the exception of the dismissed ESA claim), (3) the Tribe and Friends' filed joint summary judgment motions, and (4) Mr. Childe's affirmative participation in the merits case was

extremely limited, involving non-substantive matters. OBr. 31, 35-36. Friends does not dispute any of those points.

Moreover, as to the United States' arguments concerning Mr. Childe's minimal substantive participation in the merits litigation, Friends responds (Br. 25-26) by stating merely that Mr. Childe wrote two complaints. But Friends fails to identify anything in the complaints that required the type of knowledge or skills that exceeded the grasp of an otherwise competent and reasonable attorney charged with litigating this matter. Friends also fails to gain ground by referring, with no argument, to the "*Friends of the Everglades'* Motion for Partial Summary Judgment * * * regarding the 2003 Amendments to the Everglades Forever Act, [DE 226]," and "*Friends of the Everglades'* Motion for Summary Judgment with respect to the Phosphorus Rule [DE 255]," Br. 25-26 (emphases added). First, the summary judgment motions to which Friends merely refers were filed jointly by both plaintiffs in the merits case. There were no separate "Friends" motions. Second, Friends tellingly does not state that Mr. Childe wrote those motions, had any significant role in them, or possessed any special knowledge or skill relevant to those motions.

In short, Friends fails to refute the point that Mr. Childe's substantive contribution to the merits litigation was *de minimis*. Further, Friends' duplication-

of-effort arguments are not responsive to the United States' position and do not provide any support for the district court's enhanced fee award.

CONCLUSION

The district court's judgment granting enhanced attorneys fees under EAJA should be reversed and the action remanded for an amended award within the EAJA rate cap.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 3807 words.

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CERTIFICATE OF SERVICE

I hereby certify that on June 10th 2011, copies of the foregoing Reply Brief of the Federal Government Appellants were served by Federal Express delivery upon counsel at the addresses listed below:

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