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

OPENING BRIEF FOR THE FEDERAL GOVERNMENT APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The following is a list of all judges, attorneys, persons, associations of persons, firms, partnerships, corporations, and other legal entities that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, any publicly held company that owns 10 percent or more of a party's stock, and other identifiable entities related to a party:

Antorcha, Juan Carlos

Blank, Robert H.

Borkowski, Winston K.

Childe, John E.

Crowley, David Alexander

De Monaco, Charles

Friends of the Everglades

Gold, Alan S., U.S. District Court Judge

Hayman, Kenneth

Jones-Foose, Lisa

Klock, Joseph P. Jr.

Mancusi-Ungaro, Philip

McAliley, Chris M., U.S. District Magistrate Judge

Miccosukee Tribe of Indians of Florida

Moreno, Ignacia S., Assistant Attorney General, Env. & Natural Resources Div.

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Thomson, Parker, D.

United States of America

United States Environmental Protection Agency

United States Environmental Protection Agency, Administrator, Lisa Jackson

United States Environmental Protection Agency, Regional Administrator,

Gwendolyn Keyes Fleming

_____

Tamara N. Rountree

STATEMENT REGARDING ORAL ARGUMENT

Federal Government defendants-appellants submit that oral argument will benefit the Court because this case presents issues concerning the Equal Access to Justice Act, 28 U.S.C. 2412, on which this Court has not ruled directly.

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STATEMENT OF JURISDICTION

District Court jurisdiction: Plaintiff-Appellee Friends of the Everglades ("Friends") invoked the jurisdiction of the district court under 28 U.S.C. 1331 and the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et. seq.* *See* Docket Entry ("DE") 150; Record Excerpts ("RE") at 106, Tab 150.

This Court's jurisdiction: The district court entered final judgment on April 14, 2010. Tab 405. The United States timely filed a notice of appeal on June 11, 2010. DE 420. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

This appeal involves the district court's grant of an enhanced attorney-fee award to Friends under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. 2412. The underlying litigation arose under the APA and involved the United States Environmental Protection Agency's ("EPA") review, under the Clean Water Act ("CWA"), 33 U.S.C. 1313(c), of the State of Florida's water quality standards for phosphorus in the Everglades. The Miccosukee Tribe of Indians of Florida ("Miccosukee Tribe") and Friends filed multiple complaints against EPA and, in response to the parties' motions for summary judgment, the district court ruled in favor of Friends on certain claims. Friends moved for an award of attorneys fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. 2412. The district

court awarded, among other requested fees, a "special factor" enhancement of EAJA's fee rate of $125 per hour, 28 U.S.C. 2412(d)(2)(A)(ii), for Friends' lead attorney John Childe. In total, the district court awarded Mr. Childe over $200,000 in enhanced attorney fees. The issues on appeal are:

1. Whether the district court erred in enhancing the hourly fee rate well above the maximum rate established by Congress in EAJA, relying solely on knowledge Mr. Childe acquired from practicing law as the basis for the enhancement.

2. Whether the district court erred in concluding that Mr. Childe possessed knowledge warranting a special factor enhancement where the record does not establish that Mr. Childe actually possessed the knowledge on which the court's enhanced award is based.

3. Even assuming Mr. Childe possessed the requisite knowledge for an enhanced fee rate, whether the district court erred in granting such an enhancement where Mr. Childe's particular knowledge was not necessary to the litigation of this case.

STATEMENT OF THE CASE

A. The Equal Access to Justice Act

EAJA provides that a court shall award to a prevailing party fees and other expenses incurred by that party in any civil action unless the court finds that the

position of the United States was substantially justified. 28 U.S.C. 2412(d)(1)(A). The Act further provides that the amount of fees awarded "shall be based upon prevailing market rates for the kind and quality of the services furnished, except that * * * attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a *special factor*, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. 2412(d)(2)(A)(ii) (emphasis added). EAJA does not specifically define a "special factor" for purposes of justifying an award in excess of EAJA's rate limit.

B. Factual and Procedural Background

1. Facts of the Underlying Merits Litigation

The CWA requires States to develop water quality standards and directs EPA to review, and approve or disapprove, "revised or new" water quality standards to ensure their compliance with the Act. 33 U.S.C. 1313(c). The State of Florida enacted the Everglades Forever Act to reduce phosphorus levels in discharges to the Everglades by: (1) requiring the Florida Department of Environmental Protection ("FDEP") to conduct rulemaking to establish a numeric concentration level for phosphorous (i.e., a "phosphorous criterion"), and (2) requiring that flows delivered to the Everglades Protection Area achieve all

applicable water quality standards, including the phosphorous criterion, by 2006. Florida amended the Everglades Forever Act in 2003 ("EFA Amendments"). The Amendments established a "Long Term Plan" for achieving the phosphorus numeric criterion and authorized FDEP to implement "moderating provisions" that could excuse non-compliance with water quality based effluent limits until 2016 if certain conditions were met. EPA reviewed the EFA Amendments and initially determined that EPA approval was not required because the Amendments authorized future actions but did not constitute "revised or new" water quality standards under the CWA.

FDEP subsequently promulgated a "Phosphorus Rule" that included a numeric criterion for phosphorus, the moderating provisions authorized by the EFA Amendments, and a methodology for determining whether compliance with the numeric criterion is achieved in the Everglades Protection Area. EPA approved eight sections of the Rule in four successive agency actions. EPA reviewed and approved certain sections of the Phosphorus Rule finding that they constituted "revisions" to Florida's water quality standards and that the revisions complied with the CWA. EPA reviewed other sections of the Rule and concluded that those provisions did not constitute revisions and, therefore, did not require EPA approval.

2. The Underlying Merits Proceedings

In 2004, the Miccosukee Tribe and Friends filed separate complaints challenging EPA's determinations concerning the EFA Amendments. In 2005, the Tribe amended its complaint alleging that EPA's review and approval of Florida's Phosphorus Rule under the CWA was arbitrary and capricious. DE 72; DE 147. Friends later filed a new action also challenging EPA's Rule approval under the APA and, in an amended complaint, challenging the Rule approval under the Endangered Species Act ("ESA"), 16 U.S.C. 1531, *et seq.* Tab 150 at 106. The district court consolidated all of the lawsuits, resulting in a three-count action that challenged the EFA Amendments and the Phosphorus Rule under the APA, and the Phosphorus Rule under the ESA.

Count I challenged EPA's finding that the EFA Amendments were not subject to agency review under the CWA because they did not constitute "revised or new" water quality standards for the Everglades. Tab 150 at 115-121. Count II challenged EPA's conclusions that: (1) certain provisions of the Phosphorus Rule did not require EPA review because the provisions did not revise the water quality standards, and (2) other provisions, that did revise the standards, complied with CWA requirements. Tab 150 at 122-130. Count III, which only Friends raised,

alleged that EPA's Phosphorus Rule decision violated the ESA. Tab 150 at 130-131.

Following cross-motions for summary judgment, the district court rendered a decision on July 29, 2008. DE 323. As to Count I, the court rejected EPA's determination that the EFA Amendments did not change Florida's water quality standards. DE 323 at 58. The court held that the Amendments suspended enforcement of the default phosphorous criterion though the year 2016, creating, in effect, a revised or new water quality standard that EPA was required to review. DE 323 at 58-59.

Under Count II, the district court rejected EPA's approval of certain portions of the Phosphorus Rule. DE 323 at 59-63; 65-82; 85-91. The court, however, upheld EPA's approval of the sections of the Phosphorus Rule that established a phosphorus criterion and a compliance methodology for that criterion. DE 323 at 63-65; 82-85. The court dismissed Friends' Count III ESA claim for lack of subject matter jurisdiction. DE 323 at 91-92.

3. Proceedings of the Attorneys Fees Litigation

Friends moved for attorneys fees under EAJA, seeking a total of $282,775.00 in costs and fees for their two attorneys. Tab 395 at 195; DE 335; DE 337. The amount Friends sought for attorney John Childe totaled $239,435.00 and

included a request for an upward adjustment of the EAJA fee rate from $125 to $350 per hour. Tab 395 at 198; DE 335; DE 344. The district court referred the motion to a magistrate judge. DE 346. The United States countered that there were no "special factors" under EAJA justifying an upward adjustment, and also argued for a 66 percent across-the-board reduction of the hours Friends billed for unsuccessful claims. DE 352.

On March 15, 2010, the magistrate issued a report and recommendation concluding that Friends was a prevailing party and that EPA's position in the litigation was not substantially justified. Tab 395 at 190. The magistrate also determined that Friends' request for an enhancement of EAJA's fee rate for Mr. Childe was appropriate. Tab 395 at 198-202. The magistrate rejected EPA's request for the 66 percent across-the-board reduction for Friends' lack of success on the Phosphorus Rule and ESA counts, but recommended a ten percent across-the-board reduction to reflect Friends' partial loss on the Phosphorus Rule Count. Tab 395 at 204.

The magistrate ultimately recommended that Friends be awarded a total of $224,744.95 in attorneys' fees for their two attorneys. Tab 395 at 206-207. The magistrate recommended a total of $212,407.69 in fees for Mr. Childe. *Id.* On April 14, 2010, the district court issued an unpublished decision, adopting the

magistrate's attorneys fees report and recommendation in its entirety and providing a separate short opinion. Tab 405 at 211. The court awarded Friends a final total of $230,530.09 in fees. Tab 405 at 215.

STANDARD OF REVIEW

This Court reviews a district court's decision to award fees, and the amount of such fees, for an abuse of discretion. *Meyer v. Sullivan*, 958 F.2d 1029, 1033 (11th Cir. 1992). An award is reviewed *de novo* "insofar as it rests on conclusions of law, such as an interpretation of the statutory terms that define eligibility for an award." *Thomas v. National Science Foundation*, 330 F.3d 486, 491 (D.C. Cir. 2003). Subsidiary findings of fact are reviewed for clear error. *Atlanta Journal and Constitution v. City of Atlanta Dept. of Aviation*, 442 F.3d 1283, 1287 (11th Cir. 2006).

SUMMARY OF ARGUMENT

The Equal Access to Justice Act provides that a court may not award fees above the statute's hourly rate unless the court finds that a "special factor" justifies a higher fee. The district court here abused its discretion in granting an enhanced award for Friends' counsel, John Childe.

1. The district court's interpretation of the EAJA special factor exception disregards relevant Supreme Court authority and court of appeals authority

demonstrating that waivers of sovereign immunity, such as that in EAJA, must be read narrowly. The Supreme Court has made clear that under EAJA, "special factors" may not be of broad or general application. Rather, EAJA allows special factor enhancements only where counsel has "distinct knowledge." The district court's ruling ignores this direction and establishes an erroneous standard for enhanced fees that is impermissibly broad. The court wrongly authorized an award in excess of the statutory limit for knowledge an attorney acquired simply by practicing in a particularized area of law. This general category of knowledge, however, can be ascribed to any attorney who has a specialized practice and, thus, is not sufficiently exceptional to warrant the application of EAJA's special factor exception.

2. Although the district court summarily concluded that Mr. Childe had "expertise" concerning two of the relevant statutes in this case, and an alleged "profound" understanding of science- related matters, nothing in the record establishes that Mr. Childe actually possessed any of the expertise or understanding that the court described, and relied on, in enhancing Mr. Childe's fees. Indeed, the court did not identify any evidence or specify any manifestation of Mr. Childe's presumed knowledge on which the court based the enhanced

award. Because the district court's award is not supported by the record, it must be reversed.

3. Even assuming some factual basis existed for the district court's finding that Mr. Childe had the expertise and specialized knowledge to which the court referred, such knowledge was not necessary to the litigation of the merits case. The Supreme Court has held that a special factor enhancement under EAJA is not warranted unless the attorney's distinctive knowledge was "needful" to the litigation. The matter here was an Administrative Procedure Act challenge involving legal inquiries based on statutory interpretation and administrative law principles and requiring a review of the administrative record to determine if EPA's decision was arbitrary or capricious. The merits case required no extraordinary knowledge or expertise. Thus, any possible knowledge that might have qualified Mr. Childe for an enhancement was not necessary to the litigation of the case and, therefore, cannot be used to award fees in excess of EAJA's rate cap. The district court's finding to the contrary was erroneous.

ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING A SPECIAL FACTOR RATE ENHANCEMENT FOR ATTORNEY JOHN CHILDE

A. Courts may not exceed EAJA's $125 per hour rate cap unless a party qualifies for a "special factor" exception

As explained above, EAJA requires a court to limit the award of attorneys fees to the rate of $125 per hour "unless the court determines that an increase in the cost of living or a *special factor*, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. 2412(d)(2)(A)(ii) (emphasis added). EAJA does not expressly define a "special factor" for purposes of a rate enhancement, and this Court has not established precise criteria for determining whether an attorney's qualifications merit enhancement under the statute's special factor exception. The Supreme Court, however, in *Pierce v. Underwood*, ("*Pierce*") 487 U.S. 552, 572 (1988), has construed EAJA's special factor provision, providing authoritative guidance on applying the statute's exception.

1. *Pierce v. Underwood* - In *Pierce*, the Supreme Court construed EAJA's special factor exception narrowly, finding that the "'special factors' envisioned by the exception must be such as are not of broad and general application." *Id.* at 573.

The Court's narrow interpretation is consistent with the requirement that a "waiver of sovereign immunity," like the one contained in EAJA, "must be strictly construed." *Maritime Mgmt., Inc. v. United States*, 242 F.3d 1326, 1336 (11th Cir. 2001). *See also Ardestani v. INS*, 502 U.S. 129, 137 (1991). According to the *Pierce* Court, the special factor exception refers to "attorneys qualified for the proceedings in some specialized sense, rather than just in their general legal competence." 487 U.S. at 572 (internal quotation marks omitted). The Court further explained that the exception:

> refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question -- as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation. Examples of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language. Where such qualifications are necessary and can be obtained only at rates in excess of the [statutory] cap, reimbursement above that limit is allowed.

Id. at 572.

Following *Pierce*, a court faced with the question of whether to grant a special factor fee exception must focus its inquiry on the "knowledge" or "skill" of the attorney for whom fees are sought. *Id.*[1/] As to the attribute of knowledge, a

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[1/] While the *Pierce* Court indicated that a special factor enhancement would be appropriate for "distinctive knowledge *or specialized skill*," *id.* (emphasis added), and offered the example of "knowledge of foreign law or language," *id.*, the district

(continued...)

court may not utilize EAJA's exception and enhance fees unless the attorney possesses: (1) "distinctive knowledge" as opposed to an extraordinary level "general lawyerly knowledge," and (2) knowledge that is "needful for the litigation in question." *Id.* The *Pierce* Court explained that an example of "distinctive knowledge" is knowledge that associated with an "identifiable practice specialty such as patent law." *Id.*

The fact that the Supreme Court based its interpretation of EAJA on the type of knowledge that qualifies for a special factor enhancement, and selected the practice specialty of patent law to illustrate such knowledge, is significant and instructive. While patent law is indeed a "practice specialty," *id.*, the knowledge possessed by patent attorneys does not -- and cannot -- derive solely from the mere practice of patent law. Members of the Patent Bar must have specific "scientific and technical training" in order to practice patent law. *See General Requirements Bulletin for the Admission to the Examination for Registration to Practice in Patent Cases Before the United States Patent and Trademark Office* ("*General Requirements Bulletin*"), at 4, *available* at

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[1/](...continued)
court here did not rely on these other qualifying attributes in awarding the fee enhancement for Mr. Childe. Accordingly, we do not discuss them in further detail.

http://www.uspto.gov/web/offices/dcom/gcounsel/oed.htm [2/] *See also Perales v. Casillas* ("*Perales*"), 950 F.2d 1066, 1078 & n.15 (5th Cir. 1992) (pointing out that patent law is not a mere specialty practice; it requires additional specialized and nonlegal training).

The requisite scientific and technical training for practicing patent law may be established by either: (1) a Bachelor's degree in a "recognized technical subject," such as biochemistry, physics or chemical engineering, (2) a Bachelor's degree in another subject that establishes "scientific and technical training equivalent to that received * * * for a Bachelor's degree in one of the subjects listed in [above]," or (3) "practical engineering or scientific experience" that must be demonstrated by the attorney "tak[ing] and pass[ing] the Fundamentals of Engineering Test," which is "a test of engineering fundamentals * * * developed and administered by a State Board of Engineering Examiners in each State or comparable jurisdiction." *General Requirements Bulletin*, at 4-8. Additionally, before commencing the practice of patent law, an attorney must pass a separate and additional bar examination, the Patent Bar examination. *Id.* at 18.

[2/] This Court may take judicial notice of publicly available governmental publications. *See, e.g., Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 332 n.10 (1961); *Funk v. Styker Corp.*, No. 10-20022, 2011 WL 207961 at *5 (5th Cir. Jan. 25, 2011).

Against this backdrop of knowledge, training, and testing associated with the practice of patent law, it is reasonable to conclude that the *Pierce* Court did not refer expressly to patent law to indicate that a "practice speciality" in name alone is sufficient to trigger the special factor exception under EAJA. Rather, a fair reading of the *Pierce* Court's directive indicates that use of the special factor exception can occur only where an attorney has demonstrated actual specialized knowledge, education or training that was acquired in a formalized manner and served to supplement a practice specialty.

2. The court of appeals' application of *Pierce* - Circuit courts applying *Pierce* are divided on what type of knowledge qualifies for the special factor exception under EAJA. A minority of circuits have interpreted *Pierce* and EAJA broadly, concluding that knowledge derived from the practice of law in a specific practice area merits a rate enhancement above the statute's rate cap. *See, e.g.*, *Atlantic Fish Spotters Ass'n v. Daley* ("*Atlantic Fish Spotters*"), 205 F.3d 488, 491-492 (1st Cir. 2000) (fisheries law); *Pirus v. Bowen*, 869 F.2d 536, 541-542 (9th Cir. 1989) (social security law); *Love v. Reilly*, 924 F.2d 1492, 1496 (9th Cir. 1991) (environmental law). The majority of the circuits, however, have interpreted *Pierce* and EAJA more narrowly. The Second, Fourth, Fifth, Eighth, Tenth and District of Columbia Circuits (the "Circuit Majority") have concluded that the

application of EAJA's special factor exception requires something more than knowledge or expertise acquired through the practice of law in a particular field. *See, e.g.*, *Healey v. Leavitt*, 485 F.3d 63, 70 (2d Cir. 2007) ("a case requires 'specialized expertise' within the meaning of the EAJA only when it requires some knowledge or skill that cannot be obtained by a competent practicing attorney through routine research or legal experience."); *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 942 (D.C. Cir. 2005) ("The established law of the circuit makes it clear that legal expertise acquired through practice is not a 'special factor' justifying an enhanced fee award under EAJA."); *Hyatt v. Barnhart* ("*Hyatt*"), 315 F.3d 239, 251-252 (4th Cir. 2002) (finding an increase in EAJA's rate cap was not merited for counsels' special expertise in practice of social security law); *Perales*, 950 F.2d at 1078 ("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 [legal] profession."); *Stockton v. Shalala*, 36 F.3d 49, 50 (8th Cir. 1994) ("The fact that [plaintiff's] attorney is experienced in social security cases does not in itself warrant a fee in excess of the statutory rate."); *Chynoweth v. Sullivan* ("*Chynoweth*"), 920 F.2d 648, 650 (10th Cir. 1990) ("Incomparable expertise, standing alone, will not justify the higher

rate. * * * [T]he 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."). *Cf. Love v. Reilly*, 924 F.2d at 1498-1499 ("circuit precedent does not require us to label 'environmental litigation' a practice specialty. Moreover, the Supreme Court's language in *Pierce* convinces me that such a broad legal field cannot qualify as a specialized practice area warranting payment in excess of [EAJA's rate cap]. * * * In broadly stating that 'environmental litigation' qualifies as such a practice specialty, the majority strays too far from the limiting constraints placed on the Act by the Court in *Pierce*.") (dissent).

Three circuits within the Circuit Majority have concluded that the special factor exception is warranted only where the attorney for whom fees are sought has technical or non-legal skills, or expertise acquired through specialized education or training beyond the research and study required of any practice specialty. *Estate of Cervin v. Commissioner*, 200 F.3d 351, 354 (5th Cir. 2000) ("'patent law [referred to in *Pierce*] appropriately represents a specialized area because of the specific technical training required of members of the Patent Bar,' including 'scientific and technical qualifications, which make them uniquely qualified * * *."); *In re Sealed Case 00-5116*, 254 F.3d 233, 235 (D.C. Cir. 2001) (finding enhanced rates were

appropriate for practice specialties "requiring technical or other education *outside* the field of American Law," not for expertise acquired only thorough practicing in a speciality area) (emphasis in original); *Hyatt*, 315 F.3d at 252-253 ("we fail to see how the 'technical knowledge' of social security law and its practice is different from simply a specialized expertise in that area of the law * * * [I]f plaintiffs' counsel have undertaken any exceptional or specialized education or training beyond the diligent study and practice required of any practice speciality, the district court has offered no elaboration as to what that specialized education or training has been.").

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). There, one of the issues was whether a special factor rate increase was appropriate for the plaintiffs' immigration attorneys. The *Jean* majority held that, in answering this question, the court is not to consider whether the billing attorneys are "highly skilled lawyers" or "lawyers with the best reputations." *Id.* at 774. Rather, "only a special skill authorizes an upward adjustment of hourly rates." *Id.* at 774. From the district court's order, the majority "perceive[d] two grounds for which a rate adjustment *might* be proper on

the basis of special factors." *Id.* (emphasis added). The majority suggested that a special factor rate increase might be appropriate for the plaintiffs' attorney who was "fluent in French and Haitian Creole." *Id.* The majority also suggested that a rate increase might be appropriate for the participating attorneys who had a "special expertise in immigration law." *Id.* at 774. The majority ultimately remanded to the district court without deciding the special factor issue. The majority instructed the court to consider, among other things, whether either of the factors suggested by the majority were indeed "'special' for EAJA purpose[s]." *Id.* *See also Pollgreen v. Morris*, 911 F.2d 527, 537 (11th Cir. 1990) (explaining that "*Jean* [] suggested that a 'special factor' rate adjustment might be appropriate for attorneys who have a special expertise in immigration law or are fluent in foreign languages relevant to the litigation.") (quoting *Jean*, 863 F.2d at 774).

The dissent in *Jean* disagreed with the majority's suggestion that a specialization in immigration law might warrant a special factor enhancement. The dissent pointed out that under the majority's suggestion, "district courts will find it difficult to identify a legal specialty that does not justify an increase." *Id.* at 781. The dissent further noted that the two areas of law expressly referenced by the *Pierce* Court -- namely, patent law and foreign law -- are "narrow areas of specialization that generally require learning not common to lawyers in the United

States." *Id.* "By contrast," the dissent continued, "competence in immigration law requires no peculiar base of knowledge; an attorney with a reasonable amount of 'general lawyerly knowledge and ability' can learn immigration law." *Id.* (quoting *Pierce*, 487 U.S. at 572).

The *Jean* dissent closely resembles the view of the Circuit Majority, *see supra*, that has interpreted *Pierce* and EAJA narrowly for purposes of the statute's special factor exception. The construction of the circuit court majority is wholly consistent with Congress' directive that special factor enhancements are *exceptions*, not the rule, under the statute. *See* 28 U.S.C. 2412(d)(2)(A)(ii) ("attorney fees *shall not* be awarded in excess of [the cap] *unless* the court determines that * * * a special factor * * * justifies a higher fee.") (emphases added). The reading of the special factor exception by the circuit court majority also comports with the *Pierce* Court's rigid construction of the statutory exception. As this Court recognized expressly, "the Supreme Court adopted a narrow construction of the 'special factor[s]' that would warrant a departure from the [] statutory hourly rate." *Pollgreen v. Morris*, 911 F.2d at 537 (quoting *Pierce*, 487 U.S. at 572-573).

Here, as explained below, the district court failed to adhere to the prescriptions of Congress, the Supreme Court and the tenets governing statutory

construction. Instead, the district court awarded a special factor rate enhancement on grounds that are so inclusive that they emasculate EAJA's rate cap. *See Pierce*, 487 U.S. at 572. For this reason, reversal is required.

B. The district court erred in concluding that attorney John Childe possessed the type of "distinctive knowledge" that qualified for a special factor exception

The district court concluded that a special factor rate enhancement was appropriate for Mr. Childe because he possessed "distinctive knowledge or specialized skill needful for the litigation in question." Tab 405 at 213-214. The court's decision to enhance Mr. Childe's fee award was based solely on the knowledge he allegedly acquired from practicing public interest environmental law. *Id.*; Tab 395 at 201. In particular, the court found that Mr. Childe qualified for the exception because he had "specialized expertise" that he "developed * * * over years of practice." Tab 395 at 201. The district court relied on two categories of practice-based knowledge in granting the enhancement: (1) Mr. Childe's knowledge of laws that form the basis of his environmental law practice, and (2) his understanding of non-legal principles that underlie his area of practice. *Id.*; Tab 405 at 213-214. Neither category, however, rises to the level of a "special factor" contemplated in EAJA.

1. Knowledge of statutes on which an attorney's law practice is based is not a sufficient ground for the EAJA special factor exception - The district court concluded that Mr. Childe's knowledge of particular environmental statutes, and the relationship between those statutes, merited an award in excess of EAJA's cap. Specifically, the court found that Mr. Childe had expertise in the CWA, knowledge of issues involving the Everglades Forever Act, and knowledge of the CWA's interrelationship with the Everglades Forever Act. Tab 395 at 201. Given that the CWA and Everglades Forever Act are environmental statutes, and Mr. Childe's practice is in public interest environmental law, the district court's interpretation of EAJA signifies that an enhanced fee award would be warranted for all attorneys who have particular knowledge of, or expertise in, statutory schemes that form the basis of their practice. A standard that broad cannot govern the application of EAJA's exception.

First, the Supreme Court held expressly that the special factors envisioned by EAJA's exception must not be "of broad and general application," *Pierce*, 487 U.S. at 573. The district court's standard, however, is so far-reaching it can enjoy both broad and general applicability. Second, the district court's standard cannot be reconciled with the Supreme Court's express acknowledgment of "the need to preserve the intended effectiveness of [EAJA's rate] cap." *Id.* *See also Jean*, 863

F.2d at 781 ("Allowing a premium for knowledge of immigration law [] runs counter to the Supreme Court's counsel to 'preserve the intended effectiveness of [EAJA's rate] cap.'") (dissent).

Finally, under the district court's view, there is no distinction between the *type* of knowledge or skill that Mr. Childe acquired from his law practice and the type acquired by any other reasonably diligent attorney. While Mr. Childe may arguably be competent in areas of the CWA and the Everglades Forever Act, such competency reveals no "*peculiar base* of knowledge" that could not be acquired by any competent attorney in preparing for, and conducting the litigation in, this matter. *Id*. at 781 (dissent) (emphasis added). And, the fact that Mr. Childe's knowledge involves environmental laws is of no consequence because the source of the knowledge is practicing law, and this generally applicable knowledge cannot constitute a ground for fee enhancement. *See Pierce*, 487 U.S. at 573.

Numerous courts have espoused a similar view, concluding that there must be some distinction between the type of knowledge that qualifies for EAJA's special factor exception and the type of knowledge possessed by all attorneys who competently practice in a narrow or specialized area of the law. The Fifth Circuit, for example, pointed out that if special factor rate enhancements were appropriate for all "substantive specializations" then, "[i]n a sense, every attorney practicing

within a narrow field could claim specialized knowledge." *Perales*, 950 F.2d at 1078. The D.C. Circuit, "[a]pplying [*Pierce*]," found that "nothing in the text or legislative history of EAJA suggests that Congress intended to make all lawyers practicing administrative law in technical fields eligible for a fee enhancement." *Select Milk Producers, Inc. v. Johanns*, 400 F.3d at 951 (citation and internal quotation marks omitted). In the Fourth Circuit, the court refused to affirm a special factor enhancement for counsels' practice-based expertise because the plaintiffs failed to demonstrate that their counsel "possessed specialized training or expertise *beyond* that which can and should be acquired by a reasonably competent attorney engaged in the practice of a legal specialty that he or she has chosen to become proficient in by diligent study and work." *Hyatt*, 315 F.3d at 253 (emphasis added). Here, the district court abused its discretion in awarding enhanced fees because the court failed to identify any distinction between the type of statutory knowledge that Mr. Childe allegedly possessed and that of any other reasonable attorney practicing law in a particular area.

The same rationale applies to require reversal of the district court's finding that an enhanced award was appropriate because Mr. Childe had "particular knowledge" of the "interrelationship" between the CWA and the Everglades Forever Act (Tab 395 at 201). The court provided no indication that Mr. Childe's

knowledge of the two particular statutes could not be acquired by any other capable practitioner litigating under the two statutes. *Cf. Raines v. Shalala*, 44 F.3d 1355, 1362 (7th Cir. 1995) (refusing to affirm district court's grant of special factor enhancement where, among other things, "[t]he attorney's appreciation of the interrelationship of disability benefits and supplemental security income was also a matter that was not beyond the ability of the diligent practitioner."). And, while courts have indicated that a fee enhancement is warranted where the statutory scheme is "beyond the grasp of a competent practicing attorney with access to a law library and the other accoutrements of modern legal practice," *see, e.g.*, *Chynoweth*, 920 F.2d at 650, the district court provides no indication that such was the case here.

In short, the district court erred in finding that Mr. Childe's knowledge of the laws that form the basis of his practice merited a special factor exception to EAJA's fee rate. Such knowledge is neither "special" nor exceptional. Rather, it is more akin to the "general lawyerly knowledge and ability" that the Supreme Court has deemed insufficient for purposes of fee enhancements. *Pierce*, 487 U.S. at 572.

2. Mr. Childe's purported knowledge of non-legal principles that underlie his practice of law is not a sufficient ground for the EAJA special

factor exception - The second category of practice-based knowledge for which the district court awarded a fee enhancement was Mr. Childe's knowledge of the non-legal concepts and terms associated with his area of practice. The court found that, with respect to the CWA and Everglades Forever Act, Mr. Childe had a "strong understanding of the underlying environmental science." Tab 395 at 201. The court also indicated, in a footnote, that Mr. Childe had a "profound understanding of esoteric scientific principles and terms regarding water quality standards (e.g., TBELs, WQBELs, BAPRTs, STAs, etc.) [that] constitutes a 'specialized skill' as opposed to '*general lawyerly knowledge* and ability useful in *all litigation*." Tab 405 at 214, n.1 (quoting *Pierce*, 487 U.S. at 572) (emphases and parentheses in original).

The district court's attempts to bolster Mr. Childe's "knowledge" fall flat. As we show *infra* at 30, nothing in the record indicates that Mr. Childe actually possessed any of the knowledge to which the court refers. As a threshold matter, however, it was an abuse of discretion for the district court to enhance Mr. Childe's award simply because he supposedly possessed an understanding of the terms and subject matter that underlie his practice.[3/]

[3/] Moreover, none of the acronyms cited by the district court are technical or scientific terms. "TBEL" and "WQBEL" stand for "technology-based effluent

(continued...)

The knowledge that attorneys derive solely from attaining proficiency in their particular area of practice cannot serve as a basis for fee enhancements because it is "too generally applicable," *Pierce*, 487 U.S. at 573, and not sufficiently "special" to invoke EAJA's special factor exception. As the Tenth Circuit pointed out "[t]he law contains a myriad of practice areas * * * [y]et merely because some scholarly effort and professional experience is required to attain proficiency in a particular practice area does not automatically require enhancement of the EAJA rate." *Chynoweth*, 920 F.2d at 650. Courts have even found that a fee rate increase is not merited simply because an attorney becomes extremely knowledgeable about technical or non-legal concepts underlying litigation *outside* of that attorney's practice specialty. *See e.g., Atlantic Fish Spotters,* 205 F.3d at 492 ("It is almost always helpful for counsel to have had prior experience in the [relevant area of law], 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").

[3/](...continued)
limitation" and "water quality-based effluent limitation," both of which are legal terms under the federal Clean Water Act. "BAPRT" stands for "best available phosphorus reduction technology," a legal term defined by the Everglades Forever Act Amendments. Finally, an "STA" is a "stormwater treatment area," an artificial wetland used for reducing the flow of phosphorus into the Everglades. Knowledge of these terms requires no specialized technical or scientific knowledge.

See also Chynoweth, 920 F.2d at 650. Here, the district court provided no indication that Mr. Childe's purportedly "strong" or "profound" understanding (Tab 395 at 201; Tab 405 at 214, n.1) involved anything other than his knowledge of basic subject-matter principles applicable to water quality standards cases such as this. Nor did the court indicate that such knowledge could not be acquired by the reasonable efforts of any other diligent practitioner litigating under the statutes here.

Finally, the district court in this case concluded that "[t]he 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 * * *." Tab 395 at 201. As a preliminary matter, the length of a district court order cannot, by itself, demonstrate complexity for purposes of a fee enhancement. More importantly, the Supreme Court has held that the "difficulty of issues" in a case is not a factor that gives rise to a fee enhancement because the presence of difficult issues in litigation is, among other things, "applicable to a broad spectrum of litigation." *Pierce*, 487 U.S. at 573. *See also Healey v. Leavitt*, 485 F.3d at 71 ("if we were to award an enhanced fee in this case simply because it is a class action brought under a complex statutory scheme, we might risk making enhanced compensation under the EAJA the rule rather than the exception it was meant to be."); *Id.* at 70 ("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 * * *.'") (quoting *Chynoweth*, 920 F.2d at 650) (other citations omitted).

While it is true that certain areas of law, including environmental law, may present complex issues that may best be handled by attorneys who specialize in the topic and bring their substantive expertise to bear in a case, that is true for virtually any area of law. It is particularly true for those areas involving intricate federal statutory schemes that typically give rise to cases covered by EAJA. *See Perales*, 950 F.2d at 1078. However, "[i]f expertise acquired through practice justified higher reimbursement rates, then all lawyers practicing administrative law in technical fields would be entitled to fee enhancements." *F.J. Vollmer Co. v. Magaw*, 102 F.3d 591, 598 (D.C. Cir. 1996). Under such circumstances, fee awards in excess of EAJA's rate cap would no longer be the exception but rather the norm. Such an outcome flies in the face of the statute.

The district court's fee award here sets the stage for the same outcome. Mr. Childe's purported knowledge of terms and principles underlying his area of practice is a *category* of knowledge that can apply to all attorneys practicing in technical area of administrative law. Because such knowledge is not sufficiently exceptional to merit an award in excess of EAJA's limit, the court's award here was an abuse of discretion.

3. Assuming *arguendo* that a special factor enhancement could be based upon practice-derived knowledge alone, the record does not establish that Mr. Childe actually had the specialized knowledge on which the district court based the enhancement here - As indicated *supra* at 21-30, the district court awarded enhanced fees for Mr. Childe, finding that, as a result of his practice, he had a "strong understanding of the [] environmental science" underlying the CWA and Everglades Forever Act (Tab 395 at 201) and a "profound understanding of esoteric scientific principles and terms regarding water quality standards" (Tab 405 at 214, n.1). Even assuming the knowledge to which the court refers constitutes the type of knowledge that merits a special factor enhancement, the district court did not identify anything in the record that demonstrates that Mr. Childe indeed possessed such knowledge. Nor did the court explain how, or whether, the "understanding" (Tab 395 at 201; Tab 405 at 214, n.1) that Mr. Childe allegedly

possessed was conveyed to the court in particular or demonstrated during the litigation in general. In fact, the court's findings about Mr. Childe's presumed "understanding" (*id.*) are without any support or citation to the record.

Such omissions by the court are particularly important here because the record indicates that, at the merits hearings in this case, the Miccosukee Tribe presented the oral arguments and Mr. Childe's oral participation was limited, involving non-substantive matters. As for the merits briefs, the Tribe filed the briefs jointly with Friends, revealing no particular knowledge or expertise on the part of Mr. Childe. *See, e.g.*, DE 255, DE 256. The district court's enhanced fee award, therefore, cannot stand because the court did not identify any basis in the record for concluding that Mr. Childe actually possessed the knowledge on which the court relied in granting the award.

C. The district court erred in concluding that Mr. Childe's purported distinctive knowledge was necessary for the litigation of this APA challenge

Assuming *arguendo* that Mr. Childe had distinctive knowledge that qualified for a special factor enhancement, EAJA further requires that such knowledge be not only useful, but "needful" in the litigated matter. *Pierce*, 487 U.S. at 572. As the First Circuit held, the appropriate inquiry for a court "is not whether counsel's experience * * * is helpful or productive but whether it is essential for competent

representation." *Atlantic Fish Spotters*, 205 F.3d at 492. "This is consistent with Congress's cost-savings objective [in EAJA] and, equally important, with the adjectives used by *Pierce* itself ('needful,' 'necessary') to determine whether special expertise should be compensated." *Id.* (parentheses in original). *See also Truckers United for Safety v. Mead*, 329 F.3d 891, 896 (D.C. Cir. 2003) ("the plain flaw in the district court's decision is that expertise [of counsel] was not 'needful for the litigation in question.'"); *Hyatt*, 315 F.3d at 252-253 (finding there was "no satisfactory showing" that expertise in class action litigation and social security disability law was "necessary" to handle dispute regarding interpretation of settlement agreement).

Here, the district court concluded that "the regulatory and scientific issues raised in this action were extraordinarily complex * * * and required counsel with Mr. Childe's highly developed specialization." Tab 395 at 201. The district court's conclusion is incorrect. The issues raised by Friends in this litigation were fundamental administrative law challenges to EPA's review of Florida's EFA Amendments and Phosphorus Rule. *See e.g.*, Tab 323 at 166-167 (Merits Order). The challenges arose under the APA, were based on EPA's administrative record, and were reviewed under the APA's arbitrary and capricious standard of review. Count I, as described by the Magistrate in this case, alleged that EPA "violated the

CWA and Administrative Procedure Act with its conclusion that the [EFA Amendments] did not change water quality standards. Tab 395 at 191. Count II alleged that EPA erred in its conclusions that Florida's Phosphorus Rule complied with the CWA. *Id.* These APA review issues did not require "distinct knowledge" of the type contemplated by EAJA or the Supreme Court. *Pierce*, 487 U.S. at 572.

As to Count I, the CWA directs EPA to review, and approve or disapprove, "revised or new" water quality standards established by States to ensure their compliance with the Act. 33 U.S.C. 1313(c)(3). EPA concluded that Florida's EFA Amendments were not subject to agency review under the CWA because they did not constitute "revised or new" water quality standards for the Everglades. This issue turned on an interpretation of the CWA and the EFA Amendments and an examination of the nature of EPA's review and decision. *See, e.g.*, Tab 323 at 172 ("To understand why EPA's conclusions are arbitrary, capricious and not in accordance with law, it is first necessary to understand what the plain words of the statute say."). In particular, it turned on whether certain language in the EFA Amendments was sufficiently mandatory as to itself constitute a revised or new water quality standard. *See, e.g.*, Tab 323 at 174-178. This is a legal inquiry that involved statutory interpretation and administrative law principles. No rarefied specialization or skill was required. Moreover, while it could be argued that any

specialization that Mr. Childe allegedly possessed was perhaps helpful, or that an attorney unfamiliar with the CWA or the Everglades might have had to spend additional time on the specific controversy, those are not the relevant factors for consideration under *Pierce*. *See Pierce*, 487 U.S. at 572. *See also Atlantic Fish Spotters*, 205 F.3d at 492 (*supra* at 32). The appropriate inquiry is whether Mr. Childe's alleged expertise was "necessary" or "essential" for competent representation. *Id.* The answer is no.

Count II, which challenged EPA's decision that the Phosphorus Rule complied with CWA, again involved an interpretation of the statute and the provisions of the Rule and an examination of the record demonstrating how EPA conducted its analysis of the Rule. *See, e.g.*, Tab 323 at 183 ("What the EPA was called upon to do, and what this Court must review in terms of EPA's administrative actions, is to determine whether the Rule follows the mandate of the CWA and protects the Everglades from long-term phosphorus concentrations above 10 ppb, which causes an imbalance in the Everglades' aquatic flora and fauna."); *Id.* ("It was arbitrary and capricious for the EPA to consider each section of the Rule in isolation and not review the Rule as a comprehensive, integrated whole for compliance with the CWA and its implementing regulations."). In particular, the issue was whether EPA reasonably relied on a letter from the Florida

Department of the Environment's General Counsel, indicating that the moderating provisions in the Phosphorus Rule would be applied only in accordance with the procedures for case-by-case variances to water quality standards. Tab 323 at 185-189. As with Count I, no rare expertise, or specialized knowledge or skill was required to litigate the administrative law challenge in Count II.[4/]

The district court, however, 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." Tab 395 at 201. The court's unsupported conclusion provides no basis for the enhanced fee awarded to Mr. Childe because the court did not find that Mr. Childe, himself, possessed such "mastery," *id.* The court's failure to provide such a finding is not surprising given that, as explained *supra* at 31, Mr. Childe's affirmative participation in the merits case was extremely limited. For example, plaintiffs' extensive oral presentation on summary judgment was presented by counsel for the Miccosukee Tribe. *See, e.g.*, DE 319. Moreover, although the court attributed the mastery of knowledge to the counsel for "Plaintiffs" (Tab 395 at 201), Friends was not the only plaintiff in the merits litigation and Mr. Childe was not the sole counsel. The Miccosukee Tribe was also a plaintiff and was represented by its own team of counsel. Additionally,

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[4/] Count III, as indicated *supra* at 6, was dismissed.

the Tribe advanced the same administrative law challenges that Friends did (with the exception of the ESA claim that the district court dismissed). Under such circumstances, a special factor enhancement for Mr. Childe would be appropriate only if the court explicitly found that *he* possessed the requisite knowledge. Because the district court did not and, based on the record, could not identify any evidence demonstrating that Mr. Childe actually had a "mastery of th[e] complex intersection of science and environmental law" (Tab 395 at 201), the court's decision to enhance Mr. Childe's award on this basis was an abuse of discretion.

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 7878 words.

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CERTIFICATE OF SERVICE

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