FILED
SEP 13 2023
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 23-251

In the Supreme Court of the United States

BRIGITH DAYANA GOMEZ BARCO AND
SYBREG VALENTINA CASTRO BALZA, PETITIONERS,

v.

DIANE WITTE, IN HER OFFICIAL CAPACITY AS FIELD OFFICE DIRECTOR OF THE NEW ORLEANS DISTRICT OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT AND REMOVAL OPERATIONS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

KENNETH A. MAYEAUX
MAYEAUX & ASSOCIATES L.C.
6554 Florida Blvd., Ste. 200
Baton Rouge, LA 70806
(225) 754-4477

WILLIAM T. SHARON
NICOLE L. MASIELLO
ARNOLD & PORTER
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000

R. STANTON JONES
ANDREW T. TUTT
SEAN A. MIRSKI
Counsel of Record
ALESSANDRA LOPEZ
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001
(202) 942-5000
sean.mirski@arnoldporter.com

QUESTION PRESENTED

This case presents a clear and acknowledged conflict over the proper interpretation of the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504; 28 U.S.C. § 2412.

EAJA permits courts to award attorney's fees to a private party who prevails in "any civil action" brought by or against the federal government. 28 U.S.C. § 2412(d)(1)(A). EAJA does not define the phrase "any civil action," but over more than 150 years, this Court has repeatedly held that habeas actions are "civil action[s]" and "civil cases." *See, e.g.*, *Ryan v. Gonzales*, 568 U.S. 57, 72, 73 (2013); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 96 (1868).

The courts of appeals are nevertheless divided over whether EAJA applies to habeas actions that challenge unlawful civil immigration detention. In this case, the Fifth Circuit held that habeas actions can *never* qualify for attorney's fees—even when challenging civil detention in conjunction with civil immigration proceedings—because habeas cases are always "hybrid" civil-criminal proceedings that "do not unequivocally fall under the text of the EAJA." Pet. App. 2a, 5a. In so holding, the Fifth Circuit "join[ed]" a divided Fourth Circuit while expressly "reject[ing]" the Second Circuit's contrary position. Pet. App. 6a n.1. It also "reject[ed] the reasoning" of a Ninth Circuit decision that EAJA covers at least some habeas actions. *Id.* The Fifth Circuit's holding was outcome-determinative—indeed, it was the only issue the court resolved—and this case thus presents the Court with the perfect opportunity to resolve the widespread disagreement over this important threshold issue.

The question presented is:

Whether a habeas action brought to challenge civil immigration detention qualifies as "any civil action" within the meaning of the Equal Access to Justice Act.

PARTIES TO THE PROCEEDING

Petitioners are Brigith Dayana Gomez Barco and Sybreg Valentina Castro Balza.

Respondents are Diane Witte, in her official capacity as Field Office Director of the New Orleans District of U.S. Immigration and Customs Enforcement and Removal Operations; Indalecio Ramos, in his official capacity as Acting Warden of South Louisiana Immigration and Customs Enforcement Processing Center; Merrick Garland, Attorney General of the United States; and Alejandro Mayorkas, Secretary of the Department of Homeland Security.

RELATED PROCEEDINGS

United States District Court (W.D. La.):

Gomez Barco v. Witte, No. 6:20-cv-497 (Aug. 23, 2021)

Castro Balza v. Barr, No. 6:20-cv-866 (Nov. 3, 2021)

United States Court of Appeals (5th Cir.):

Gomez Barco v. Witte, No. 21-30637 (Apr. 20, 2023)

Castro Balza v. Garland, No. 21-30748 (Apr. 20, 2023)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases—Continued **Page(s)**

Cases—Continued **Page(s)**

Statutes

Other Authorities

Other Authorities—Continued **Page(s)**

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–6a) is reported at 65 F.4th 782 (5th Cir. 2023). The opinions of the district court in *Gomez Barco* (Pet. App. 7a–8a) and in *Castro Balza* (Pet. App. 30a–31a) are unreported but available at 2021 WL 2419489 and 2021 WL 5144401, respectively. The order of the court of appeals denying rehearing *en banc* (Pet. App. 54a–55a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2023. Pet. App. 1a. The court of appeals denied a timely petition for rehearing *en banc* on July 10, 2023. Pet. App. 54a–55a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2412(d)(1)(A) of Title 28 of the United States Code provides:

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

INTRODUCTION

This case presents a square and significant conflict over the interpretation of the Equal Access to Justice Act (EAJA): whether a habeas action that is brought to challenge unlawful civil immigration detention is a "civil action" that allows for the recovery of attorney's fees. 28 U.S.C. § 2412(d)(1)(A).

EAJA permits prevailing parties to recover attorney's fees in "any civil action" against the United States if the position of the United States was not substantially justified and if there are no special circumstances that would make an award unjust. *Id.* The Fifth Circuit held below that habeas actions categorically fall outside of EAJA's "any civil action" language because they are *always* "hybrid" civil-criminal actions, even when they challenge unlawful *civil* detention. Pet. App. 6a. In so holding, the Fifth Circuit acknowledged that it was taking sides in an intractable circuit split: it "agree[d]" with the position taken by the Fourth Circuit while expressly "reject[ing]" the reasoning of the Second and the Ninth Circuits, which both permit petitioners to recover attorney's fees under EAJA for habeas actions successfully challenging unlawful and unjustified civil detention. Pet. App. 6a & n.1.

This case readily meets all of this Court's criteria for review. The conflict is clear, entrenched, and widely acknowledged by the relevant courts as well as numerous commentators and even the government itself. The Second Circuit has held that individuals who successfully challenge unlawful civil immigration detention can petition for fees under EAJA, whereas the Fourth and Fifth Circuits have held the opposite—the former by a divided vote. Compounding the confusion, the Fourth and Fifth Circuits have also rejected the Ninth Circuit's position that EAJA covers at least some habeas petitions in the immigration context. It is clear that the courts need

guidance, and this case presents an ideal vehicle for this Court to give it.

Further percolation would serve no purpose: courts on each side of the conflict have fully developed the relevant arguments, and there is no chance of a consensus developing that would resolve this mature split. All that remains is for the other circuits to choose a side, as the Fifth Circuit itself did below. And the overwhelming majority of detained immigrants are housed in the jurisdictions that have already staked out a position.

Furthermore, any continued division comes at considerable cost. The question presented implicates two vital rights—individual liberty and access to counsel—and correctly deciding this issue is critical to uniformly administering a nationwide scheme expressly designed to ensure "*Equal* Access to Justice." Instead, unlawfully detained individuals are currently left with vastly *un*equal opportunities to attract counsel depending on the fortuity of where the government happens to be holding them.

Certiorari should be granted.

STATEMENT OF THE CASE

1. Ms. Brigith Dayana Gomez Barco and Ms. Sybreg Valentina Castro Balza are Venezuelan citizens who were detained pending their removal by the Department of Homeland Security and who successfully challenged their indefinite detentions through petitions for writs of habeas corpus. Pet. App. 2a–3a.

a. Ms. Gomez Barco made several trips to the United States over the course of 15 years, including for her work as a flight attendant and to purchase merchandise for her two clothing boutiques in Venezuela. *See Gomez Barco* ROA.408, Ex. C – Gomez Barco Decl. Most recently admitted as a nonimmigrant visitor, Ms. Gomez Barco remained in the country after her immigration authorization expired. Pet. App. 2a. In May 2018, she was

convicted of several crimes and sentenced to 20 months and 15 days of imprisonment. *Id.* After she had served her sentence, the Department of Homeland Security detained her on July 19, 2019, and less than three weeks later, an immigration judge ordered her removed to Venezuela. *Id.*

Ms. Gomez Barco chose not to appeal that decision, and she cooperated fully with the government's efforts to remove her, including by signing every document requested and even arranging for the delivery of her passport. *See* Pet. App. 23a; *Gomez Barco* ROA.407, Ex. C – Gomez Barco Decl. Despite her cooperation, however, the government proved unable to remove her within the statutory 90-day removal period. *See* Pet. App. 23a.

On April 17, 2020—having already spent nine months in civil immigration detention waiting to be removed—Ms. Gomez Barco filed a civil action seeking habeas corpus relief. Pet. App. 10a, 20a. She invoked this Court's decision in *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001), which held that after six months of "presumptively reasonable" detention, a non-citizen may seek to show that there is "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," at which point "the Government must respond with evidence sufficient to rebut that showing." If the government cannot do so, then it must generally release the detainee subject to appropriate conditions. *See id.*

On November 19, 2020, the magistrate judge recommended granting habeas relief. Pet. App. 20a–21a, 29a. The magistrate judge agreed with Ms. Gomez Barco that her detention had dragged on "well in excess" of the presumptively reasonable six-month period. Pet. App. 23a. Ms. Gomez Barco had also provided "good reason to believe there is no significant likelihood of removal in the reasonably foreseeable future" based on an

expert report that emphasized "the ever-worsening diplomatic relations" between Venezuela and the United States, "the closure of Venezuelan airspace," and the "suspension of all travel between the United States and Venezuela due to the coronavirus, which clearly [had] no reasonable end in sight." Pet. App. 23a, 26a (internal quotation marks omitted); *see also* Pet. App. 25a (noting the United States had released more than 800 Venezuelan citizens from detention since September 2019 "in clear recognition that their removal to Venezuela [was] virtually impossible" (citation omitted)).

Finally, the magistrate judge refused to credit two declarations by Immigration and Customs Enforcement officers. *See* Pet. App. 27a. The magistrate judge noted that neither of those officers were presented as expert witnesses; that the first officer "clearly [had] no factual basis for his 'belief' that there [was] no foreseeable impediment to [Ms. Gomez Barco's] removal or that her removal [was] imminent"; and that there was "no foundation" for the second officer's statement that the Venezuelan government's travel restrictions were solely related to containing the spread of the coronavirus "or for his 'expectation' that the Venezuelan travel restrictions [would] be lifted on October 12, 2020—which we now know were not." *Id.* Because the government had failed to carry its burden to rebut Ms. Gomez Barco's showing that she would not be removed in the foreseeable future, the magistrate judge concluded her detention had become unreasonable. Pet. App. 27a–28a.

On December 16, 2020, the district court granted Ms. Gomez Barco's habeas petition and ordered her immediate release. Pet. App. 18a–19a. The district court adopted the magistrate judge's report and recommendation in full and concluded that "the additional information provided by the [government]" in its objections was "still insufficient to rebut [Ms. Gomez

Barco's] showing that there [was] no significant likelihood that she [would] be removed to Venezuela in the reasonably foreseeable future." Pet. App. 18a. Ms. Gomez Barco was released after having spent nearly 17 months in immigration detention.

b. Ms. Castro Balza has a similar story. Like Ms. Gomez Barco, she entered the United States as a nonimmigrant visitor. Pet. App. 41a. She then filed an asylum application in which she explained that pro-regime vigilante groups had persecuted her and her family in Venezuela because they had refused to support the dictatorial government of Nicolas Maduro. *Id.* Just one month before she arrived in the United States, members of these vigilante groups had murdered Ms. Castro Balza's boyfriend in front of her. *Id.* She was 18 years old at the time. *Id.*

While her asylum application was still pending, Ms. Castro Balza pled guilty to involvement in a criminal conspiracy and was sentenced to 18 months in prison. *Id.* After serving her sentence, Ms. Castro Balza was detained by the Department of Homeland Security on August 31, 2019. *See Castro Balza* ROA.84, Ex. A – Castro Balza Decl. She subsequently withdrew her asylum application and sought voluntary departure in hopes of leaving detention as soon as possible. *See Castro Balza* ROA.85, Ex. A – Castro Balza Decl. The immigration judge denied her voluntary departure request and entered a final order of removal on November 21, 2019. Pet. App. 42a.

Like Ms. Gomez Barco, Ms. Castro Balza chose not to appeal and cooperated fully with the government's attempts to remove her. *See* Pet. App. 48a; *Castro Balza* ROA.85, Ex. A – Castro Balza Decl. But after it became clear that the government could not remove her in the foreseeable future, *see* Pet. App. 42a–43a, Ms. Castro Balza also filed a civil action seeking habeas relief. On

September 17, 2020, the magistrate judge recommended granting her petition based on evidence and reasoning similar to that in Ms. Gomez Barco's case. *See* Pet. App. 48a–53a. On October 14, 2020, the district court adopted the magistrate judge's report and recommendation in full. Pet. App. 38a–39a. Ms. Castro Balza was finally released after over 13 months in immigration detention.

2.a. Following their releases, Ms. Gomez Barco and Ms. Castro Balza petitioned for attorney's fees and costs under EAJA, which awards fees and costs to a prevailing party in "any civil action" against the government unless the government can show that its position was "substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A); *see* Pet. App. 3a.

Ms. Gomez Barco and Ms. Castro Balza thought their cases easily qualified as "civil actions" under this Court's precedent. Every aspect of their cases was civil: this Court has "consistently recognized that habeas corpus proceedings are civil in nature," *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); immigration detention is "civil detention," *Zadvydas*, 533 U.S. at 690; and removal proceedings are "purely civil action[s]," *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). But the government nevertheless opposed the fee petitions in part on the grounds that Ms. Gomez Barco and Ms. Castro Balza's habeas actions were not "civil actions" within the meaning of EAJA. *See, e.g.*, Pet. App. 11a.

b. In both cases, the magistrate judges agreed with the government. First, both magistrate judges agreed that "[t]he threshold issue" was "whether the instant *habeas* proceeding is a 'civil action' as contemplated by the EAJA." Pet. App. 12a; *see* Pet. App. 35a (similar). Both magistrate judges noted that "the Fourth and Tenth Circuits have held that 'the EAJA's waiver of sovereign

immunity to awards of attorney's fees does not extend to habeas corpus proceedings' " while "[t]he Second Circuit and the Ninth Circuit have determined that it does." Pet. App. 12a; *see* Pet. App. 35a (similar). But "given the statute's ambiguity on the availability of EAJA fees in *habeas corpus* actions," the magistrate judges "decline[d] to follow the rationale of the Second and Ninth Circuits and instead adopt[ed] the reasoning of the [Fourth Circuit] in finding that strict construction of the waiver of sovereign immunity dictates that EAJA fees are not available to petitioners in *habeas corpus* matters." Pet. App. 17a; *see* Pet. App. 36a (similar).

c. Both recommendations went to the same district court judge, who agreed in both cases with the recommended denial of attorney's fees but on "alternate grounds"—namely, that the government's position was "substantially justified." Pet. App. 7a–8a; *see* Pet. App. 30a–31a. The district judge did not elaborate in either case, other than noting "the novel and difficult circumstances involved in this case, e.g., a rapidly evolving global pandemic coupled with civil conflict in the would-be country of removal." Pet. App. 8a; *see* Pet. App. 31a (similar).

d. Ms. Gomez Barco and Ms. Castro Balza timely appealed the district court's decisions, and their cases were consolidated for purposes of oral argument and decision. In both cases, the government argued the Fifth Circuit should affirm the decision below primarily on the "threshold" ground that EAJA categorically excludes habeas corpus proceedings. *E.g.*, Br. for Appellees at 14, *Gomez Barco* (5th Cir. Apr. 8, 2022). The government also argued in the alternative that its position had been substantially justified. *See, e.g.*, *id.* at 2.

3. On April 20, 2023, the Fifth Circuit affirmed, holding that "habeas corpus petitions are not purely civil in nature, and therefore do not unequivocally fall under

the text of the EAJA." Pet. App. 2a. The Fifth Circuit emphasized that it did not "reach the issue of whether the Government was substantially justified in its actions." Pet. App. 6a.

a. The Fifth Circuit began its analysis of EAJA's meaning with the proposition that whenever the federal government waives its immunity, "any ambiguity" in that waiver must be "strictly construed in favor of the sovereign." Pet. App. 4a (citing *Lane v. Pena*, 518 U.S. 187, 192 (1996)). The panel explained that EAJA "is a limited waiver of sovereign immunity, allowing for the imposition of attorney's fees and costs against the United States in specific civil actions." *Id.* In particular, the panel noted, EAJA waives the government's immunity "'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.'" Pet. App. 5a (quoting 28 U.S.C. § 2412(d)(1)(A)). The Fifth Circuit therefore agreed with the government that "[t]he threshold issue" in the case was "whether the EAJA expressly and unequivocally waives the United States' sovereign immunity regarding attorney's fees in immigration habeas corpus actions." *Id.*

b. The Fifth Circuit held that it does not. Pet. App. 6a. Citing precedent from the Fifth and Fourth Circuits "recogniz[ing] the hybrid nature of habeas corpus petitions," the panel "agree[d] that habeas corpus proceedings are hybrid actions." Pet. App. 5a–6a (citations omitted). "Since 'a habeas corpus proceeding is neither a wholly criminal nor a wholly civil action, but rather a hybrid action that is unique, a category unto itself,'" the panel reasoned, "it is not purely a civil action." Pet. App. 6a (quoting *O'Brien v. Moore*, 395 F.3d 499, 505 (4th Cir. 2005)). And because "[a] waiver of the Government's sovereign immunity will be strictly construed," *id.* (quoting *Lane*, 518 U.S. at 192), the Fifth

Circuit concluded that "the EAJA does not authorize attorney's fees for successful 28 U.S.C. § 2241 motions." *Id.*

c. In holding as much, the Fifth Circuit emphasized that it was "join[ing] the Fourth and Tenth Circuit's reasoning in *O'Brien* and *Ewing v. Rodgers*, 826 F.2d 967 (10th Cir. 1987) and reject[ing] the reasoning of the Second Circuit in *Vacchio v. Ashcroft*, 404 F.3d 663 (2d Cir. 2005) and the Ninth Circuit in *In re Petition of Hill*, 775 F.2d 1037 (9th Cir. 1985)." Pet. App. 6a n.1. "The reason," the court explained, was "straightforward: habeas proceedings are not purely civil actions, and the EAJA is clear that attorney's fees may be recovered only in civil actions." *Id.*

d. On July 10, 2023, the Fifth Circuit denied a timely petition for rehearing *en banc*. Pet. App. 54a–45a.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CLEAR AND INTRACTABLE CONFLICT OVER A SIGNIFICANT QUESTION

The Fifth Circuit's decision deepens a circuit split over whether a habeas action challenging unlawful civil immigration detention qualifies as "any civil action" under EAJA. That conflict is square and intractable, with three different circuits fracturing into two firmly opposed factions and a fourth circuit having already rejected one side's categorical perspective.

Courts, commentators, and the government have openly acknowledged the split, and it will not resolve without this Court's intervention. Instead, the division and confusion will continue to mount, resulting in enormously disparate outcomes in motions for attorney's fees based solely on where parties happen to find themselves. The situation is unsustainable, and the conflict is ripe and ready for this Court's review.

1. The decision below directly conflicts with settled law in the Second Circuit. In *Vacchio v. Ashcroft*, 404 F.3d 663 (2d Cir. 2005), the Second Circuit confronted the identical question presented here, and it adopted the opposite holding: that "'civil actions' under EAJA encompass immigration habeas petitions." *Id.* at 668 (emphasis omitted).

Tullio Vacchio was an Italian citizen and permanent resident of this country. *Id.* at 665. In 2002, the INS detained him on the basis of two previous misdemeanor convictions for selling marijuana, which the INS incorrectly claimed were "aggravated felonies" that required his detention pending removal under 8 U.S.C. § 1226(c). *See id.* Two months later, Mr. Vacchio filed a habeas petition, and a Second Circuit panel ultimately ordered him released on bail. *See id.* at 666. He then petitioned for fees and costs under EAJA, but the district court denied his motion in part on the grounds that "Vacchio's habeas petition for a release from immigration detention did not qualify as a 'civil action' under the EAJA." *Id.* at 667.

On appeal, the Second Circuit held otherwise. It noted that "[o]n its face, the term 'any civil action' would seem to include habeas petitions, which ordinarily qualify as civil actions." *Id.* But the court also recognized that habeas proceedings can sometimes operate in ways "different from any other type of civil action." *Id.* (citation omitted). The Second Circuit thus concluded it needed to examine EAJA's "language, its history and its purpose" in order to "determine whether the limitation to 'civil actions' excludes from the statute's ambit habeas proceedings challenging immigration detentions." *Id.* at 667–68 (citation omitted).

Canvassing all three, the Second Circuit held that EAJA applies to habeas petitions challenging unlawful civil immigration detention. *Id.* at 668; *see id.* at 667–72.

The court emphasized that "Congress has defined 'civil action' broadly, specifically exempting 'cases sounding in tort,' and 'including proceedings for judicial review of agency action.' " *Id.* at 669 (quoting *Hashim v. INS*, 936 F.2d 711, 714 n.3 (2d Cir. 1991)). The court also emphasized that Congress had designed EAJA in part to "encourag[e] challenges to improper government action as a means of formulating better public policy." *Id.* at 671. The Second Circuit concluded that this objective was served by habeas petitions, like Mr. Vacchio's, which challenge the legality of continued civil immigration detention and the validity of regulatory policy. *Id.* "It is clear," the court reasoned, that such proceedings "affect[] numerous people" and "can provide a concrete, adversarial test of Government regulation[,] ... thereby insur[ing] the legitimacy and fairness of the law." *Id.* (cleaned up).

The Second Circuit was also unpersuaded by the government's argument "that the availability of EAJA relief must be construed strictly in favor of the Government insofar as it is a waiver of sovereign immunity." *Id.* at 671 n.10. The court explained that the sovereign-immunity canon did not require it to "constru[e] the term 'civil action' in the most narrow possible manner." *Id.*; *see id.* ("[W]hen construing a waiver of sovereign immunity, we should not 'assume the authority to narrow the waiver that Congress intended.' " (quoting *United States v. Kubrick*, 444 U.S. 111, 117–18 (1979))). Instead, the Second Circuit interpreted " 'civil action' not with an aim to narrow or expand its meaning," but rather to "discern as best we can Congress's intent." *Id.* "We have done so," the court concluded, and "our interpretation of Congress's intent compels us to conclude that the EAJA term 'civil action' includes immigration-context habeas petitions." *Id.*

Over the course of its opinion, the Second Circuit repeatedly distinguished its earlier decision in *Boudin v. Thomas*, 732 F.2d 1107 (2d Cir. 1984). *Boudin* had held that EAJA does not apply to habeas petitions challenging *criminal* detention because such petitions did not serve Congress's goals as reflected in the statute's legislative history. *See Vacchio*, 404 F.3d at 668; *see also Boudin*, 732 F.2d at 1112. But the Second Circuit decided that *Boudin*'s reasoning and holding did not make sense in the context of habeas petitions challenging *civil* detention. *Boudin*, for example, had argued that financial incentives to hire counsel may not be necessary in the criminal habeas context, where defendants may be appointed counsel. *Vacchio*, 404 F.3d at 668. But a similar rationale was "not nearly as persuasive" in the civil habeas context, where "persons in immigration proceedings are not provided free legal representation in the absence of paid counsel." *Id.* at 671. The court therefore "conclude[d] that the EAJA's purpose of providing financial encouragement to litigants [was] not sufficient to demonstrate that Congress' intent was to exclude habeas petitions in the immigration context from the term 'civil action[s].'" *Id.*[1]

Finally, the Second Circuit rejected the "hybrid action" theory that the Fourth and Fifth Circuits would later embrace. *Boudin*, the panel explained, had carved out every "*criminal* habeas petition[]" from EAJA's

---

[1] *Boudin* had also suggested that EAJA fees were intended only for "litigation entered into by choice," rather than cases where litigants would seek counsel regardless because of the significant liberty interests involved. In *Vacchio*, this Court rejected this reasoning, explaining that EAJA applies to many circumstances in which "the non-government party is essentially forced to participate," such as "a situation where the SEC takes legal action against an individual who is then forced to engage counsel to defend himself." 404 F.3d at 670.

scope because that kind of petition was "a collateral civil action (habeas) that has its roots in a criminal action." *Vacchio*, 404 F.3d at 672. But that "is not the case in the context of an immigration habeas petition, which is both a civil action in its own right, and which has its roots in a civil action [the immigration proceeding and associated civil detention]." *Id.* The Second Circuit thus "h[e]ld that a habeas proceeding challenging immigration detention[] constitutes a 'civil action' under the EAJA." *Id.*

2. A divided panel of the Fourth Circuit held just the opposite in *Obando-Segura v. Garland*, 999 F.3d 190 (4th Cir. 2021). The *Obando-Segura* majority recognized that the Second Circuit had reached "a different conclusion" in *Vacchio*. *Id.* at 195. But over a sharp dissent, the *Obando-Segura* majority nevertheless held that EAJA "does not apply to . . . habeas proceedings seeking release from civil detention." *Id.* at 191.

In 2017, Jose Andres Obando Segura, a Colombian citizen, filed a habeas petition challenging the constitutionality of his continued detention pending removal. *Id.* at 192. A district court granted the motion and ordered a bond hearing before an immigration judge. *Id.* After being released on bond, Mr. Obando filed a motion for attorney's fees under EAJA, and the district court denied the motion on the grounds that a habeas action challenging unlawful civil detention did not qualify as a "civil action" within the meaning of EAJA. *Id.*

On appeal, the Fourth Circuit affirmed. *See id.* at 191. The panel majority began its opinion by observing that, although the law is frequently divided into "criminal law, where the state imposes punishments, and civil law, which includes basically everything else," habeas corpus proceedings "do not fit neatly into this dichotomy." *Id.* at 192. Instead, the majority opined, "habeas corpus proceedings are unique and occupy a special place of their own in our system." *Id.* at 192–93 (quotation marks

omitted). Emphasizing that federal courts must "construe ambiguous waivers of sovereign immunity narrowly," the majority concluded that the "ambiguous" nature of habeas proceedings excludes them from EAJA's reach. *Id.* at 193.

Much of the majority's analysis turned on its understanding that all habeas actions are "hybrid actions," a holding that the majority traced back to an earlier Fourth Circuit decision, *O'Brien v. Moore*, 395 F.3d 499 (4th Cir. 2005). Like the Second Circuit's earlier decision in *Boudin*, *O'Brien* had held that EAJA does not encompass a *criminal* defendant's habeas proceeding because such proceedings are not "unambiguously" civil actions. *Obando-Segura*, 999 F.3d at 193. *O'Brien* had acknowledged that EAJA does not explicitly exclude habeas proceedings and that "courts have, for a long time, categorized habeas cases as 'civil' in nature, rather than criminal." *Id.* (quotation marks omitted). But the *O'Brien* panel had felt "uncomfortable" slotting habeas proceedings into this traditional civil-criminal paradigm. *Id.* (quotation marks omitted). Instead, it had determined that "a proceeding following an application for the writ of habeas corpus was a hybrid proceeding, unique and in a category unto itself." *Id.* (quotation marks omitted). That determination had reflected *O'Brien*'s reading of Fourth Circuit and Supreme Court caselaw, *see id.*, as well as its view that "a habeas proceeding assumes some of the criminal nature of the challenged criminal detention," *id.* at 194; *see also id.* ("[A] habeas proceeding . . . necessarily assumes part of the underlying case's criminal nature" (quoting *O'Brien*, 395 F.3d at 505)).

In *Obando-Segura*, the Fourth Circuit majority held that *O'Brien*'s reasoning about the "hybrid" nature of habeas petitions challenging criminal detention "dictate[d]" the same result even for petitions challenging civil detention. *Id.* According to the majority, it did not

make sense to draw a line between the two types of petitions because "the reason for the challenged detention does not change the essence or function of the habeas application used to seek release"; whether the underlying detention is civil or criminal, "the traditional function of the writ is to secure release from illegal custody." *Id.* (quotation marks omitted). The majority thus held that *all* "habeas proceedings include a 'criminal aspect' and 'a civil aspect' "—even habeas actions challenging civil detention in conjunction with civil immigration proceedings—and that those "dual aspects, as well as the differences between habeas proceedings and normal civil actions, render habeas proceedings as a whole 'hybrid' proceedings and dictate that Obando's application for the writ of habeas corpus is not unambiguously a 'civil action.' " *Id.* at 195

The majority openly acknowledged that it was splitting from the Second Circuit's decision in *Vacchio*. *Id.* But the majority characterized *Vacchio* as having relied too "heavily on the Act's purposes," whereas in its view *O'Brien* had "relied on persuasive Supreme Court and Fourth Circuit precedent that enumerated why habeas proceedings are hybrid proceedings that are meaningfully different from civil actions." *Id.*

Finally, the Fourth Circuit majority rejected the argument that Supreme Court precedent since *O'Brien* had "changed the principles for interpreting government waivers of sovereign immunity." *Id.* The majority acknowledged the Supreme Court's recent directive that the sovereign-immunity canon is merely a canon of construction "that does not 'displace the other traditional tools of statutory construction,' " but the majority concluded that *O'Brien*'s reasoning about the nature of habeas petitions was consistent with that directive. *Id.* (brackets omitted) (quoting *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008)). *O'Brien* had "found

'civil action' to be ambiguous after employing the traditional statutory-construction tools," the majority claimed, "[a]nd that ambiguity required that [the *O'Brien* court] construe the term in favor of the sovereign." *Id.*[2]

Judge Keenan dissented. *Id.* at 197. She argued that Mr. Obando's habeas proceeding "plainly qualifie[d] as 'any civil action' " under EAJA, *id.*, and that the majority's invocation of the supposedly "hybrid" nature of habeas proceedings made no sense in the context of Mr. Obando's challenge to the lawfulness of his *civil* detention. After all, Mr. Obando "d[id] not seek to attack a criminal detention, sentence, or conviction." *Id.* It followed that Mr. Obando's habeas action did not "have both criminal and civil aspects," as the majority had claimed, but was instead "purely civil in nature." *Id.* (quotation marks omitted).

Judge Keenan began her analysis with this Court's precedents. Even though this Court has occasionally "recogniz[ed] the 'unique' *features* of habeas corpus," she noted, it "has defined habeas proceedings as civil *in nature* for over a century." *Id.* at 197 (emphases added) (citing, *e.g.*, *Hilborn v. United States*, 163 U.S. 342, 344–46 (1896); *Harris v. Nelson*, 394 U.S. 286, 293–94 (1969); *Hilton*, 481 U.S. at 776; *Mayle v. Felix*, 545 U.S. 644, 654 n.4 (2005); *Banister v. Davis*, 140 S. Ct. 1698, 1702–03

---

[2] Despite its claim that it was applying all the "traditional tools of statutory construction," the Fourth Circuit majority refused to engage substantively with the dissent's textual argument that "the word 'any' [in EAJA] requires that the term 'civil action' be read expansively," concluding that—if the dissent's argument were right—it would undermine *O'Brien*'s holding. *Obando-Segura*, 999 F.3d at 196, 198. The majority also refused to "consider legislative history" before applying the sovereign-immunity canon, citing language from one of this Court's cases that set out the standard for *when* courts may find a waiver of sovereign immunity rather than the *scope* of the resulting waiver. *Id.* at 195 n.4 (citing *Lane*, 518 U.S. at 192).

(2020)).[3] Judge Keenan observed that "[n]othing in the text of the EAJA suggests that Congress departed from this established understanding with respect to habeas challenges to immigration detention." *Id.* So rather than adopt the majority's "novel interpretation" and "read into the EAJA an implicit exception excluding such habeas actions," Judge Keenan would have instead "appl[ied] long-standing Supreme Court precedent categorizing habeas proceedings as civil matters and h[e]ld that the EAJA applies to Obando-Segura's petition." *Id.*

Judge Keenan explained that this conclusion was further "compel[led]" by two aspects of EAJA's "clear" statutory text. *Id.* at 197–98. First, Judge Keenan noted, "EAJA by its terms applies to '*any* civil action (*other than cases sounding in tort*).'" *Id.* at 198 (quoting 28 U.S.C. § 2412(d)(1)(A)). "By qualifying the term 'civil action' with the word 'any,'" Judge Keenan reasoned, "Congress plainly sought to give the EAJA expansive reach," and, indeed, had "expressed its intent for the EAJA to apply to the broadest possible range of civil cases." *Id.* (citing *Vacchio*, 404 F.3d at 667). Second, Judge Keenan explained that Congress had also "demonstrated its intent to place another category of civil actions outside the scope of the EAJA, by explicitly excluding tort actions from the reach of the statute." *Id.* She reasoned that, in light of

---

[3] The majority had invoked one of this Court's cases, *Schlanger v. Seamans*, 401 U.S. 487 (1971), which the majority characterized as having held that "national service of process—authorized in 'civil actions' against government officials under 28 U.S.C. § 1391(e)—was not authorized in a habeas proceeding brought by a military enlistee challenging his civil detention." *Obando-Segura*, 999 F.3d at 193 (citing *Schlanger*, 401 U.S. at 490 n.4). In response, Judge Keenan explained that *Schlanger*'s "brief footnote" concerned merely whether "different litigation rules sometimes apply to habeas actions," and thus it had "little or no bearing on our task here, which is to determine whether the phrase 'any civil action' in the EAJA encompasses purely civil immigration habeas cases." *Id.* at 198 n.1.

this "express exception," courts "cannot assume that Congress also intended *implicitly* to exclude any other category of purely civil cases from the scope of the statute." *Id.*

In Judge Keenan's view, these three factors—"the textual exception for tort actions, the expansive statutory phrase '*any* civil action,' and the decades-long precedent defining habeas actions as civil in nature"—"mandate the conclusion that the EAJA unambiguously includes habeas challenges to civil immigration detention." *Id.*

Judge Keenan further concluded that *O'Brien*'s "hybrid action" theory did not alter this analysis. *Id.* She noted that the *O'Brien* court's holding had been "based on the conclusion that habeas actions challenging *criminal* detentions are not 'civil actions' within the meaning of the EAJA but, instead, are hybrid criminal-civil actions." *Id.* That conclusion did not logically extend to Mr. Obando's action because "it is well-established that immigration detention is civil in nature" and "the Supreme Court long has characterized habeas corpus as a civil remedy." *Id.* at 199. Judge Keenan therefore reasoned that Mr. Obando's challenge "ha[d] no 'criminal aspect' whatsoever," and that there was thus "no basis on which to classify a civil habeas action challenging civil immigration detention as a 'hybrid' criminal-civil proceeding excluded from the broad category of 'any civil action.'" *Id.* (citing *Vacchio*, 404 F.3d at 672 and *In re Hill*, 775 F.2d at 1040–41).

Judge Keenan agreed with the majority on one point, however: that the Fourth Circuit's decision in *Obando-Segura* had "create[d] a circuit split." *Id.* at 197 (citing *Vacchio*, 404 F.3d at 667–72 and *In re Hill*, 775 F.2d at 1040–41); *accord id.* (describing "[t]his disagreement with our sister circuits" as "unnecessary"); *id.* at 198 ("[O]ther circuits [have] reached the opposite result in habeas cases involving immigration.").

3. The Ninth Circuit has not squarely resolved the question presented, but courts, commentators, and even the government routinely cite its decision in *In re Hill*, 775 F.2d 1037 (9th Cir. 1985), as part of the relevant circuit split because the decision's reasoning is irreconcilable with the Fourth and Fifth Circuits' view that EAJA categorically excludes habeas petitions.

Carl Hill, a British citizen, filed a habeas petition challenging an exclusion proceeding in which he was found inadmissible because he had self-identified as homosexual to an immigration officer. *Id.* at 1039. After the writ was granted, Mr. Hill moved for attorney's fees under EAJA, *id.*, but the district court denied his motion, *id.* at 1040.

On appeal, the Ninth Circuit held that Mr. Hill's habeas petition qualified as a "civil action" under EAJA. *Id.* at 1041. The court explained that, to determine whether a proceeding constitutes a "civil action" under EAJA, courts "must look to the substance of the remedy sought, not the labels attached to the claim." *Id.* at 1040–41. Applying that lens, the court held that Mr. Hill's habeas petition was a civil action. *Id.* at 1041. The Ninth Circuit acknowledged the Second Circuit's holding in *Boudin* that EAJA did not apply to habeas actions challenging "unlawful criminal custody." *Id.* But the court refused to extend *Boudin* beyond the "criminal context," *id.* at 1040, reasoning that Mr. Hill's petition vindicated not only his own personal rights but also challenged government policies "that had a sweeping effect on homosexual aliens seeking to enter the United States," *id.* at 1041. "[I]n essence," the Ninth Circuit explained, Mr. Hill "sought to secure a declaratory judgment that the Government's policy ... was improper"—a civil, not criminal, remedy. *Id.*

The Ninth Circuit also found that characterizing Mr. Hill's habeas petition as a civil action served EAJA's dual

purposes as identified in *Boudin*. *Id.* According to *Boudin*, EAJA aimed to remove financial disincentives and encourage challenges to government action. *Id.* Mr. Hill's petition advanced those goals, the court reasoned, because Mr. Hill (1) "was not eligible for government-provided counsel," (2) "had little economic incentive to challenge" his exclusion, and (3) "ha[d] no custodial incentive to reverse the Government's action." *Id.*

The Ninth Circuit thus held that "[a]pplication of the EAJA to Hill's petition [was] appropriate." *Id.* Since then, the Ninth Circuit has regularly awarded EAJA fees for successful habeas actions challenging unlawful civil immigration detention. *See, e.g.*, *Nadarajah v. Holder*, 569 F.3d 906, 909–10 (9th Cir. 2009); *Levin v. Coleman*, 79 F. App'x 308, 310 (9th Cir. 2003); *see also Diaz-Magana v. Rogers*, 81 F.3d 167 (9th Cir. 1996) (memorandum disposition) (EAJA available to habeas petitions in "immigration cases").

Although *In re Hill* did not address whether a habeas action challenging civil immigration *detention* qualifies as a "civil action,"[4] the Ninth Circuit necessarily rejected the Fourth and Fifth Circuits' view that habeas actions are categorically "hybrid proceedings" not covered by EAJA. *In re Hill* thus features prominently in the debate on both sides of the circuit split and underscores the starkly different views of the lower courts on the question presented. The Fourth and Fifth Circuits have "reject[ed]" the Ninth Circuit's "reasoning" on the grounds that, without exception, "habeas proceedings are not purely civil actions." Pet. App. 6a n.1; *accord Obando-Segura*, 999 F.3d at 194 n.3 (explaining that *O'Brien* had

[4] This Court has also since clarified that habeas actions cannot be used to challenge exclusion from the country, *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1963 (2020), which limits the number of cases in which *In re Hill*'s specific holding will apply as a practical matter.

"found that *Hill* ... [was] not persuasive given that [it] conflicted with ... *Boudin*," which had held "that the Equal Access to Justice Act 'does not unequivocally and unambiguously include a habeas proceeding' " (citation omitted)). On the other side of the split, the Second Circuit invoked *In re Hill* for the difference between habeas actions "in the immigration context" and "the criminal context." *Vacchio*, 404 F.3d at 669; *see also id.* at 669–71 (explaining why *In re Hill*'s reasoning supports reading EAJA to encompass habeas challenges to civil immigration detention). Likewise, the dissent in *Obando-Segura* criticized "the majority's novel interpretation of the EAJA [for] creat[ing] a circuit split with the approach[] taken by the ... Ninth Circuit[]." 999 F.3d at 197.

If nothing else, *In re Hill* thus reinforces the broader disarray over whether habeas actions can ever qualify as "civil actions" under EAJA and reinforces the obvious need for this Court's guidance on the question presented by this case.[5]

4. Outside the relevant circuits, the conflict is also widely recognized.

For example, the government admitted in its briefing below that "[t]he Second Circuit and the Ninth Circuit have extended the EAJA's waiver of sovereign immunity to awards of attorneys' fees in habeas corpus proceedings." Br. for Appellees at 16 & n.4, *Gomez Barco*

---

[5] Courts will also occasionally invoke a Tenth Circuit case, *Ewing v. Rodgers*, 826 F.2d 967 (10th Cir. 1987), as part of the circuit split, *see, e.g.*, Pet. App. 6a n.1, but *Ewing* limited its holding to "a habeas petition challenging confinement arising from a criminal judgment," 826 F.2d at 971 & n.5 (distinguishing *In re Hill*). *See also, e.g.*, *Arias v. Choate*, No. 1:22-CV-02238, 2023 WL 4488890, at *4 (D. Colo. July 12, 2023) (emphasizing that in *Ewing*, "the Tenth Circuit recognized a distinction between criminal and non-criminal habeas proceedings").

(5th Cir. Apr. 8, 2022). The government urged the Fifth Circuit to nevertheless join the Fourth Circuit's side of the split.

Like the government, numerous district courts have recognized the circuit conflict, and these courts have likewise split over which approach to follow. *Compare, e.g.*, *Arias v. Choate*, No. 1:22-CV-02238, 2023 WL 4488890, at *4 (D. Colo. July 12, 2023) ("find[ing] the reasoning of *Obando-Segura* and *Barco* unpersuasive" and "adopt[ing] the Second and Ninth Circuit's reasoned conclusion that civil immigration proceedings fall squarely within the EAJA's 'any civil action' provision and the statute's sovereign immunity waiver"); *Kholyavskiy v. Schlecht*, 479 F. Supp. 2d 897, 901 (E.D. Wis. 2007) (holding that EAJA encompasses "habeas actions challenging administrative detention" and distinguishing *O'Brien* on the grounds that "the fact that a habeas action is not a *typical* civil action does not make the phrase civil action ambiguous"), *with, e.g.*, Pet. App. 17a ("[T]his Court declines to follow the rationale of the Second and Ninth Circuits and instead adopts the reasoning of the *O'Brien* court...."); Pet. App. 35a–36a (similar); *Obando-Segura v. Barr*, No. 17-CV-3190, 2019 WL 12336432, at *3 (D. Md. Oct. 18, 2019) (holding that *O'Brien*'s reasoning applies to "non-criminal immigration habeas petition[s]"); *Al-Shewailey v. Mukasey*, No. 07-CV-1392, 2008 WL 542956, at *2 (W.D. Okla. Feb. 25, 2008) (holding habeas petitioner not entitled to EAJA award because "habeas proceedings are unique, hybrid actions"); Ruling on Petitioner's Request for Attorney's Fees and Costs, *Vacchio v. Ashcroft*, No. 02-CV-293, slip op. at 9–10 (D. Vt. Aug. 1, 2003) (refusing to "follow[] the lead of the Ninth Circuit" and to "limit[] *Boudin*'s holding to 'habeas corpus proceedings in the criminal context' ").

Commentators have also widely flagged the conflict, ventilated the merits of the two sides, and urged this

Court to step in. Scholars generally endorse the views of the Second and Ninth Circuits. *See, e.g.*, Seth Katsuya Endo, *Fee Retrenchment in Immigration Habeas*, 90 Fordham L. Rev. 1489, 1492, 1508, 1511 (2022) (recognizing the "significant circuit split," emphasizing "litigants' uncertainty," and urging the Court to resolve the conflict in petitioners' favor because "[t]here is little, if any, serious debate that habeas proceedings are civil actions" and because "standard statutory interpretation tools strongly resist [*Obando-Segura*'s] narrow reading"); Gregory Sisk, *Litigation With the Federal Government* 548–49 (2d ed. 2023) (recognizing the "Courts of Appeals have divided" and concluding "that non-criminal habeas proceedings fall within the 'any civil action' to which the EAJA explicitly applies" based on the need to give "full effect" to the statute's "textual terms"); 14 Charles Alan Wright & Arthur Miller, *Fed. Prac. & Proc. Juris.* § 3660.1 (4th ed. 2023 update) (citing the split and concluding that "[a] habeas proceeding other than one that challenges the legality of a criminal detention is treated as a civil action for EAJA purposes").

Other scholars have recognized the split while advising "[p]ractitioners . . . to monitor upcoming cases . . . for further developments." Dalton Courson, *The EAJA: Inapplicability to Habeas Claims*, 4 Access to Just. 19, 21 (2021); *see, e.g.*, Dan Kesselbrenner & Lory D. Rosenberg, *Habeas Corpus, Immigr. Law & Crimes* § 4:13 (June 2023 ed.); 1 Mary F. Derfner & Arthur D. Wolf, *Court Awarded Attorney Fees* § 7.53 (2023); 3 Shane Dizon & Pooja Dadhania, *Immigr. Law Serv.* § 15:36 (2d ed. August 2023); 4 Alba Conte, *Eligible Proceedings, Attorney Fee Awards* § 26:2 (3d ed. 2023); Practitioners' Notes, *Immigr. Pleading & Prac. Manual* § 5:21 (2022 ed.).

* * * * *

Courts, commentators, and the government all acknowledge that the lower courts are divided over this threshold legal issue and that the split is square, open, and entrenched. The debate has been exhausted: each side has engaged with and rejected the points raised by the other side in the course of a national conversation that stretches back decades. It would serve no purpose to permit additional percolation—one approach is right, the other is wrong, neither side is budging, and the remaining circuits are all simply left to pick sides, as the Fifth Circuit itself did when it "join[ed]" the Fourth Circuit's reasoning after its own brief analysis. Pet. App. 6a n.1. Only this Court can resolve the mature conflict that has developed on this important question, and its review is urgently needed.

II. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS REVIEW IN THIS CASE

1. Congress passed the Equal Access to Justice Act to ensure *equal* access to justice. Instead, detained immigrants find themselves with decidedly *un*equal opportunities to attract counsel depending on whether the government has chosen to detain them in New York or Texas, Connecticut or the Carolinas. The availability of fee-shifting under EAJA should not turn on accidents of geography, and the existing uncertainty is indefensible.

Clarity is not only essential but urgent. The circuits with custody over the vast majority of detained immigrants have staked out their positions on the issue, and for practical purposes the debate between the relevant lower courts is over. As attorneys and government officials process the resulting landscape, the availability of representation will grow ever more jurisdiction-dependent. And the cost will be the liberty interests of those unlucky enough to end up detained in the wrong states. The petition should be granted.

a. EAJA promises fees in part to encourage attorneys to take meritorious cases that otherwise would not be financially worthwhile. *See Comm'r, I.N.S. v. Jean*, 496 U.S. 154, 163, 164–66 (1990); *Lewis v. Casey*, 518 U.S. 343, 374 n.4 (1996) (Thomas, J., concurring) ("Federal fee-shifting statutes ... also provide sufficient incentive for counsel to take meritorious cases."); *Astrue v. Ratliff*, 560 U.S. 586, 601 (2010) (Sotomayor, J., concurring) ("EAJA fees awards, which average only $3,000 to $4,000 per case, have proved to be a remarkably efficient way of improving access to the courts ....").

Since EAJA encourages attorneys to take cases, its unequal application risks unequal access to counsel, especially among indigent litigants. Release from detention is inherently a non-monetary remedy, so neither detainees nor immigration attorneys can hope to recover litigation expenses through victory alone. Some parties may be able to afford counsel regardless, but most detained immigrants are indigent and do not have that luxury. *See* Jennifer L. Colyer et al., *The Representational and Counseling Needs of the Immigrant Poor*, 78 Fordham L. Rev. 461, 463–64 (2009). Nor is *pro bono* counsel a realistic option when the overwhelming bulk of removal immigration representation—as much as 90%—is provided by fee-seeking counsel. *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 26–27 (2015). It follows that absent EAJA's fee-shifting incentive, most of those detained by immigration authorities are unlikely to obtain counsel. *See, e.g.*, Robert A. Katzmann, *Study Group on Immigrant Representation: The First Decade*, 87 Fordham L. Rev 485, 486 (2018) (describing low levels of representation for immigrants).

b. Disparate application of EAJA means disparate outcomes, including that immigrants who are wrongly

detained in the Fourth and Fifth Circuits may not be able to vindicate their constitutional rights. Counsel, unsurprisingly, matters a great deal both in habeas and in immigration proceedings. One study found that 44% of immigrants with representation were granted a custody hearing by an immigration judge whereas only 18% of those without counsel achieved the same outcome. *See* Eagly & Shafer, *supra*, at 70. Likewise, 48% of counseled immigrants were released following that hearing as compared to only 7% without counsel. *Id.*; *see* Note, *The Right to be Heard from Immigration Prisons: Locating a Right of Access to Counsel for Immigration Detainees in the Right of Access to Courts*, 132 Harv. L. Rev. 726, 729 (2018). Counsel is similarly significant for immigration detainees seeking habeas relief. *See, e.g.*, Tulane University Law School Immigration Rights Clinic, *No End in Sight: Prolonged and Punitive Detention of Immigrants in Louisiana* 31 (May 2021) (finding that every one of the five immigration habeas petitions granted in the Western District of Louisiana between January 1, 2010 and July 31, 2020 was counseled).

Counsel's presence—or absence—could scarcely have greater stakes. "The unjustified detention of an individual is probably the most serious type of unjustified government action." *Kholyavskiy*, 479 F. Supp. 2d at 901; *accord Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action . . . ."). But "unjustified detention" is the likely outcome for detained immigrants who cannot rely on the promise of EAJA's fee-shifting to attract counsel. EAJA awards attorney's fees only in narrow circumstances: if (1) the petitioner has "prevail[ed]" against the government; (2) the government's position was not "substantially justified," *and* (3) there are no "special circumstances [that would]

make an award unjust." 28 U.S.C. § 2412(d)(1)(A). Counsel understand these restrictions when choosing cases to take on, which means that in the immigration detention context, EAJA makes the biggest difference for the most vulnerable: those who are "[un]justifi[ably]" detained—either because they were wrongly detained in the first place, *see, e.g.*, *Vacchio*, 404 F.3d at 665–66, or because they were detained well past legal limits, *see, e.g.*, Pet. App. 20a–21a—but who lack the resources to hire counsel to prove as much.

Calculating the exact number of people directly affected by this issue is impossible, but it is clear that the problem is recurring and that the split demands this Court's immediate resolution. ICE has reported that from October 2022 to August 21, 2023, it and CBP have had custody over a combined average daily population of 27,318.[6] Of that population, an average of roughly 17,000 detained immigrants neither have been convicted of a crime nor have any criminal charges pending against them.[7] ICE further reports that in every month of that period, there have been between 285 and 335 detainees who have already spent over a year detained.[8] And, as petitioners' own cases show, a petition for a writ of habeas corpus is often the only avenue by which these prolonged detainees can seek any relief.

Since unlawfully detained immigrants are much more likely to have counsel if the EAJA fee-shifting provision applies, the practical implication is obvious: immigration detainees currently have unequal access to relief from unjustified detention based solely on the happenstance of

---

[6] U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FY 2023 ICE Statistics Tab "Facilities FY23" (Aug. 31, 2023), https://www.ice.gov/detain/detention-management.

[7] *Id.*, Tab "Detention FY23."

[8] *Id.*, Tab "ICLOS and Detainees."

where in the country the government is detaining them. *See* Endo, *supra*, at 1511–13.

2. Jurisdictional disparities in access to counsel are concerning under any circumstance, but resolution is particularly urgent here because the circuits involved house a disproportionate number of detained immigrants. Since October 2022, the Second, Fourth, and Fifth Circuits have had daily custody of an average 15,973 detainees—58.5% of the 27,318 immigrants detained across the country—with the Fifth Circuit alone accounting for the bulk of that number.[9] Factor in the Ninth Circuit, and the total percentage rises to 75.1%.[10] If this Court ultimately holds that the phrase "any civil action" encompasses habeas actions challenging civil detention in conjunction with civil immigration proceedings, then it will restore EAJA's availability to well over half of the population entitled to it.

Furthermore, the fact that the circuits with the vast majority of immigration detainees have weighed in confirms that the issue is ripe for this Court's review. All else being equal, habeas cases challenging immigration detention will arise more often in the circuits with more detainees, and those circuits now know where they stand. There is nothing left for this Court to await before granting review.

Timely review will also avoid continued satellite litigation. This Court has stressed the need to resolve uncertainty about attorney's fees "without unnecessary delay" so as to avoid "a second major litigation." *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 435 (2016) (citation omitted). Partly for that reason, this Court regularly grants review in attorney's fees cases with comparable splits. *See, e.g.*, *id.* at 430–31 (resolving a 1-3

---

[9] *Id.*, Tab "Facilities FY23."

[10] *Id.*

split); *Astrue v. Ratliff*, 560 U.S. 586, 590–91 (2010) (resolving a 1-2 split over EAJA's scope where, as here, a fourth circuit had rejected one side of the split without fully addressing the question presented); *Scarborough v. Principi*, 541 U.S. 401, 412 (2004) (resolving a 1-3 split over EAJA's scope).[11]

Further delay also risks entrenching the disparity in access to counsel. Immigration attorneys must make decisions about where to live and to work, as well as what types of practices to build and what types of cases to prioritize. EAJA's availability can factor into these decisions, meaning that the longer this Court waits to answer the question presented, the greater the chance that the existing disparities ossify.

3. Finally, this case is an excellent vehicle for deciding the issue presented. The dispute turns on a pure question of law: whether the phrase "any civil action" in EAJA covers habeas petitions that challenge civil immigration detention. Nothing stands in the way of this Court answering that question, and it was briefed at every level and resolved by the Fifth Circuit. *See* Pet. App. 2a. Nor is there any doubt that the issue was outcome-determinative; indeed, it was the only question the court below answered. *See* Pet. App. 6a. If this Court agrees with the Fourth and Fifth Circuits, then petitioners will lose; if the Court instead sides with the Second and Ninth Circuits, then the Court can remand for the Fifth Circuit to decide in the first instance whether the government's position was "substantially justified."[12] Either way, the

---

[11] The Court also routinely grants review in other, non-attorney's fee cases with comparable or shallower conflicts. *See, e.g.*, *Moore v. United States*, No. 22-800, *cert. granted*, 143 S. Ct. 2656 (2023) (2-1 split); *Reed v. Goertz*, 598 U.S. 230 (2023) (2-1 split); *Bittner v. United States*, 598 U.S. 85 (2023) (1-1 split).

[12] As the Solicitor General has often observed, this Court "routinely grants certiorari to resolve important questions that

Court will be able to cleanly resolve the circuit split and address this important, recurring issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH A. MAYEAUX
MAYEAUX & ASSOCIATES L.C.
6554 Florida Blvd., Ste. 200
Baton Rouge, LA 70806
(225) 754-4477

WILLIAM T. SHARON
NICOLE L. MASIELLO
ARNOLD & PORTER
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000

R. STANTON JONES
ANDREW T. TUTT
SEAN A. MIRSKI
Counsel of Record
ALESSANDRA LOPEZ
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001
(202) 942-5000
sean.mirski@arnoldporter.com

SEPTEMBER 2023

---

controlled the lower court's decision notwithstanding a respondent's assertion that, on remand, it may prevail for a different reason," Cert. Reply at 2, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (No. 18-15); *accord* Cert. Reply at 9, *United States v. Taylor*, 142 S. Ct. 2015 (2022) (No. 20-1459), including in cases where the district court ruled for the respondent on the alternative ground, *see, e.g.*, *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419 (2023); *Minerva Surgical, Inc. v. Hologic, Inc.*, 141 S. Ct. 2298 (2021); *Mont v. United States*, 139 S. Ct. 1826 (2019).