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, NEW ORLEANS DISTRICT, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT AND REMOVAL OPERATIONS, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF IMMIGRATION SERVICES & LEGAL ADVOCACY, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

HOMERO LÓPEZ
IMMIGRATION SERVICES AND LEGAL ADVOCACY
3801 Canal Street
New Orleans, LA 70119
hlopez@islaimmigration.org

TAMARA F. GOODLETTE
DANIEL HATOUM
KASSANDRA GONZALEZ
TEXAS CIVIL RIGHTS PROJECT
P.O. Box 17757
Austin, TX 78760
tami@texascivilrightsproject.org

JARED GERBER
Counsel of Record
CHARITY E. LEE
SARAH B. GUTMAN
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000
jgerber@cgsh.com

Counsel for Amici Curiae

October 16, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions and Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1, 2, 3]

Immigration Services & Legal Advocacy ("ISLA") is a legal services provider dedicated to providing legal representation for detained immigrants throughout Louisiana to ensure that their rights are respected and protected. Habeas proceedings are a key part of ISLA's work and the legal framework that ensures that no one is subjected to unlawful civil detention.

The Texas Civil Rights Project ("TCRP") is a legal advocacy organization with offices across Texas. Since its founding in 1990, TCRP has fought for the rights of immigrants. TCRP has a strong interest in ensuring that unlawfully detained immigrants have legal representation and relief through civil habeas proceedings.

American Gateways is a nonprofit organization based in Texas and is the only nonprofit in the state to provide legal orientation, immigration workshops, and

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in any part, and that no person or entity, other than *amici* and their counsel, made a monetary contribution to fund the brief's preparation and submission. Pursuant to Supreme Court Rule 37.2(a), all counsel of record received timely notice of the intent to file this *amicus* brief.

[2] For *amici* signing in an individual capacity (the "Individual *Amici*"), institution names are provided for purposes of identification only. The views expressed in this brief do not necessarily reflect the views of the institutions with which Individual *Amici* are affiliated.

[3] All organizational *amici* are 501(c)(3) nonprofit organizations.

pro bono legal representation at three federal immigrant detention facilities. American Gateways has a significant interest in ensuring that detained immigrants can find and retain counsel when those immigrants' rights are being violated.

Galveston-Houston Immigrant Representation Project ("GHIRP") is a group of lawyers and legal professionals committed to providing high-quality legal services to low-income immigrants in the Galveston-Houston area. GHIRP seeks to ensure that all individuals within the United States have equal access to its justice system and the protections it offers, and to eliminate barriers immigrants face in obtaining legal counsel. GHIRP's federal litigation program regularly brings habeas actions in federal court challenging prolonged and unlawful detention of its clients.

Denise Gilman teaches and co-directs the Immigration Clinic at the University of Texas at Austin School of Law, where she also teaches a Refugee Law and Policy seminar. Professor Gilman has written and practiced extensively on international human rights and immigrants' rights, with a particular focus on detention and asylum issues. As a clinical professor for the last eighteen years, she has supervised law students representing detained families in Immigration Court, represented individual detained clients in federal court, co-counseled class action litigation relating to immigration detention, and led student trips to detention centers to provide pro bono counseling to detained asylum seekers.

The Immigrant Legal Resource Center ("ILRC") is a national nonprofit organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. Through ILRC's extensive networks with service providers, immigration practitioners, and public defenders, ILRC has developed a profound understanding of the barriers faced by low-income individuals seeking to obtain immigration benefits and defend against removal.

Las Americas Immigrant Advocacy Group is a nonprofit organization based in El Paso, Texas that provides free and low-cost legal services to immigrants, refugees, and others seeking humanitarian relief in West Texas and New Mexico. It has served over 40,000 people from over seventy-seven countries since 1987 and provides legal representation through both attorneys and accredited representatives through the Department of Justice.

The Refugee and Immigrant Center for Education and Legal Services ("RAICES") is a not-for-profit organization that fights for the freedoms of immigrant, refugee, and asylum-seeking families. Founded in San Antonio in 1986, RAICES is the largest immigration legal services provider in Texas, and pairs direct legal representation and social services case management with impact litigation and advocacy focused on expanding permanent protections for immigrants and changing the narrative around immigration in the U.S. Each year, RAICES supports more than 700 parents and children through expansive refugee resettlement programming; provides legal rights presentations and screenings in a dozen-plus shelters and select emergency facilities

for unaccompanied minors; and opens approximately 10,000 affirmative and removal defense direct representation cases, representing individuals in both detained and non-detained proceedings. This work includes representation in habeas proceedings.

Elissa Steglich co-directs and teaches the Immigration Clinic at the University of Texas at Austin School of Law. Professor Steglich has extensive experience practicing immigration law and has been a strong advocate for immigrant rights, especially the rights of immigrant children. Until June 2015, she was the Legal Services Director at the American Friends Service Committee's Immigrant Rights Program in Newark, New Jersey. She served as Managing Attorney for the program from 2006–2014. In addition to supervising legal staff, she provided direct representation to asylum seekers, immigrant children, and immigrant victims of violence and human trafficking.

The Tahirih Justice Center is the largest multi-city direct services and policy advocacy organization specializing in assisting immigrant survivors of gender-based violence. In five cities across the country, Tahirih offers legal and social services to immigrants fleeing all forms of gender-based violence. Tahirih promotes a world where immigrant survivors can live in safety and with dignity. This work includes habeas petitions to represent victims of violence who are wrongfully detained.

BACKGROUND AND SUMMARY OF ARGUMENT

The United States government detains immigrants on a massive scale. This Court has stated that such detentions—when unlawful—present a "serious constitutional problem." *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). People in immigration detention have limited recourse to challenge their detention. Furthermore, immigration processes are notoriously slow, and many immigrants remain civilly detained for months or even years. Petitioners were detained for more than a year and won their freedom only by securing counsel to file successful habeas petitions.[4] The right to be free from such unlawful detention "lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. 678 at 690.

Immigrants face an uphill battle to secure their liberty interests and obtain release from unlawful detention because they lack access to counsel. Without legal counsel, the odds of prevailing in an immigration habeas action are extremely low. Detained immigrants are unequipped to challenge unlawful detention, and the government can take their liberty with little fear of consequences.

To limit arbitrary government action, in 1980, Congress passed the Equal Access to Justice Act ("EAJA" or the "Statute"). In passing this law, Congress intended to remove financial barriers for

---

[4] *See* Petition for Writ of Certiorari at 6–7 (hereinafter "Petition").

individuals challenging unjustified government actions. To accomplish this, the EAJA allows for the recovery of attorney's fees if a party prevails in a *civil* suit against the government unless the government can show that its position was "substantially justified or that special circumstances make an award unjust." *See* 28 U.S.C. § 2412(d)(1)(A).

Here, the Fifth Circuit disturbed Congress's intended scheme by holding that immigrants who successfully challenge their unlawful immigration detention via a habeas petition are not eligible for attorney's fees under the EAJA. This holding directly contradicts the language and purpose of the Statute and expands a split among the circuit courts.

Because of this circuit split, immigrants across the country face different outcomes in recovering attorney's fees for habeas petitions. Currently, such fees cannot be recovered under the EAJA in the Fifth and Fourth Circuits, but are available in the Ninth and Second Circuits. Moreover, the Fifth Circuit, like the Fourth Circuit and certain district courts, has misconstrued this Court's instructions regarding the sovereign immunity canon. The Fifth Circuit has wrongly interpreted the canon to mean that the sovereign is given deference over the EAJA's actual language and legislative intent—even where the statutory language lacks ambiguity.

The decision below cannot stand. It subverts the plain meaning of the Statute, undermines Congress's statutory design, and creates inequities in the availability of attorney's fees for immigrants challenging unlawful detention. This Court should

grant certiorari, reverse the decision and hold that immigrants who successfully challenge their immigration detention through habeas actions can recover fees under the EAJA.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE FIFTH CIRCUIT'S DECISION LIMITS UNLAWFULLY DETAINED IMMIGRANTS FROM ACCESSING COUNSEL

The Fifth Circuit's decision to deny EAJA fees to immigrants who succeed in their habeas petitions exacerbates the already severe lack of representation for immigrants. This Court should grant certiorari and reverse the Fifth Circuit's decision to ensure unlawfully detained immigrants have the representation they need to secure their freedom from government overreach.

A. Detained immigrants lack access to counsel

The United States detains immigrants on a colossal scale, [5] yet immigrants have no right to government-appointed legal representation to challenge their detention, even when it is unlawful. *See* 8 U.S.C. § 1362. Such unlawful detentions can last for months or even years, causing severe disruption to

---

[5] In fiscal year 2022, Immigrations and Customs Enforcement ("ICE") reported 311,578 initial book-ins to detention. *See ICE Annual Report Fiscal Year 2022*, U.S. Immigration and Customs Enforcement, 12 (2022), https://www.ice.gov/doclib/eoy/iceAnnualReportFY2022.pdf.

the life and liberty of thousands of immigrants and families. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 869 (2018) (Breyer, J., dissenting) (noting that "thousands of people here are held [in immigration detention] for considerably longer than six months").[6] Here, Petitioners were detained for more than a year.[7]

Detained immigrants struggle to access counsel in their underlying immigration cases and in habeas challenges to their detentions. There is no right to government-appointed counsel in either situation. *See* 8 U.S.C. § 1362 (permitting counsel to represent a person in removal proceedings "at no expense to the Government"). As a result, while only 45.3% of total immigrants placed into removal proceedings nationwide between fiscal years 2018 and 2022 had legal representation, a mere 29.2% of those detained during the same period were able to secure counsel.[8]

Access to representation for detained immigrants also depends heavily on geographic location. For instance, some facilities in Louisiana

---

[6] *See also No End in Sight: Prolonged and Punitive Detention of Immigrants in Louisiana*, Tulane Univ. L. Sch. Immigr. Rts. Clinic, at 15 (May 2021), https://law.tulane.edu/sites/law.tulane.edu/files/TLS%20No%20End%20In%20Sight%20Single%20Pages%20FINAL.pdf (hereinafter "*No End in Sight*") (finding that the average length of detention before an immigrant filed a habeas petition was 387 days).

[7] *See* Petition at 6–7.

[8] *New Proceedings Filed in Immigration Court*, TRAC Immigration, https://trac.syr.edu/phptools/immigration/ntanew/ (last accessed Oct. 10, 2023).

and other southern states "have only one immigration attorney within a 100-mile radius for every 200 people detained at a facility."[9] Meanwhile, "almost 90% of nondetained immigrants in New York City secured counsel, compared to only .002% of detained respondents in Tucson, Arizona."[10] Thus, location and detention status can determine whether an immigrant has representation.

For detained immigrants, counsel is crucial to securing a positive outcome. A 2016 study showed that detained immigrants with representation were four times more likely to be released at a custody hearing than those without representation.[11]

The data is similar in the immigration habeas context.[12] One study found that, between 2010 and 2020, 85% of detained immigrants in Louisiana filed their habeas petitions without a lawyer.[13] Similarly, a three-year survey of immigration detention habeas

---

[9] *No Fighting Chance: ICE's Denial of Access to Counsel in U.S. Immigration Detention Centers*, ACLU, 11 (2022), https://www.aclu.org/sites/default/files/field_document/no_fighting_chance_aclu_research_report.pdf (hereinafter "*No Fighting Chance*").

[10] Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 Univ. Pa. L. Rev. 1, 8 (2015).

[11] Ingrid V. Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, Am. Immigr. Council, 2 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

[12] *See No End in Sight*, *supra* note 6, at 28–31.

[13] *Id.* at 29.

petitions in Massachusetts found that 76% were filed *pro se*. [14] Like removal proceedings, having an attorney for a habeas petition is crucial: the Louisiana study found that only 9% of unrepresented detained immigrants were released from detention, while more than 25% of represented people obtained release. [15] Meanwhile, the Massachusetts survey found that only 4% of unrepresented detained immigrants received favorable decisions, while 27% of those represented received a favorable decision—nearly a seven-fold improvement. [16]

Counsel, once secured, face their own challenges. Representing detained immigrants is difficult and costly. Attorneys struggle to communicate with detained clients because of abrupt transfers, inadequate detainee tracking systems, and unpredictable visitation regulations that vary between detention centers. For example, securing a phone call with a detained client can take as long as a month. In one case, TCRP attorneys conducted an intake with a father who was separated from his child while the father was in Customs and Border Protection ("CBP") custody. However, when trying to schedule a follow-up call, TCRP attorneys learned the father had been transferred to ICE custody. Because CBP and ICE do not coordinate or update their

---

[14] Brief of *Amicus Curiae* American Immigration Lawyers Association in Support of Appellant and Reversal, at 13, *Maldonado-Velasquez v. Moniz*, No. 17-1918 (Dec. 2, 2017) (hereinafter "Am. Immigr. Lawyers Assoc.").

[15] *No End in Sight*, *supra* note 6, at 31.

[16] Am. Immigr. Lawyers Assoc., *supra* note 14, at 13.

systems daily, it took TCRP over two weeks of persistent outreach to locate him.

When TCRP attorneys finally located this client, it took another two weeks to speak with him, despite daily calls to the detention center. Often, the center would not answer its phone, requiring the attorneys to call again and again. When the center answered, officers gave conflicting information about how to schedule attorney calls. When TCRP finally reached its client, it had been over a month since intake—a month of unnecessary separation that traumatized both father and child.

Other *amici* have experienced similar issues. It is not uncommon for ISLA attorneys to schedule a client visit with a detention center, confirm the visit with center staff, drive three to five hours to the center, only to be told that the client was released or transferred, with staff unable or unwilling to say where the government moved the client.

In October 2022, ISLA abruptly lost contact with a number of clients who had been detained in Jena, Louisiana. Detention center staff refused to say where the clients had been taken. The ICE detainee locator database continued to list the clients as detained at Jena, and government attorneys also had no information. ISLA eventually learned through family members of clients that there had been a mass transfer to another facility in Basile, Louisiana. Yet, for nearly a week after informally locating the clients, attorneys were unable to contact their clients because they were not officially registered at the new facility. One of the clients had filed a habeas petition and the

sudden transfer complicated and extended those proceedings because the new facility was not equipped for video-based attorney calls. Once ISLA was allowed to contact its clients, the facility refused to allow the attorneys to fax documents to clients, so attorneys had to choose between mail—which often entails unworkable delays—or driving six to ten hours for in-person visits to keep clients updated on their cases.

Even when attorneys are able to contact and locate their clients promptly, opaque and ever-changing rules regulating visitation create further barriers. For example, ISLA attorneys report that detention center staff frequently cite a document called "the manual" as justification for restrictions on attorney visits, such as prohibition of laptops or phones and even denial of entrance, yet refuse to provide a copy of the manual or information on how to find it. Detention staff also limit legal visits and calls, even when ICE's rules do not permit these restrictions. When visits do occur, they are often in public spaces with center staff present. While it is ISLA's mission to provide representation in the face of these challenges, other attorneys are often unwilling or unable.

These barriers—abrupt transfers coupled with arbitrary and fluctuating rules—make representation of detained immigrants costly and deter most practitioners from taking on such representation. This struggle is not unique to ISLA, TCRP, or these detention centers. A study by the American Civil Liberties Union found that many attorneys simply refused to represent clients in detention centers

because communication issues were too cumbersome.[17]

Some of the most effective representation of detained immigrants comes from nonprofit organizations that are often stretched financially and can only represent a fraction of detained immigrants.[18] The possibility of getting EAJA fees, however, would incentivize private practitioners to accept these difficult cases. Accordingly, the availability of fees under the EAJA would increase the availability of legal representation to the underserved detained immigrant community.

B. EAJA fees are critical to nonprofit organizations' ability to represent wrongfully detained immigrants in habeas proceedings

Nonprofit organizations like *amici*—often the best or only option for detained immigrants—consider fee recovery under the EAJA when determining whether to represent clients in habeas actions. The Fifth Circuit's decision makes it less likely that such organizations will be able to represent unlawfully detained immigrants.

ISLA, for instance, is dedicated to providing direct representation to detained immigrants. Yet, due to the cost and specialized nature of federal

---

[17] *No Fighting Chance*, *supra* note 9, at 11.

[18] *See* Seth Katsuya Endo, *Fee Retrenchment in Immigration Habeas*, 90 Fordham L. Rev. 1489, 1534 (2022) (hereinafter "Endo").

habeas proceedings, it limits its habeas docket to cases where it can find adequate co-counsel. ISLA calculates, based on the EAJA fees it received for work on a recent immigration petition, that an average of two EAJA-fees-generating habeas cases a year would support a full-time attorney. *See Nkenglefac v. Garland*, 64 F.4th 251, 253 (5th Cir. 2023). Accordingly, if there were a reasonable possibility of receiving fees for habeas cases, ISLA would be able to hire a full-time attorney to focus on habeas petitions for unlawfully detained immigrants.

Like ISLA, TCRP is funded through various external foundations and private donors. However, not all of its funding is guaranteed or recurring. When reviewing cases, legal directors consider whether attorney's fees may be available. For instance, during the COVID-19 pandemic, TCRP filed several habeas cases for immuno-compromised immigrants who faced heightened risk from COVID-19. At the time, TCRP's immigration team was small, but it recognized the importance of filing these habeas petitions, as release could mean the difference between life and death. While there was no private funding directly tied to this work, the potential availability of fees made it financially feasible for TCRP to respond to this dire need for habeas representation.

Furthermore, promoting access to counsel through EAJA fees can actually help save the government money.[19] The fiscal year 2023 funding for

---

[19] *Id.* at 1534–35.

ICE detention is $2.9 billion.[20] The projected daily cost to detain an adult immigrant in 2024 is $157.20—roughly $57,378 a year.[21] With EAJA fees, attorneys can help ensure that wrongful detention is avoided, thereby creating a cost savings to the government once the individual is released.[22]

C. The Fifth Circuit's decision disincentivizes attorneys from representing wrongfully detained immigrants and encourages *pro se* appearances

The Fifth Circuit's decision disincentivizes private attorneys and nonprofit organizations from representing wrongfully detained individuals, exacerbating wrongful detention and leaving many immigrants to proceed *pro se*. Without EAJA fees, private attorneys may choose to represent only people who can afford to pay or people the attorneys can afford to represent *pro bono*. This serves only a tiny fraction of the need. Similarly, nonprofit organizations, like *amici*, will need to raise money from other sources to cover the costs and may decline such representations altogether in favor of simpler or less costly cases.

---

[20] *Featured Issue: Immigration Detention and Alternatives to Detention*, Am. Immigr. Lawyers Assoc. (March 28, 2023), https://www.aila.org/advo-media/issues/featured-issue-immigration-detention.

[21] *Id.*

[22] *See Endo*, *supra* note 18, at 1535.

Without counsel, wrongfully detained immigrants will be forced to represent themselves. *Pro se* petitions create challenges for both petitioners and the federal courts.[23] For the detained immigrant, it is a struggle to navigate the complex combination of immigration law and habeas practice. "[T]he labyrinthine character of modern immigration law" is "a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike." *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003). And "habeas litigation is particularly complicated and time-consuming" for immigrants challenging the legality of their detention. *Reid v. Donelan*, 17 F.4th 1, 18 (1st Cir. 2021) (internal quotations omitted). Consequently, a lawyer is often the only person who can make sense of immigration law, which "is a legal specialty of its own." *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010); *see Arizona v. U.S.*, 567 U.S. 387, 395 (2012) ("Federal governance of immigration and alien status is extensive and complex.").

Furthermore, "the ability of a *pro se* detainee to win on habeas review is often contingent on factors entirely outside the detainee's control, such as the type of legal self-aid resources the detention facility provides and the availability of relevant forms and precedents to the detainees."[24] Even detainees who can read and write in English, and have access to a

---

[23] *See No End in Sight*, *supra* note 6, at 30.

[24] Aditi Shah, *Constitutional and Procedural Pathways to Freedom from Immigration Detention: Increasing Access to Legal Representation*, 35 Geo. Immigr. L. J. 181, 198 (2020).

law library in their detention facility, may find that its contents are geared towards criminal law.[25] Thus, detainees are unlikely to have access to the basic legal tools necessary to secure their release.[26]

Data demonstrates these challenges can be outcome-determinative. One study found that out of 449 immigration habeas petitions examined, the Western District Court of Louisiana summarily dismissed eighty-five cases solely for procedural errors, including failure to pay a $5 filing fee or updating an address—issues that counsel could have easily addressed.[27]

These *pro se* litigants can also place unnecessary burdens on courts.[28] A California study examined the extent of administrative burdens caused by *pro se* litigants. Federal district courts in California routinely dedicate staff to provide *pro se* litigants with procedural help. Of ninety surveyed California district courts, 84% ensured that staff

---

[25] *See* Maisie A. Baldwin, *Left to Languish: The Importance of Expanding the Due Process Rights of Immigration Detainees*, 102 Minn. L. Rev. 1703, 1726–28 (2018) (noting that lists of recommended materials from the American Association of Law Libraries "do not include important sources of immigration law and process").

[26] *See id.*

[27] *No End in Sight*, *supra* note 6, at 17.

[28] *Id.* at 30 ("An attorney may make the difference between release and further prolonged detention, and can improve efficacy in judicial proceedings for the court and all parties involved.").

provided procedural assistance to *pro se* litigants.[29] More than half of these districts worked to "reduce the impact of pro se cases on court staff."[30] At least a quarter of the sixty-one judges surveyed reported that *pro se* litigants create additional burdens on chambers, including through "repeated requests for immediate judicial attention" and "requests for inappropriate direction or advice from the judge."[31]

Providing attorney's fees to incentivize attorneys to take habeas cases would ease administrative burdens. For example, a study of Massachusetts district courts found that counsel increased efficiency by "investigat[ing] facts and negotiat[ing] settlements," thereby reducing the need for court involvement to reach a final outcome.[32]

Pro se litigants are at a significant disadvantage compared to immigrants who secure representation. In addition, *pro se* proceedings are inefficient and present significant challenges for

---

[29] Donna Stienstra, Jared Bataillon & Jason A. Contone, *Assistance to Pro Se Litigants in U.S. District Courts: A Report on Surveys of Clerks of Court and Chief Judges*, Fed. Jud. Ctr., i, v (2011), https://www.prisonlegalnews.org/media/publications/Assistance%20to%20Pro%20Se%20Litigants%20in%20U.S.%20Dist.%20Courts%20Study%20Fed.%20Judicial%20Ctr.%202011.pdf.

[30] *Id.* at 13.

[31] *Id.* at 23–24.

[32] D. James Greiner et. al., *The Limits of Unbundled Legal Assistance: A Randomized Study in A Massachusetts District Court and Prospects for the Future*, 126 Harv. L. Rev. 901, 933–34 (2013).

courts. Allowing for the recovery of EAJA fees for immigrant habeas petitions would ameliorate these concerns. This is the very purpose of the EAJA—to provide greater access to counsel. This Court should grant certiorari to ensure unlawfully detained immigrants have adequate access to counsel and are not forced to proceed *pro se*.

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION BELOW CONTRADICTS THE EAJA'S PLAIN MEANING AND PURPOSE

The EAJA states that it applies to "any civil action," a category that unambiguously includes civil immigration habeas actions, yet the Fifth Circuit misapplied the sovereign immunity canon and concluded the Statute does not apply to such proceedings. Not only does this contradict the plain language of the Statute, it also subverts Congress's aim of using the EAJA to eliminate barriers that prevent people facing arbitrary government action, including unlawfully detained immigrants, from securing their rights. This Court should grant certiorari to clarify the scope of the sovereign immunity canon and restore the plain meaning and purpose of the EAJA.

A. The Fifth Circuit's decision contradicts the plain meaning of the Statute and misapplies the sovereign immunity canon

The Fifth Circuit's holding that habeas actions challenging civil immigration detention do not qualify as civil actions under the EAJA is contrary to the plain text of the Statute. The Fifth Circuit reached its

conclusion by misapplying this Court's precedent on the sovereign immunity canon—precedent that has led to confusion among the lower courts, creating circuit splits. Therefore, this Court should grant certiorari to clarify the proper application of this canon.

A waiver of sovereign immunity must be "unequivocally expressed" and "[a]ny ambiguities in the statutory language are to be construed in favor of immunity." *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012) (citations omitted). However, "[t]he sovereign immunity canon is just that—a canon of construction" and does not "displace[] the other traditional tools of statutory construction." *Richlin Security Service Co. v. Chertoff*, 553 U.S. 571, 589 (2008). Moreover, application of this canon is only required when there is ambiguity in the language of the statute. There is no such ambiguity here. The plain text of the EAJA makes clear that habeas proceedings are covered under the Statute's waiver.

For more than a century, this Court has "consistently recognized that habeas corpus proceedings are civil in nature." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see also Ex parte Tom Tong*, 108 U.S. 556, 559 (1883); *Browder v. Dir., Dep't of Corr. of Illinois*, 434 U.S. 257, 269 (1978) ("It is well settled that habeas corpus is a civil proceeding.").

The EAJA, enacted in 1980, provides that a court shall award fees to the prevailing party "in *any* civil action (other than cases sounding in tort)." 28 U.S.C. 2412(d)(1)(A) (emphasis added). When interpreting a statute, this Court has recognized a

"cardinal canon before all others": "that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

Given the longstanding recognition of habeas proceedings as "civil" actions, Congress presumably intended to include them under the EAJA—otherwise they would have been explicitly carved out, as tort actions were. In waiving the United States's sovereign immunity as to *any* civil action, the EAJA therefore waived sovereign immunity as to *every* civil action (other than those specifically excluded), including habeas proceedings. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) (explaining that "the word 'any' naturally carries 'an expansive meaning.'") (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)).

Yet the Fifth Circuit undertook none of this required statutory analysis before turning to the sovereign immunity canon. It stated that its "task is to discern the 'unequivocally expressed' intent of Congress, construing ambiguities in favor of immunity." *Barco v. Witte*, 65 F.4th 782, 785 (5th Cir. 2023) (citations omitted). The court—relying solely on a case analyzing habeas petitions in the criminal context—then characterized civil habeas proceedings as "hybrid" civil-criminal actions. *Barco*, 65 F.4th at 785 (citing *O'Brien v. Moore*, 395 F.3d 499, 505 (4th Cir. 2005)). Such overreliance on strict construction of the sovereign immunity canon is precisely what this Court has called "unhelpful" when it "run[s] the risk

of defeating the central purpose of the statute." *Kosak v. U.S.*, 465 U.S. 848, 853 n.9 (1984).

Here, the result is harm to the very marginalized communities that Congress intended the EAJA to empower and protect. This Court should grant certiorari to clarify the use of the sovereign immunity canon so that lower courts do not run roughshod over the plain text of legislation.

B. Detained immigrants are a category of individuals that Congress passed the EAJA to help

Congress designed the EAJA "to eliminate the barriers that prohibit . . . individuals from securing vindication of their rights in civil actions . . . brought by or against the Federal Government." *Scarborough v. Principi*, 541 U.S. 401, 406 (2004) (quoting H.R. Rep. No. 96–1005, at 9 (1980)). Congress implemented the fee-shifting provision of the EAJA to remove financial barriers so that individuals would not be "deterred from seeking review of, or defending against, unreasonable government action because of the expense involved in securing the vindication of their rights." *Sullivan v. Hudson*, 490 U.S. 877, 883 (1989) (quoting 94 Stat. 2325).

Detained immigrants are at great risk of "unreasonable government action," *id.*, yet often face logistical and financial barriers to hiring counsel to challenge detention by a government that "is

represented by counsel at all times." [33] Therefore, detained immigrants fall within the category of people who Congress passed the EAJA to help. By eliminating EAJA fees for detained immigrants, the Fifth Circuit's decision thus rebuilds the barriers Congress sought to dismantle.

C. EAJA fees deter unlawful detention

Congress intended for the EAJA to empower individuals, including detained immigrants, to challenge unjustified government actions and deter overreach. *See* 28 U.S.C. § 2412(d)(1)(A); H.R. Rep. No. 96-1418 (1980); *Vacchio v. Ashcroft*, 404 F.3d 663, 668 (2d Cir. 2005). Through the EAJA, Congress created an avenue for individuals to challenge government action that is "arbitrary, frivolous, unreasonable, or groundless, or [where] the United States continued to litigate after it clearly became so." [34] More specifically, the fiscal responsibility imposed in the Statute was "intended to make the individual [government] agencies and departments accountable for actions pursued in bad faith." [35]

Amici's experience shows that attorney's fees under the EAJA reduce unnecessary habeas litigation. Generally, when advocates have a strong habeas case, they will contact ICE directly to negotiate for the

---

[33] Johan Fatemi, *A Constitutional Case for Appointed Counsel in Immigration Proceedings: Revisiting Franco-Gonzalez*, 90 St. John's L. Rev. 915, 932 (2016).

[34] H.R. Rep. No. 96-1418 at 14 (internal quotations omitted).

[35] *Id.* at 17.

immigrant's release.[36] Previously, the government was often willing to negotiate because—at least prior to the decision below—it faced the prospect of paying attorney's fees. The availability of EAJA fees forces the government to evaluate whether it can take a substantially justifiable position. When the government cannot justify its actions, in the experience of *amici*, it usually releases the immigrant and avoids paying potential attorney's fees. If a detained immigrant is released, the court avoids the burden of habeas litigation, and the immigrant avoids further months in detention. Without the prospect of attorney's fees, the government has less incentive to release detainees as part of settlement negotiations, putting the burden of resolving habeas cases on the courts instead.

Furthermore, EAJA fees will not open the floodgates for meritless habeas filings because fees are not guaranteed. Rather, an attorney can only receive fees when the government cannot show that its position was "substantially justified." 28 U.S.C. § 2412(d)(1)(A). The Statute contains an additional safety valve, permitting a court to deny fees where "special circumstances make an award unjust." *Id.* Accordingly, the Statute incentivizes attorneys to only file petitions that they believe will succeed.

Finally, Congress stated that "[t]he Courts have inherent equitable power to award fees when

---

[36] *See No End in Sight*, *supra* note 6, at 12 (describing voluntary administrative releases of immigrants as "shadow wins where the immigrant is released without court vindication") (internal quotations omitted).

overriding considerations of justice so demand."[37] By holding that EAJA fees are unavailable in immigration habeas actions, the Fifth Circuit's decision cuts against the spirit of the Statute, limiting courts' "inherent equitable powers." [38] This Court should grant certiorari so Congress's intent in awarding fees under the EAJA is realized.

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION BELOW FURTHERS A SPLIT IN THE CIRCUIT COURTS OF APPEALS

The Fifth Circuit's decision deepens an existing circuit split on awarding attorney's fees under the EAJA for prevailing parties in immigration habeas petitions.[39] Different rules for recovering EAJA fees between circuits create a disparity in the availability of counsel for immigrants seeking habeas relief based solely on location.

Habeas protects against misapplications of immigration law that lead to wrongful civil detention. In this context, the writ is an important part of the immigration system. Accordingly, rule-based disparities in immigration habeas run counter to the Constitutional and Congressional requirements that "the immigration laws of the United States should be enforced vigorously and uniformly." U.S. CONST. ART. I, § 8, cl. 4. (requiring "an uniform Rule of Naturalization"); IRCA § 115, 100 Stat. 3384. *See also*

---

[37] H.R. Rep. No. 96-1418 at 8.

[38] *See id.*

[39] *See* Petition at 10–25.

Arizona, 567 U.S. at 401 (describing the federal immigration system as "a comprehensive and unified system").

Now, with the Fifth Circuit's decision, attorneys in the two circuits that house the most detained immigrants—the Fifth and the Ninth—face different rules on whether they can collect attorney's fees for successful immigration habeas petitions. In the Fifth Circuit, which houses roughly 56% of the nation's detained immigrants, attorneys cannot collect EAJA fees for a successful habeas petition.[40] Meanwhile, in the Ninth Circuit—which houses nearly 17% of detained immigrants—attorneys can receive such fees.[41]

The implications of this divided system are dire. A California legal organization can intentionally develop a practice of representing wrongfully detained immigrants, knowing that it may be able to recoup some of its fees through the EAJA. However, an organization in Texas must fund such work from other sources or forgo the representation altogether. Accordingly, unlawfully detained immigrants in California have a greater chance of securing their release than those in Texas.

---

[40] *See Detention Facilities Average Daily Population,* TRAC Immigration, https://trac.syr.edu/immigration/detentionstats/facilities.html (last accessed Oct. 12, 2023) (adding average daily detention population numbers as of September 18, 2023, by state and calculating to compare).

[41] *See id.*

This divided system also encourages a perverse form of forum shopping. The government—which has complete control on where to detain immigrants—could move immigrants to the Fifth Circuit to avoid the risk of paying EAJA fees. ICE routinely transfers immigrants across the country.[42] These transfers are not done equitably.[43] Rather, "the largest number of interstate transfers go to Louisiana, Mississippi, and Texas, states that collectively have the worst ratio of transferred immigration detainees to immigration attorneys in the country (510 to 1)."[44] The Fifth Circuit "has jurisdiction over the largest number of detainees (about 175,000) transferred between states."[45] The decision below provides further incentive for the government to transfer detainees to the Fifth Circuit, where it faces no risk of paying EAJA fees.

The Court should grant certiorari to ensure a uniform rule that does not incentivize forum shopping or otherwise create unjust disparities in access to counsel between the circuits.

---

[42] *See A Costly Move*, Human Rights Watch, 3–4 (June 2011), https://www.hrw.org/sites/default/files/reports/us0611webwcover_0.pdf.

[43] *See id.* at 19.

[44] *Id.* at 2.

[45] *Id.*

CONCLUSION

For the aforementioned reasons, *amici* urge this Court to grant certiorari and to reverse the judgment below. This Court should hold that under the EAJA, attorney's fees are available in habeas immigration proceedings for petitioners challenging their civil immigration detention.

Respectfully submitted,

HOMERO LÓPEZ
IMMIGRATION SERVICES AND LEGAL ADVOCACY
3801 Canal Street
New Orleans, LA 70119
hlopez@islaimmigration.org

TAMARA F. GOODLETTE
DANIEL HATOUM
KASSANDRA GONZALEZ
TEXAS CIVIL RIGHTS PROJECT
P.O. Box 17757
Austin, TX 78760
tami@texascivilrightsproject.org

JARED GERBER
Counsel of Record
CHARITY E. LEE
SARAH B. GUTMAN
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000
jgerber@cgsh.com

Counsel for Amici Curiae

October 16, 2023