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.,

Respondents.

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

BRIEF OF *AMICI CURIAE* FEDERAL HABEAS AND GOVERNMENT LITIGATION SCHOLARS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are legal scholars who research, write, and teach about habeas corpus, federal litigation, civil procedure, and civil rights. They have substantial expertise in the history of the habeas writ, attorney's fees, and related civil litigation matters, and have written extensively on these subjects. *Amici* have a professional interest in the proper disposition of those issues and believe the Court should take up this case and decide it based on a complete and accurate understanding of the historical record.

Gregory Sisk is the Pio Cardinal Laghi Distinguished Chair in Law and Professor at the University of St. Thomas School of Law (Minnesota). He is the author of *Litigation with the Federal Government* (5th ed. 2023) and the author of *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. Law Review 1245 (2014).

Randy A. Hertz is a Professor of Clinical Law at New York University School of Law. He is the co-author of *Federal Habeas Corpus Practice and Procedure* (2015).

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

the co-author of *The Historical Scope of Habeas Corpus and INS v. St. Cyr*, 16 Geo. Immigr. L. J. 485 (2002).

SUMMARY OF ARGUMENT

Longstanding practice establishes that habeas corpus proceedings for non-criminal detentions—*i.e.*, non-criminal habeas corpus—are civil actions. The habeas action has long been recognized as separate from the underlying proceeding that led to detention and as vindicating the distinctly civil right of individual liberty. Thus, although the writ's application and procedures have changed over time, this Court's "decisions have consistently recognized that habeas corpus proceedings are civil in nature." *Hilton* v. *Braunskill*, 481 U.S. 770, 776 (1987). Against that backdrop, Congress enacted the Equal Access to Justice Act (EAJA) and provided a fee recovery right to a prevailing party in "any civil action" brought against the United States. 28 U.S.C. § 2412(d)(1)(A).

Despite that history, the lower courts are split on the question of whether a habeas action brought to challenge civil immigration detention qualifies as a "civil action" within the meaning of the EAJA. The historical record confirms that it is. This Court should grant certiorari and so hold.

ARGUMENT

I. Historical Practice Makes Clear that Habeas Proceedings Are Civil Actions

For centuries of American history, habeas proceedings have been available to detainees to challenge their detention by the government and protect the most fundamental and important civil right: liberty.

This Court and other courts in the common law tradition have understood habeas proceedings themselves—particularly those challenging non-criminal forms of detention—as civil in nature. The habeas writ and resulting proceedings have thus been understood as distinct from the underlying action those proceedings challenge.

The habeas writ's centrality in early American history supports the view that habeas proceedings are a civil action against the government essential to protecting a civil right. Even before the American Revolution, habeas corpus was available to British subjects and non-enemy foreigners in the American colonies. Marc D. Falkoff, *Back to Basics: Habeas Corpus Procedures and Long-Term Executive Detention*, 86 Denv. U.L. Rev. 961, 978 (2009). During the Revolutionary War, early Americans developed a particular appreciation for the writ of habeas corpus when they witnessed the suspension of the writ in England and the resulting long-term detention of Americans there. Amanda L. Tyler, *Habeas Corpus and the American Revolution*, 103 Calif. L. Rev. 635, 647 (2015). By the time the Framers drafted the Constitution, the importance of the writ was the subject of little debate, and access to the writ was enshrined into the Constitution. Falkoff, *supra*, at 981; see U.S. Const. art. I, § 9, cl. 2. The first Congress ensured that the federal courts had jurisdiction over habeas actions in the Judiciary Act of 1789, Ch. 20, § 14, 1 Stat. 73, 81–82 (1789), and the writ has been part of the fabric of our judicial system ever since.

Throughout that history, the writ of habeas corpus has itself protected a distinctly *civil* right—that of

individual liberty. This Court has described the habeas writ as "the best and only sufficient defence of personal freedom." *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1868). Thus, even in a case brought by a detainee facing criminal prosecution, this Court recognized his request for a writ of habeas corpus as "a new suit brought by him to enforce a civil right." *Ex parte Tom Tong*, 108 U.S. 556, 559–60 (1883); *Kurtz* v. *Moffitt*, 115 U.S. 487, 488 (1885) (recognizing habeas proceedings as civil in nature for the purposes of removal). This Court's more recent decisions underscore that understanding: the Court has reiterated that the writ protects against the "erosion of [people's] right to be free from wrongful restraints upon their liberty," *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963), and serves as "both the symbol and guardian of individual liberty," *Peyton* v. *Rowe*, 391 U.S. 54, 58 (1968).

While the writ's usage to challenge detention in underlying criminal cases is well known, the writ has long enabled persons to "challenge Executive and private detention in civil cases as well as criminal." *INS* v. *St. Cyr*, 533 U.S. 289, 301–302 (2001). Well before this country's founding, the writ of habeas corpus was available to people confined for non-criminal reasons. Paul D. Halliday, *Habeas Corpus From England to Empire* 32–33 (2012) (detailing seventeenth and eighteenth century use of writ in cases addressing "prisoners of war," "family custody disputes," "naval impressment" and other "detentions that contained no element of wrong in them"); see also Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 Yale L. J. 2509, 2522–23 (1998).

This practice continued after the United States secured independence. In 1824, for example, when a father brought a habeas corpus petition to release his minor son from the custody of the child's grandfather, Justice Story considered the case on the merits—effectively recognizing habeas as a mechanism to challenge forms of custody entirely unrelated to any criminal proceeding. *United States* v. *Green*, 26 F. Cas. 30, 31 (C.C.D.R.I. 1824) (No. 15,256); see generally Donald E. Wilkes, Jr., *From Oglethorpe to the Overthrow of the Confederacy: Habeas Corpus in Georgia, 1733-1865*, 45 Ga. L. Rev. 1015, 1036 n.78 (2011) (collecting authorities on use of habeas in child custody disputes). And in 1833, Judge Barbour, citing Matthew Bacon's treatise, wrote that "[w]henever a person is restrained of his liberty, by being confined in a common jail, or by a private person, whether it be for a criminal or civil cause," the writ of habeas corpus could be used to inquire into the cause of commitment. *Ex parte Randolph*, 20 F. Cas. 242, 253 (C.C.D. Va. 1833) (No. 11,558). This history shows that habeas proceedings are protective of a civil right, and extend to many forms of control or detention with no connection to criminal proceedings.

Against this historical backdrop, this Court has also repeatedly described habeas corpus proceedings as civil actions. In *Tom Tong*—a habeas proceeding challenging a municipal criminal proceeding—this Court distinguished between civil and criminal proceedings, noting that "[p]roceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings." 108 U.S. at 559. While "[t]he prosecution against him is a criminal prosecution," "the writ of habeas corpus

which he has obtained is not a proceeding in that prosecution" but is instead "a new suit brought by him to enforce a civil right." *Id.* at 559–60. This new suit "is one instituted by himself for this liberty, not by the government to punish him for his crime." *Id.* at 560. "Such a proceeding on his part is ... a civil proceeding, notwithstanding his object is, by means of it, to get released from custody under a criminal prosecution." *Ibid.*

This Court likewise recognized that habeas proceedings challenging an underlying criminal detention were civil proceedings for the purpose of removal from state to federal court. *Kurtz*, 115 U.S. at 499. And this Court reaffirmed that conclusion only a few years later, reasoning that a writ of prohibition was "a civil remedy, given in a civil action," just as "a writ of *habeas corpus*," which the Court had "held to be a civil, and not a criminal, proceeding, even when instituted to arrest a criminal prosecution." *Farnsworth* v. *Montana*, 129 U.S. 104, 113 (1889). By 1892, the Court could say that it was "well settled that a proceeding in *habeas corpus* is a civil and not a criminal proceeding." *Cross* v. *Burke*, 146 U.S. 82, 88 (1892). This settled understanding that non-criminal habeas corpus actions are civil in nature continued after the enactment of the EAJA in 1980. Pub. L. No. 96–481, 94 Stat. 2321. In *Hilton* v. *Braunskill*, for example, the Court stated that its "decisions have consistently recognized that habeas corpus proceedings are civil in nature." 481 U.S. 770, 776 (1987) (collecting cases). There is no reason to depart from that longstanding classification in the context of the EAJA, and certainly none to do so when, as here, the underlying detention is likewise civil in nature. See *Zadvydas* v. *Davis*, 533

U.S. 678, 690 (2001) (non-criminal immigration detention is "civil, not criminal," in nature).

To be sure, habeas corpus proceedings have unique features. *Brown* v. *Vasquez*, 952 F.2d 1164, 1169 (9th Cir. 1991). In certain instances, for example, specific procedural rules may not apply in habeas actions. *Schlanger* v. *Seamans*, 401 U.S. 487, 490 n.4 (1971); see also *Browder* v. *Dir., Dep't of Corr. of Ill.*, 434 U.S. 257, 269 (1978) (stating that the Federal Rules apply, with limitations, to habeas proceedings). But particular actions may have unique procedural features without changing the fundamental nature of the action. See, *e.g.*, 31 U.S.C. § 3730(b) (setting out distinct rights of intervention and claim control in civil actions under False Claims Act); 28 U.S.C. § 1608 (setting out service requirements in civil actions against foreign states).

The Court's classification of habeas proceedings as "civil" in nature is consistent with the purpose of the writ and the longstanding distinction between the writ itself and the underlying action. A habeas petition historically distinguished the constitutional permissibility of a restriction of liberty from the question of substantive guilt or innocence. Charles Alan Wright, *Habeas Corpus: Its History and Its Future*, 81 Mich. L. Rev. 802, 806 (1983). As this Court has recognized, the "writ of habeas corpus is not a proceeding in the original criminal prosecution, but an independent civil suit." *Riddle* v. *Dyche*, 262 U.S. 333, 335–36 (1923). This split between post-detention procedure and the original prosecution explains why habeas petitions are themselves civil actions, regardless of whether the underlying suit giving rise to the detention was criminal or civil.

In short, the history of the writ of habeas corpus confirms that the writ exists to protect liberty, a civil right; that the writ is a vehicle to challenge civil as well as criminal forms of detention; and that proceedings seeking a writ, particularly when challenging non-criminal detention, are civil proceedings.

II. History Demonstrates that the EAJA's Exception to Sovereign Immunity Applies to Any Civil Action

The EAJA's enactment is part of a broader pattern in which Congress, over the last seventy years, has leaned into "lower[ing] the shield" of sovereign immunity to allow awards of attorney's fees to those who succeed in litigation against the government. Gregory C. Sisk, *Litigation with the Federal Government*, at 499 (2d ed. 2023); see *id.* at 500 (by waiving sovereign immunity, the EAJA "puts the Government on equal footing with private defendants for fee-shifting"). The reading adopted below in deference to the presumption of sovereign immunity departed from that broad pattern and contradicted the expansive language—"*any* civil action"—Congress enacted. 28 U.S.C. § 2412(d)(1)(A) (emphasis added).

Congress took its first steps toward opening up the government to awards of attorney's fees in 1948, when it amended Title 28 to provide that the United States could be liable for fees and costs when expressly provided for by an Act of Congress. Pub. L. No. 80–773, 62 Stat. 869, 973 (1948). Congress reaffirmed the waiver in 1966 when it amended 28 U.S.C. § 2412(a) to adopt the predecessor statute to the EAJA. In that statute, Congress used substantially similar language to the EAJA, applying the waiver to

prevailing parties in "any civil action." *In re Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985 (Simels)*, 775 F.2d 499, 501 (2d Cir. 1985). When this Court rejected a judicial expansion of fee shifting in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 247 (1975), Congress responded by clarifying its intent and passing distinct and targeted statutes that provided fee-shifting schemes for civil rights suits, including the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988(b) (1994)).

Congress passed the EAJA shortly after *Alyeska* and the resulting 1976 Act in response to concerns that "persons may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights." *Sullivan* v. *Hudson*, 490 U.S. 877, 883 (1989) (quotation marks omitted). The EAJA seeks to rectify this inequality by providing an award of reasonable attorney's fees to the prevailing party in any civil action brought by or against the United States, unless the position taken by the United States is "substantially justified" or special circumstances make an award unjust. 28 U.S.C. § 2412(d)(1)(A). Support for the bill was overwhelming. It passed in the Senate 94-3. See 125 Cong. Rec. S10924 (daily ed. July 31, 1979).

The EAJA, therefore, effectuates a waiver of the government's sovereign immunity and is a significant exception to the so-called "American Rule" under which each party pays its own costs, win or lose. The EAJA allows the recovery of attorney's fees expansively—"in any civil action (other than cases sounding in tort), including proceedings for judicial review of

agency action." 28 U.S.C. § 2412(d)(1)(A). The EAJA already contains its own limitation, excluding "cases sounding in tort," and there is no basis to add further limitations not enacted by Congress. *Id.* See *Vacchio* v. *Ashcroft*, 404 F.3d 663, 669 (2d Cir. 2005) (quoting *Hashim* v. *INS*, 936 F.2d 711, 714 n.3 (2d Cir. 1991)). The EAJA, especially compared to previous fee-shifting legislation, is a "triumph of the principle that innocent citizens unfairly treated" by the United States in regulatory and civil actions ought to be reimbursed for the costs of vindicating themselves. Gary R. Battistoni, *The Possibility of Recovery of Attorney's Fees by Successful Private Defendants in Federal Regulatory Actions*, 3 Harv. J.L. & Pub. Pol'y 191, 218 (1980).

Congress initially slated the EAJA's fee-shifting provision to expire after three years. Pub. L. No. 96–481, 94 Stat. 2321 (1980). But, consistent with the larger trend of opening the federal government to the recovery of attorney's fees, and in a resounding affirmation of its intent to expand access to justice, Congress reenacted the measure in 1985—this time, without a sunset provision. Pub. L. No. 99–80, 99 Stat. 183 (1985). In reaffirming its intent in passing the EAJA and extending the scheme in perpetuity, Congress ensured that private individuals, corporations, and organizations "will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved." H.R. Rep. No. 99–120, at 4 (1985).

In light of this background and Congress's expansive language, there is no reason to give the EAJA a restrictive reading. The text of the EAJA makes no suggestion that Congress intended to limit the definition of "civil action" with respect to habeas challenges

to immigration detention. Far from limiting the term "civil action" or excluding habeas corpus proceedings, the EAJA applies broadly to "*any* civil action." 28 U.S.C. § 2412(d)(1)(A) (emphasis added).

The cases addressing the EAJA provide additional context for the legislation's words and meaning. Courts have recognized the EAJA's fundamental fairness purpose, historical exception to sovereign immunity, elimination of barriers to justice, and vindication of citizens' rights in civil actions. See *Scarborough* v. *Principi*, 541 U.S. 401, 406 (2004); *Ibrahim* v. *U.S. Dep't of Homeland Sec.*, 912 F.3d 1147, 1179 (9th Cir. 2019) (en banc) (award of attorney's fees is "consistent with the EAJA's goal of creating a level playing field in cases in which there is an imbalance of power and resources"); *Priestly* v. *Astrue*, 651 F.3d 410, 416 (4th Cir. 2011) ("Congress intended to award a wide range of fees and expenses to the prevailing party in litigation with the government"). And they have construed it in accordance with that purpose.

While circuit courts are divided on the more narrow question presented here, the Second Circuit's application of these principles to hold that the habeas writ is civil in nature is persuasive. In *Vacchio* v. *Ashcroft*, 404 F.3d 663 (2d Cir. 2005), the Second Circuit held that a petition for writ of habeas corpus challenging immigration detention is a civil action under the EAJA. Given the unique nature of the habeas writ, to determine whether such proceedings were "civil" under the EAJA, the Second Circuit looked to the statute's "language, its history and its purpose" to "determine whether the limitation to 'civil actions' excludes from the statute's ambit habeas proceedings challenging immigration detentions." *Id.* at 667-68. In the

EAJA's text, the Second Circuit noted that Congress' expansive definition of "civil action" was limited only by a phrase "specifically exempting 'cases sounding in tort.'" *Id.* at 669 (quoting *Hashim* v. *INS*, 936 F.2d 711, 714 n.3 (2d Cir. 1991)). That broad definition included habeas actions, particularly when brought to challenge non-criminal detention. *Ibid.* The Second Circuit looked next to Congress's intent, reasoning that through the EAJA, Congress looked to balance the scales between private litigants and the federal government. *Id.* at 671. Habeas petitions, protective of the most fundamental civil right of liberty, met that goal. *Ibid.* Thus the Second Circuit held that the EAJA applies to habeas petitions challenging unlawful civil immigration detention because they are civil actions. *Id.* at 667-68.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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