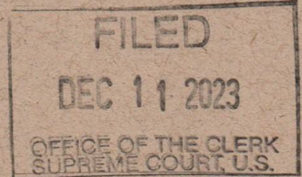

No. 23-251

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners and the government agree: these cases present a square and acknowledged circuit split over whether a habeas action brought to challenge unlawful civil immigration detention qualifies as "any civil action" under the Equal Access to Justice Act (EAJA). 28 U.S.C. § 2412(d)(1)(A). The government concedes the split, does not dispute its importance or regularity, does not claim that further percolation would meaningfully aid this Court's consideration, and does not identify any barrier to review. Every requirement for certiorari is easily and indisputably satisfied, and the petition should be granted.

Given the split's undeniable existence and significance, the government advances only two half-hearted arguments against review. Neither is persuasive.

First, the government calls (at 13) for "further percolation"—not because delay would sharpen the issues for this Court's consideration, but because the government hopes the Second Circuit will go *en banc* to reconsider its position at some indeterminate point in the future. But it is virtually inconceivable that the Second

Circuit will change course, and either way the government ignores the Ninth Circuit, which the government itself has long included in this mature split. Furthermore, this Court regularly grants cases with comparable or shallower splits, especially when—as here—further delay would impose serious costs that eclipse any possible benefits to waiting.

Second, the government claims (*id.*) that these cases present "poor vehicles" because the government might eventually prevail on alternative grounds the court of appeals never considered. The best response to that puzzling assertion comes from the government itself, which has repeatedly won review of cases in this very posture by correctly noting that "the existence of a potential alternative ground relied upon by the district court, but not addressed by the court of appeals, is not a barrier to [this Court's] review." Gov't Cert. Reply Br. at 3, *United States v. Bean*, 2002 WL 32101203 (Jan. 2002) (No. 01-704). Regardless, the government is wrong about its chances on remand.

Lacking any good argument against certiorari, the government previews its merits arguments. But EAJA's text and two centuries of this Court's caselaw establish that habeas challenges to civil immigration detention qualify as "any civil action," and the government's arguments merely confirm that the question presented is ready for this Court's review.

Certiorari should be granted.

I. THERE IS A CLEAR AND INTRACTABLE CONFLICT

As the government concedes (at 11), "three circuits have squarely addressed [the] question" of "whether habeas proceedings challenging immigration detention qualify as 'civil actions' under the EAJA." The Second Circuit has unanimously held that they do, *Vacchio v.*

Ashcroft, 404 F.3d 663 (2d Cir. 2005); the Fifth Circuit has unanimously held they do not, Pet. App. 1a–6a; and the Fourth Circuit has divided 2-1 on the question, *Obando-Segura v. Garland*, 999 F.3d 190 (4th Cir. 2021). Compounding the disarray, the Ninth Circuit has adopted reasoning that is flatly "irreconcilable" with the approach taken by the Fifth Circuit and the Fourth Circuit majority. Pet. 20–22; *see In re Hill*, 775 F.2d 1037 (9th Cir. 1985). Together, these four jurisdictions house the overwhelming majority of detained immigrants—approximately 75.1%. Pet. 29. For all practical purposes, the debate in the lower courts is over.

Because the government cannot deny the split, it resorts (at 13) to calling for "further percolation." But to what end? Certainly not to sharpen the relevant legal issues. As petitioners explained—and the government does not dispute—the question presented has been fully ventilated. *See* Pet. 8–25. Nearly 20 judges have analyzed the issue from every angle, weighed counter-arguments, considered exhaustive scholarly commentary, and issued reasoned and published decisions dividing themselves into nearly even camps. *See id.* Lower courts have nothing left to do on this straightforward question of statutory interpretation other than to pick a side, as the Fifth Circuit did below when it summarily "join[ed]" the Fourth Circuit's reasoning while "reject[ing] the reasoning of the Second . . . and the Ninth Circuit[s]," Pet. App. 6a n.1, and as district courts have been doing since, *see Arias v. Choate*, No. 1:22-CV-02238, 2023 WL 4488890, at *4 (D. Colo. July 12, 2023) ("adopt[ing] the Second and Ninth Circuit's reasoned conclusion" while "find[ing] the reasoning of *Obando-Segura* and *Barco* unpersuasive"). Further percolation would not benefit this Court's consideration in the slightest, and the government identifies no aspect of the question presented that the lower courts have yet to fully air.

Instead, the government calls for delay in the fanciful hope that the Second Circuit will go *en banc*, overrule *Vacchio*, and thereby mend the split. Contrary to the government's suggestion (at 13), however, there is nothing new in either *FAA v. Cooper*, 566 U.S. 284 (2012), or the Fourth and Fifth Circuits' decisions that would "prompt the Second Circuit to reconsider its position in *Vacchio*." As the government admits (at 12), *Cooper* merely "reiterated" established principles governing the sovereign immunity canon—principles this Court had expressed "on many occasions" before *Vacchio*, 566 U.S. at 290 (citing numerous cases), and which *Vacchio* correctly applied, *see* 404 F.3d at 671 n.10; *see also infra* p. 10. Nor would the Second Circuit "benefit" from the Fourth and Fifth Circuits' decisions. Br. in Opp. 12. Both circuits held that habeas cases are categorically a "hybrid" of civil and criminal actions, and they arrived at that perplexing conclusion by invoking pre-*Vacchio* caselaw about EAJA's application to habeas petitions challenging *criminal* detention. *See* Pet. 9–10, 15–16. In *Vacchio*, the Second Circuit considered the same body of caselaw and rejected the same conclusion, explaining that whatever its merits in the criminal context, the "hybrid" theory made no sense "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." 404 F.3d at 672.[1] It is thus no surprise that many courts and commentators have continued to reject the government's position even

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[1] Seeking to discredit *Vacchio*, the government claims (at 12) the Second Circuit prioritized "legislative history" to reach its conclusion. But the textual basis for the Second Circuit's conclusion is ironclad. *See Vacchio*, 404 F.3d at 669; *see also Obando-Segura*, 999 F.3d at 198 (Keenan, J., dissenting); Scholars Amicus Br. 8–12. Judge Cabranes referenced legislative history primarily to distinguish *Boudin v. Thomas*, 732 F.2d 1107 (2d Cir. 1984), which relied on legislative history to reach the opposite conclusion for habeas actions challenging *criminal* detention.

with the "benefit" of the Fourth and Fifth Circuits' decisions. *See, e.g.*, *Obando-Segura*, 999 F.3d at 197 (Keenan, J., dissenting); *Arias*, 2023 WL 4488890, at *4; *see also* Scholars Amicus Br. 8–12; Pet. 23–24 (additional scholarly commentary). Nothing suggests the Second Circuit would do otherwise today.

Practically, too, there is no chance the Second Circuit will reconsider its position. Exceptional everywhere, *en banc* review is virtually non-existent in that court in particular. Since 1979, the Second Circuit "has consistently granted fewer petitions for rehearing en banc than any other circuit court, both in absolute terms and relative to the court's caseload." Martin Flumenbaum & Brad S. Carp, *The Rarity of En Banc Review in the Second Circuit*, N.Y.L.J. (Aug. 24, 2016, 2:03 PM), https://bit.ly/41fVzoS; *see Knight First Amend. Inst. v. Trump*, 953 F.3d 216, 225 (2d Cir. 2020) (statement of Parker, J.) ("A distinctive feature of the Second Circuit is its infrequency of rehearing cases en banc."). In the last twelve years, the Second Circuit has gone *en banc* only seven times, and its judges vote against rehearing even in cases "the Supreme Court ought to review." *State v. United States*, 964 F.3d 150, 153 (2d Cir. 2020) (Lohier, J., concurring in denial of rehearing *en banc*). *En banc* review, moreover, is especially unlikely on the question presented here, given this Court's repeated admonition against prolonging "litigation on . . . fee issue[s]." *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 435 (2016).

Tellingly, the government does not even promise to *ask* the Second Circuit to reconsider *Vacchio*. Indeed, the government has never so much as *appealed* adverse awards in this context despite multiple opportunities to do so. *See, e.g.*, *Arias*, 2023 WL 4488890, at *4.

Furthermore, the government's focus on the Second Circuit ignores the Ninth Circuit's decision in *In re Hill*, which the Solicitor General does not deny is

"irreconcilable" with the Fourth and Fifth Circuits' holdings and which cannot meaningfully be limited to the non-detention context. Pet. 20. That is why the Ninth Circuit regularly awards EAJA fees for successful habeas actions challenging unlawful civil immigration detention, *see* Pet. 21, and why the Second, Fourth, and Fifth Circuits have all either endorsed or repudiated *In re Hill* at length, *see* Pet. 21–22. It is also why the government acknowledged below that "the Ninth Circuit [has] 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* (5th Cir. Apr. 8, 2022). Having successfully urged the Fifth (and Fourth) Circuit to reject the Ninth Circuit's holding, the government cannot now pretend that the Ninth Circuit's views are irrelevant.

Even if further percolation offered any real benefit, it would not outweigh the serious and undisputed costs to further delay. By asking the Court to wait for the Second Circuit's Godot, the government fails to account for the resources parties will spend relitigating this fully ventilated question in other circuits. And the longer this open conflict festers, the greater the risk that existing disparities in access to counsel become entrenched. Counsel, after all, "consider fee recovery under the EAJA when determining whether to represent clients," Practitioners Amicus Br. 13, as well as when making staffing, hiring, and other decisions with long-term consequences, *see id.* at 13–15, 25–26.

Finally, the government does not dispute that this Court regularly (and rightly) grants certiorari in cases with comparable or shallower splits. *See* Pet. 29–30 & n.11. Since this petition was filed, the Court has furnished nine more examples, including four in which the Second Circuit alone could have mended the split through *en banc* review. *See Warner Chappell Music v. Nealy*, No. 22-

1078, *cert. granted*, 2023 WL 6319656 (Sept. 29, 2023) (2-1 split); *Moody v. Netchoice*, No. 22-277, *cert. granted*, 2023 WL 6319654 (Sept. 29, 2023) (1-1 split); *Cantero v. Bank of Am., N.A.*, Nos. 22-529, *cert. granted*, 2023 WL 6780369 (Oct. 13, 2023) (1-1 split); *Nat'l Rifle Ass'n of Am. v. Vullo*, No. 22-842, *cert. granted*, 2023 WL 7266997 (Nov. 3, 2023) (1-1 split).

The circuit split in this case is mature, and this Court should grant review now.

II. THE QUESTION PRESENTED WARRANTS REVIEW IN THESE CASES

EAJA's "very purpose" is "to provide greater access to counsel." Practitioners Amicus Br. 19. The statute cannot fulfill its promise of *equal* access to justice, however, so long as "[d]ifferent rules for recovering EAJA fees between circuits create a disparity in the availability of counsel for immigrants seeking habeas relief based solely on location." *Id.* at 25. Everyone is harmed: not just detained immigrants, for whom "counsel is crucial to securing a positive outcome," *id.* at 9, but also courts and even the government, which must bear the burdens imposed by *pro se* litigants as well as the steep costs of unlawful and unnecessary detention, *id.* at 14–18.

The government does not dispute the surpassing importance of the question presented or the special need to ensure uniformity in this area. Instead, the government claims only (at 13) that these cases are "poor vehicles" because the government hopes to prevail on remand on the ground that its position was "substantially justified." 28 U.S.C. § 2412(d)(1)(A). But that is not a vehicle problem. As the government concedes (at 13), "the court of appeals did not reach that alternative ground," meaning it would not impair this Court's ability to reach the question presented and resolve the split. That is why the government itself so often recognizes that this Court regularly reviews cases where the district

court relied on alternative grounds but the court of appeals did not. *See* Gov't Cert. Reply Br. at 3, *Bean*, 2002 WL 32101203 (collecting examples); Gov't Cert. Reply Br. at 9, *Comm'r v. Estate of Jelke,* 2008 WL 4066478 (Sept. 2008) (No. 07-1582) (same); *see also* Pet. 30 n.12 (additional examples from recent Terms). In fact, the government acquiesced in certiorari just two months ago despite a potential alternative ground for affirmance because, as here, "the court [of appeals] did not decide the case on that ground." Gov't Br. in Opp. at 16, *Erlinger v. United States,* 2023 WL 6940228 (Oct. 2023) (No. 23-370).

Regardless, the government will not prevail on remand. Ms. Gomez Barco and Ms. Castro Balza were detained for 17 and 13 months, respectively, even though there was never any significant likelihood that they would be removed to Venezuela in the reasonably foreseeable future. *See* Pet. 5–7. The government defends their prolonged detentions (at 14) by citing declarations it submitted claiming their removals were imminent. But the district court rejected those declarations as baseless: one had "no foundation," and the officer making the other "clearly [had] no factual basis for his 'belief' that ... removal [was] imminent." Pet. App. 27a. The district court nevertheless thought the government's position was substantially justified solely because of "the novel and difficult circumstances in this case," namely, the pandemic and Venezuela's civil conflict. Pet. App. 8a. But no matter how novel or difficult the circumstances, the government offered no support for its assurances about petitioners' imminent removal apart from the declarations that the district court found were wholly unsubstantiated.

Finally, the government observes with the benefit of hindsight (at 14–15) that Ms. Gomez Barco was removed nearly six months after she won her release and nearly two years after she was first detained. Six additional

months is hardly a ringing endorsement of the government's insistence that her removal was just around the corner. In any event, the government's argument just highlights the contrast with Ms. Castro Balza, who was assured as early as May 2020 that she would be removed from the country by the end of the month, *see* Pet. App. 42a, but who has *still* not been removed despite her ongoing cooperation. Save for her successful habeas petition, Ms. Castro Balza might still be detained to this day—4 years, 3 months, 11 days, and counting—and the government would still presumably be claiming her removal is "reasonably foreseeable." If that is a substantially justified position, it is hard to imagine what is not.

III. THE DECISION BELOW IS WRONG

EAJA applies to "any civil action." 28 U.S.C. § 2412(d)(1)(A). Over two centuries, this Court has declared no fewer than a dozen and a half times that habeas proceedings are civil actions. *See* Scholars Amicus Br. 2–8 (listing examples). In 1840, the Court thought it "too plain for argument" that habeas petitions are "civil actions." *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 565, 567 (1840). In 1892, the Court declared the question "well settled." *Cross v. Burke*, 146 U.S. 82, 88 (1892). Just before EAJA's passage, the Court affirmed that "[i]t is well settled that habeas corpus is a civil proceeding." *Browder v. Dir., Dep't of Corr.*, 434 U.S. 257, 269 (1978). Just after EAJA's passage, the Court reaffirmed that "[o]ur decisions have consistently recognized that habeas corpus proceedings are civil in nature." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). And just recently, the Court reiterated that "[h]abeas proceedings, for those new to the area, are civil in nature." *Banister v. Davis*, 140 S. Ct. 1698, 1702–03 (2020). As Justice O'Connor aptly summarized: "The availability and scope of habeas corpus have changed over the writ's long

history, but one thing has remained constant: Habeas corpus is . . . an original civil action." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 14 (1992) (O'Connor, J., dissenting).

EAJA's text settles any doubt. Contrary to the government's selective quotation (at i, 5, 8, 9, 11, 13, 15), EAJA does not use the phrase "civil action[s]"; instead, EAJA applies to "*any* civil action *(other than cases sounding in tort)*." 28 U.S.C. § 2412(d)(1)(A) (emphases added). "[B]y choosing the word 'any' to modify the term 'civil action,'" "Congress expressed its intent for the EAJA to apply to the broadest possible range of civil cases." *Obando-Segura*, 999 F.3d at 198 (Keenan, J., dissenting). And "by explicitly excluding tort actions," Congress made clear it did not intend "*implicitly* to exclude any other category of purely civil cases from [EAJA's] scope." *Id.*

Ignoring EAJA's text, the government invokes the sovereign immunity canon. But "[t]he sovereign immunity canon is just that—a canon of construction." *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008). It does not require "that Congress use magic words" or "state its intent in any particular way"; rather, courts use the canon to resolve ambiguities that remain after the application of "other traditional tools of statutory construction." *Cooper*, 566 U.S. at 291.

So it speaks volumes that the government makes no effort to apply those traditional tools to EAJA. Instead, the government cites two cases about different statutory provisions. Both cases, however, confirm the only point relevant here: "habeas corpus proceedings are characterized as 'civil.'" *Harris v. Nelson*, 394 U.S. 286, 293 (1969); *accord Schlanger v. Seamans*, 401 U.S. 487, 490 n.4 (1971). Both cases also make the unremarkable point that Congress can, if it chooses, exempt habeas actions from the rules governing other civil actions. *See Harris*, 394 U.S. at 294 (Federal Rules of Civil Procedure

expressly exempted habeas from certain discovery rules); *Schlanger*, 401 U.S. at 490 n.4 (Congress exempted habeas from service-of-process provision through legislative history). But there is no indication Congress meant to do that here, and every indication it did not.

If nothing else, the government's merits argument establishes one thing—the relevant legal issues are joined, ripe, and ready for this Court's review. The Court should grant certiorari and resolve this timely, important, and cleanly presented issue on which the circuits are indisputably split.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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