No. 02-1657

In the Supreme Court of the United States

RANDALL C. SCARBOROUGH, PETITIONER

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(B), provides that "[a] party seeking an award of fees * * * shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney * * * stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified." The question is as follows:

Whether a complete application containing each of those elements, including an allegation that the government's position was not substantially justified, must be filed within thirty days to confer jurisdiction on the court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 319 F.3d 1346. The order of this Court (Pet. App. 36a) vacating and remanding an earlier decision of the court of appeals is reported at 536 U.S. 920. The earlier opinion of the court of appeals (Pet. App. 26a-35a) is reported at 273 F.3d 1087. The opinion of the United States Court of Appeals for Veterans Claims (Pet. App. 22a-25a) is reported at 13 Vet. App. 530.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 2003. A petition for rehearing was denied on April 17, 2003 (Pet. App. 37a-38a). The petition for a writ of certiorari was filed on May 9, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Equal Access to Justice Act (EAJA) authorizes a court to award fees to prevailing parties in certain litigation against the United States, unless the position of the United States is found to be substantially justified:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses * * * 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.

28 U.S.C. 2412(d)(1)(A).

As a prerequisite to obtaining an award of fees under EAJA, a party must file an application containing certain information within thirty days of the court's final judgment:

> A party seeking an award of fees * * * shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this

> subsection, and the amount sought, including an itemized statement from any attorney * * * stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified.

28 U.S.C. 2412(d)(1)(B).

2. Petitioner sought review of a decision made by the Board of Veterans' Appeals that found no clear and unmistakable error in a 1976 determination that petitioner's disability lacked a service connection. Pet. App. 22a. The United States Court of Appeals for Veterans Claims vacated and remanded the Board's decision (*ibid.*), and, on remand, petitioner was awarded retroactive benefits. Petitioner prematurely filed an application for attorney's fees under EAJA with the Court of Appeals for Veterans Claims, which was held and treated as filed on October 4, 1999, following the issuance of the court's mandate. See *Id.* at 23a. Petitioner's application stated that petitioner "was the prevailing party pursuant to the July 1999 remand order" and that "his net worth did not exceed the $2,000,000.00 limit for filing under the EAJA." *Id.* at 2a. The application also included an enumeration of the fees and expenses incurred by his attorney in representing him. *Id.* at 3a. The application did not, however, allege that the government's position in the underlying litigation lacked substantial justification. *Ibid.* On December 3, 1999, the government moved to dismiss the application for lack of subject matter jurisdiction for failure to allege a lack of substantial justification in the government's position. *Ibid.*

3. The Court of Appeals for Veterans Claims (CAVC) dismissed petitioner's application. Pet. App.

22a-25a. The court held that "to be eligible for an EAJA award, the EAJA application must be filed within the 30-day EAJA application period set forth in 28 U.S.C. 2412(d)(1)(B)" and that "in order to satisfy jurisdictional requirements, the application must contain a showing that the applicant is a prevailing party, an assertion that the applicant is a party eligible for an award under the EAJA, and an allegation that the position of the Secretary was not substantially justified." *Id.* at 23a-24a. Because petitioner's application contained no allegation that the government's position lacked substantial justification, the court found that it "lack[ed] jurisdiction over the * * * EAJA application." *Id.* at 25a.

4. The Federal Circuit affirmed. Pet. App. 26a-35a. The court read the language in EAJA to be "plain and unambiguous" in requiring "[a] party seeking an award of fees [to] submit an application including each of the four requirements enumerated, within the thirty-day time limit." *Id.* at 30a. The court acknowledged that the Third Circuit had held, in *Dunn* v. *United States*, 775 F.2d 99, 104 (1985), that "as long as the EAJA application was filed within the thirty-day time limit, the application may be supplemented or corrected after the thirty-day period, provided that the Government was not prejudiced." Pet. App. 31a. Likewise, the court acknowledged that the Eleventh Circuit had reached a similar result in *Singleton* v. *Apfel*, 231 F.3d 853 (2000). Pet. App. 31a-32a. The court explained, however, that those decisions "venture[d] beyond the plain language of the EAJA." *Id.* at 32a.

The court of appeals nonetheless recognized that the "statutory language does not mandate strict compliance or foreclose supplementation where the details of the stated jurisdictional averments remain to be fleshed out

or corrected." Pet. App. 33a. It is only "[w]hen the application completely fails to address one of the four statutory requirements by the thirty-day deadline" that the "application will be jurisdictionally defective." *Ibid.* The court accordingly held that it lacked jurisdiction over petitioner's application because it "was not merely in need of the 'fleshing out of the details' * * * but was entirely devoid of the required allegation that the Government's position was 'not substantially justified.'" *Id.* at 34a-35a.

5. On petition for certiorari, this Court granted the petition, vacated the judgment, and "remanded to the * * * Federal Circuit in light of *Edelman* v. *Lynchburg College*, [535 U.S. 106 (2002)]." Pet. App. 36a. In *Edelman*, this Court held that a Title VII discrimination charge can be supplemented to include the oath or affirmation required by 42 U.S.C. 2000e-5(b) after the filing deadline under 42 U.S.C. 2000e-5(e)(1) has passed.

6. On remand, a divided panel of the Federal Circuit affirmed. Pet. App. 1a-18a. The court reiterated its disagreement with the Third and Eleventh Circuits. *Id.* at 6a-11a. It then addressed this Court's *Edelman* decision, finding it not controlling for three reasons. First, the court reasoned that "the statute at issue in *Edelman*," Title VII, "is 'a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process.'" *Id.* at 13a (quoting *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 115 (2002) (citation omitted)). By contrast, the "EAJA statute * * * is directed to attorneys seeking attorney fees" and thus "paternalistic protection" against inadvertent forfeiture of rights "is not required." *Ibid.*

Second, the court explained that "the two requirements in *Edelman*—namely the timely filing of the charge and the verification—are contained in separate

statutory provisions." Pet. App. 13a (citing 42 U.S.C. 2000e-5(b) and 5(e)(1)). In the EAJA, however, the "allegation of lack of substantial justification is part of the single statutory provision detailing both the contents required for an EAJA application and the requirement that the application be filed within thirty days." *Id.* at 14a.

Third, the court found that the purposes of the substantial justification allegation are different from the purpose of the verification requirement at issue in *Edelman*. The verification requirement is "aimed at stemming irresponsible litigation, and as such * * * it is not unreasonable to permit relation-back of a late-filed oath." Pet. App. 12a (citing *Edelman*, 535 U.S. at 116). The substantial justification allegation, on the other hand, "is not simply a tool to weed out frivolous claims, but rather is one portion of the basis of the award itself." *Id.* at 14a. In this regard, the court of appeals observed that this Court described the substantial justification requirement as "'operat[ing] as a one-time threshold for fee eligibility.'" *Ibid.* (quoting *Commissioner, INS* v. *Jean*, 496 U.S. 154, 160 (1990)).

Accordingly, the court concluded that an allegation of a lack of substantial justification "is more akin" to the requirements for the contents of a notice of appeal that may not be cured after the deadline, than to the signature requirement that may be satisfied after the fact under *Becker* v. *Montgomery*, 532 U.S. 757 (2001). Pet. App. 16a. In this regard, the court observed that the statutory EAJA content requirements "'are jurisdictional in nature, and their satisfaction is a prerequisite'" to conferring jurisdiction on a court to award fees. *Id.* at 17a (quoting *Smith* v. *Barry*, 502 U.S. 244, 248 (1992)). In sum, only "[a]fter satisfying the four requirements of the EAJA application * * *

does the court have jurisdiction to determine what fee award is reasonable." *Id.* at 14a-15a (citing *Jean*, 496 U.S. at 160-161).

Chief Judge Mayer dissented. Pet. App. 19a-21a. In his view, "[t]he 'no substantial justification' allegation in the EAJA application is akin to the verification requirement of *Edelman* and the signature requirement of *Becker v. Montgomery*, 532 U.S. 757 (2001)." *Id.* at 19a.

ARGUMENT

1. The Federal Circuit correctly held that under the plain language of EAJA, a timely filed fee application must include an allegation that the government's position in the underlying proceeding was not substantially justified. The EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United States (see, *e.g.*, *Lane* v. *Pena*, 518 U.S. 187, 192 (1996)) and not enlarged beyond what the language requires (*United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992)). If the government consents to an action, "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941).

EAJA provides:

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement * * *. The

> party shall also allege that the position of the United States was not substantially justified.

28 U.S.C. 2412(d)(1)(B). Section 2412(d)(1)(B) thus requires that an application must be filed within thirty days of final judgment and must include (1) a showing that the applicant is a prevailing party; (2) a showing that the applicant is eligible to receive an award, *i.e.*, that the applicant's net worth "did not exceed $2,000,000 at the time the civil action was filed," 28 U.S.C. 2412(d)(2)(B); (3) the amount sought, with an itemization of time expended; and (4) an allegation that the government's position was not substantially justified.

As the court of appeals held, the Act's "plain language * * * require[s] not only that an application be filed by the thirty-day deadline, but that it contain averments addressing each of the four * * * requirements enumerated in the statute." Pet. App. 9a. The requirements—both as to timeliness and an application's required contents—are included in the same paragraph and, except for the allegation of substantial justification, in the same sentence. Because the statute "[u]se[s] * * * the same mandatory language with respect to the thirty-day deadline and each of the four enumerated application requirements * * * [,] all of the requirements must be addressed, if not satisfied, within thirty days in order for a court to assert jurisdiction." *Ibid.* Thus, the pleading requirements of Section 2412(d)(1)(B) set forth the irreducible minimum of an EAJA application that must be timely filed within the statutory period.[1]

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[1] Contrary to petitioner's suggestion (Pet. 25-26), little import should be placed on the fact that the required allegation of no substantial justification is included in the subsequent sentence rather

Petitioner argues (Pet. 22) that the Court of Appeals for Veterans Claims in the underlying civil action against the United States had jurisdiction over the case and thus "it would be strange, indeed unprecedented, to require a litigant to establish jurisdiction in the same court twice." The Court of Appeals for Veterans Claims, however, had no authority, *i.e.*, no jurisdiction, to award petitioner attorney's fees absent the specific and express waiver of sovereign immunity in EAJA itself. *Lane* v. *Pena*, 518 U.S. at 197 ("Where a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived.") (citation omitted); accord *Library of Congress* v. *Shaw*, 478 U.S. 310, 314-320 (1986). Moreover, contrary to petitioner's assertion, nothing in Section 2412(d)(1)(A) "recognizes that a court entertaining an EAJA application *already* has jurisdiction." Pet. 22. Section 2412(d)(1)(A) authorizes the court to award to a prevailing party attorney's fees the party incurs in any civil 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

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than the sentence with the time limit and the other three application requirements that must be "show[n]" by the applicant. Instead, the second sentence is best understood as an effort to preserve parallel sentence structure and make clear that a lack of substantial justification need only be "allege[d]" by the applicant. 28 U.S.C. 2412(d)(1)(B). Petitioner also erroneously relies (Pet. 27-28) on the fact that Section 2412(d)(1)(A) places on the government the burden of showing that the government's position is substantially justified. Regardless of the burden of *proof* on the issue, Congress unambiguously placed the burden on the applicant to make a timely *allegation* in his application that he is entitled to fees because the government's position was not substantially justified.

United States was substantially justified." 28 U.S.C. 2412(d)(1)(A). That provision merely recognizes that the party must incur fees in a case in which the court *had* jurisdiction; the provision does not purport to give the court jurisdiction to award attorney's fees when the prevailing party does not comply with the statutory prerequisites during the thirty-day period specified in Section 2412(d)(1)(B). *Bryan* v. *OPM*, 165 F.3d 1315, 1321 (10th Cir. 1999) (EAJA time limits jurisdictional); accord *Yang* v. *Shalala*, 22 F.3d 213, 215 n.4 (9th Cir. 1994); *Newsome* v. *Shalala*, 8 F.3d 775, 777 (11th Cir. 1993); *Damato* v. *Sullivan*, 945 F.2d 982, 986 (7th Cir. 1991); *Welter* v. *Sullivan*, 941 F.2d 674, 675 (8th Cir. 1991); *Peters* v. *Secretary of HHS*, 934 F.2d 693, 694 (6th Cir. 1991); *J.M.T. Mach. Co.* v. *United States*, 826 F.2d 1042, 1047 (Fed. Cir. 1987).

2. The court of appeals' decision is also supported by the history and purpose of EAJA to prevent EAJA applications from growing into a "second major litigation." *Pierce* v. *Underwood*, 487 U.S. 552, 563 (1988). The Senate Report on the bill that became the 1985 EAJA amendments explained that the "thirty-day deadline for filing the fee application is jurisdictional and cannot be waived." S. Rep. No. 586, 98th Cong., 2d Sess. 16 (1984);[2] see H.R. Rep. No. 120, 99th Cong., 1st Sess. 7 (1985). Congress similarly rejected a proposal

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[2] Although the cited 1984 Senate Report accompanied a bill that was eventually vetoed by the President, the bill that became law included the thirty-day filing period without modification. See H.R. Rep. No. 120, 99th Cong., 1st Sess. 7 (1985); *Huffman* v. *OPM*, 263 F.3d 1341, 1347 n.1 (Fed. Cir. 2001). Many courts, including this Court, have relied on the 1984 Senate Report to interpret the EAJA amendments. *Melkonyan* v. *Sullivan*, 501 U.S. 89, 96 (1991); *Commissioner, INS* v. *Jean*, 496 U.S. at 159 n.7.

that would allow time extensions to be granted.[3] Congress was clearly attuned to the potential for high costs in resolving EAJA claims.[4] Congress did not want EAJA litigation to "unduly prolong many law suits to the detriment of the parties and our system of justice." H.R. Rep. No. 1005, 96th Cong., 2d Sess. Pt. 1, at 27 (1980) (additional views of Rep. LaFalce); see *Equal Access to Justice Act of 1979: Hearings on S. 265 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on Judiciary*, 96th Cong., 1st Sess. 43 (1979) (Sen. DeConcini).

Accordingly, Congress in drafting EAJA sought to "authorize * * * relief * * * in as *concise* and *precise* a fashion as possible" in order to "avoid any measure that will itself breed additional litigation." H.R. Rep. No. 1005, *supra*, at 28 (emphasis added). In sum, Congress envisioned a stream lined procedure to resolve fee disputes. That end would not be served by petitioner's reading of EAJA, the logic of which would permit an applicant to file an EAJA application that stated *none* of the pleading requirements of Section 2412(d)(1)(B). That approach would invite disputes over the adequacy of filings and the extent of prejudice to the government. In other words, it would invite exactly the sort of process that threatens to grow into a

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[3] *Reauthorization of Equal Access to Justice Act: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 15 (1983).

[4] See H.R. Rep. No. 1418, 96th Cong., 2d Sess. 22 (1980) (Congressional Budget Office report illustrating the costs involved in litigating EAJA claims); *Equal Access to Justice Act of 1979: Hearings on S. 265 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 9 (1979).

"second major litigation." *Pierce*, 487 U.S. at 563. Instead, by requiring a complete application to confer jurisdiction on the district court, the EAJA application provision helps ensure that fee disputes will be resolved promptly and efficiently.

3. This Court's review is not warranted to consider petitioner's primary claim (Pet. 21-25) that the provision at issue here should not be considered jurisdictional because, in petitioner's view, EAJA is subject to principles of equitable tolling under this Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990). Petitioner faults the court of appeals because "it ignored—indeed, did not even cite," *Irwin*, which petitioner views as "the key precedent on point." Pet. 21. But the court's failure in its initial decision to discuss equitable tolling or to cite *Irwin* is presumably fully explained by petitioner's failure to raise equitable tolling or to cite *Irwin*. See 01-1360 U.S. Br. in Opp. at 12 n.6. Rather, petitioner mentioned *Irwin* for the first time in his reply brief, and it is established practice that courts will not hear arguments first raised in reply briefs. See *Bendix Autolite Corp.* v. *Midwesco Enters., Inc.*, 486 U.S. 888, 895 (1988).

Nor should the court of appeals be faulted for neither citing *Irwin* nor addressing the issue of equitable tolling upon remand from this Court. In its remand order, the Court did not instruct the court to address *Irwin* or the issue of equitable tolling, notwithstanding petitioner's argument in his first certiorari petition that the federal circuit decision was "at odds with this Court's decision in *Irwin*." 01-1360 Pet. at 17. The Court simply remanded for reconsideration in light of *Edelman*, a case which does not cite *Irwin* or involve the issue of equitable tolling. This Court's decision in *Edelman* in no way retroactively excused petitioner's

failure to pursue his *Irwin* argument. Accordingly, because petitioner failed to timely raise the issues on which he now seeks review and the court below has not considered those issues, this Court should decline to consider petitioner's claims in the first instance. See, *e.g.*, *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999).

Moreover, this case would not be an appropriate vehicle to consider petitioner's contention (Pet. 24-25) that he met the requirements of equitable tolling. As discussed, the court below did not consider the issue. It is also not at all clear that principles of equitable tolling would apply to EAJA's jurisdictional time limits. The general rule is that equitable tolling is not available with respect to time periods that are jurisdictional, rather than mere statutes of limitation (*Stone* v. *INS*, 514 U.S. 386, 405 (1995); *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)), and the majority of courts have concluded that equitable tolling does not apply to EAJA's 30-day application period. See, *e.g.*, *Birnell* v. *Apfel*, 76 F. Supp. 2d 1195, 1199 (D. Kan. 1999); *Allbritton* v. *HHS*, 796 F. Supp. 35, 41 (D. Mass. 1992) ("Because the First Circuit has ruled that the thirty-day period is jurisdictional, [equitable tolling] is unavailable."); *Epling* v. *United States*, 958 F. Supp. 312, 314-315 n.1 (W.D. Ky. 1997); but see *Luna* v. *Department of HHS*, 948 F.2d 169, 173 (5th Cir. 1991) (applying equitable tolling to EAJA).

Even assuming equitable tolling is available under EAJA, petitioner could not prevail under such a theory. The doctrine of equitable tolling is "extended * * * only sparingly," and does not extend to a situation, like here, where petitioner's failure to follow clear statutory requirements is "at best a garden variety claim of ex-

cusable neglect." *Irwin*, 498 U.S. at 96.[5] Petitioner argues (Pet. 25 n.8) that his pleading defect "was induced by the government's misconduct" because the government did not file a response within 30 days of petitioner's premature application as required by petitioner's reading of then-extant Vet. App. R. 39. The government, however, did not cause petitioner to file a defective pleading; that error was caused by petitioner's counsel. See Response to Appellee's Motion to Dismiss Motion for Leave to Supplement Filing 3 ("the omission of the allegation as to substantial justification was the error of counsel").

Moreover, there is no evidence that the government's failure to file a response to petitioner's premature pleading at that time was a result of an intent to lull petitioner into not correcting a defective pleading, and indeed the CAVC issued an order that notified the government that its response was due 30 days after petitioner's application was *filed*, not 30 days after petitioner served its application on the government as suggested by petitioner. 01-1360 Br. in Opp. App. 1a. In any event, petitioner cites no basis for contending that the government had an obligation to bring a pleading defect to petitioner's attention so that petitioner would have had time to correct the mistake before the expiration of the 30-day period following final judgment. In those circumstances, it would not be appropriate to extend the doctrine of equitable tolling

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[5] Petitioner therefore errs in reading (Pet. 24) *Irwin* to make equitable tolling applicable whenever a defective pleading is filed "during the statutory period." Such an expansive reading of the doctrine of equitable tolling would swallow congressionally mandated pleading requirements by encompassing a "garden variety claim of excusable neglect." *Irwin*, 498 U.S. at 96.

to excuse petitioner's mistake in filing a defective EAJA application.

4. Contrary to petitioner's claim (Pet. 25-28), the court of appeals decision also comports with this Court's decision in *Edelman* v. *Lynchburg College*, 535 U.S. 106 (2002). In *Edelman*, this Court held that a timely discrimination charge filed pursuant to Title VII, 42 U.S.C. 2000e-5(e)(1), need not include within the time period a verification of the charge that is required by 42 U.S.C. 2000e-5(b). 535 U.S. at 115.[6] The Court reasoned that the provision requiring verification "merely requires the verification of a charge, without saying when it must be verified." *Id.* at 112. The time limit likewise merely provides "that a charge must be filed within a given period, without indicating whether the charge must be verified when filed." *Ibid.*

There is no such textual ambiguity under EAJA, as the court of appeals explained (Pet. App. 13a). Instead, EAJA incorporates the time limit and the required application contents in the same paragraph—indeed, for the most part in the same sentence: it provides that a party seeking fees "*shall*, within thirty days * * * submit to the court an application for fees * * * *which shows that*" the party prevailed and is eligible, includes an itemization of time expended and the rate at which fees were charged, and alleges that the government's position was not substantially justified. 28 U.S.C. 2412(d)(1)(B) (emphasis added). Unlike the ambiguous

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[6] Section 2000e-5(b) provides that "[c]harges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." Section 2000e-5(e)(1) provides that "[a] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred."

Title VII language at issue in *Edelman*, EAJA's text unambiguously requires a timely allegation that the government's position lacked substantial justification. Indeed, the Court in *Edelman* recognized that the agency could have permissibly construed Title VII to require a plaintiff to file a verified charge within the charge-filing time limit. 535 U.S. at 114 n.8; accord *id.* at 121 (O'Connor, J., with whom Scalia, J., joins, concurring in the judgment) ("the best reading of the statute is that a charge must be made under oath or affirmation within the specified time").

Morever, the Court in *Edelman* relied on the "consisten[t] * * * background law" that allows a verification or signature requirement to relate back to an otherwise timely filed pleading. 535 U.S. at 116. By contrast, courts, including this Court, regularly treat content requirements as necessary to confer jurisdiction. Pet. App. 16a-17a; *Edelman*, 535 U.S. at 116 ("the timing and content requirements for the notice of appeal [are] 'jurisdictional in nature'"); see also *Becker* v. *Montgomery*, 532 U.S. 757, 765 (2001) (signature need not be included on notice of appeal, but content and timing requirements "are indeed linked jurisdictional provisions"); *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 314 (1988) (failure to name a party in a notice of appeal "constitutes a failure of that party to appeal"). Accordingly, there is no background tradition consistent with allowing petitioner's incomplete EAJA application to confer jurisdiction on the district court. Rather, until *all* of the information required by Section 2412(d)(1)(B) is provided, no application has been "submit[ted]" (*ibid.*) under the statute. See, *e.g.*, *Commissioner, INS* v. *Jean*, 496 U.S. 154, 160 (1990) ("A fee application *must contain* an allegation 'that the position

of the United States was not substantially justified.'") (emphasis added).

Two other related features distinguish Title VII from EAJA and inform the proper interpretation of Section 2412(d)(1)(B). First, Title VII "is 'a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process.'" Pet. App. 13a (quoting *Edelman*, 535 U.S. at 115). By contrast, the "EAJA statute * * * is directed to attorneys seeking attorney fees," and thus the same "paternalistic protection" against inadvertent forfeiture of rights "is not required." *Ibid.* Second, whereas the Court has construed Title VII in light of its remedial purposes, *e.g.*, *Love* v. *Pullman Co.*, 404 U.S. 522, 526- 527 (1972), Congress passed EAJA against the settled backdrop that waivers of sovereign immunity must be narrowly construed. See p. 7, *supra*. There is accordingly no basis to stretch the plain language of Section 2412(d)(1)(B) to permit defective EAJA applications to be cured after the statutory deadline has passed. Finally, the effect of the recent *Edelman* decision on EAJA's time limits is not an issue that other circuits have had an opportunity to address.

5. Petitioner urges (Pet. 16-21) that certiorari is warranted to resolve a conflict in the circuits on the question presented. It is not clear, however, that the court of appeals' decision will adversely affect EAJA applicants with any significant frequency or that the conflict is of great practical importance. EAJA applications will nearly always be prepared by attorneys, who will presumably follow the decision below when filing EAJA applications in the Federal Circuit. Compliance with the Federal Circuit's rule requires making a simple declarative sentence in the fee petition. Moreover, unlike a conflict that creates different rules governing primary conduct in different parts of the

country, the conflict here only affects the conduct of attorneys preparing fee petitions in litigation against the government. It creates no material inconsistency if lawyers litigating in the Federal Circuit are on notice from a governing precedent that Section 2412(d)(1)(B) means what it says and will be taken seriously, while lawyers in the other circuits that have addressed the issue are on notice that they have greater latitude in making an EAJA filing. Moreover, because lawyers in other circuits will lose their claim to fees if the government is prejudiced by omissions in the application—an outcome outside the applying lawyer's control—other lawyers across the country have every incentive to ensure that their initial applications include all the statutorily required information in a timely fashion.

The conflict in authority does not create any prejudice. The government suffers no prejudice from the rule of other circuits because those circuits excuse only filings that do not prejudice the government. Moreover, there is no prejudice to litigants in the Federal Circuit now that the rule is clearly established. Although petitioner notes (Pet. 20 n.6) instances in which litigants did not timely file an EAJA application containing the requirements of Section 2412(d)(1)(B), all those decisions were issued before the Federal Circuit decision in this case (and, for that matter, before the Federal Circuit's earlier ruling that has been vacated).

Finally, the decision below recognizes that, as long as an applicant timely alleges the pleading jurisdictional prerequisites under EAJA, the applicant will be permitted "some latitude to supplement his application to flesh out the missing details." Pet. App. 9a. Accordingly, because there is no reason to conclude that the decision below will lead to the inadvertent filing of

defective EAJA applications, this Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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