No. 01-1360

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

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
WILLIAM KANTER
AUGUST E. FLENTJE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION 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 whether a complete application satisfying each of the elements of subsection 2412(d)(1(B), including an allegation that the government's position was not substantially justified, must be filed within thirty days of final judgment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rule:

In the Supreme Court of the United States

No. 01-1360

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

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 273 F.3d 1087. The decision of the United States Court of Appeals for Veterans Claims (Pet. App. 11a-14a) is reported at 13 Vet. App. 530.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 2001. A petition for rehearing was denied on February 25, 2002 (Pet. App. 15a-16a). The petition for a writ of certiorari was filed on March 13, 2002. 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 fees under EAJA, a party must file an application containing cerain information within thirty days of 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. 17a. The United States Court of Appeals for Veterans Claims (CAVC) reversed and remanded the Board's decision (*id.* at 20a), and, on remand, petitioner was awarded retroactive benefits. Petitioner prematurely filed an application for attorneys 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 2a. 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." *Ibid.* The application also included an enumeration of the fees and expenses incurred by his attorney in representing him. 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.

3. The CAVC dismissed petitioner's application. Pet. App. 11a-14a. 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 "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 12a-13a. 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 14a.

4. The Federal Circuit affirmed. Pet. App. 1a-10a. The court read the language in EAJA to be "plain and unambiguous" in requiring that "[a] party seeking an award of fees 'submit' an application including each of the four requirements enumerated, within the thirty-day time limit." *Id.* at 5a. 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. 6a. Likewise, the court acknowledged that the Eleventh Circuit had reached a similar result in *Singleton* v. *Apfel*, 231 F.3d 853 (2000). Pet. App. 6a-7a. The court explained, however, that those decisions "venture[d] beyond the plain language of the EAJA." *Id.* at 7a.

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. 8a. 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 9a-10a.

ARGUMENT

1. The Federal Circuit correctly held that the plain language of EAJA requires a timely filed application to 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*, 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).

Section 2412(d)(1)(B) of 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.

Subsection 2412(d)(1)(B) thus requires an application to be filed within thirty days of final judgment and include (1) a showing that applicant is a prevailing party; (2) a showing that applicant is eligible to receive an award,

i.e., that 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 * * * requires that an application not only be filed by the thirty-day deadline, but that the application contain averments addressing each of the four * * * requirements enumerated in the statute." Pet. App. 8a. The requirements—as to both timeliness and an application's required contents—are included in the same subsection 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 applications 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]

---

[1] Contrary to petitioner's suggestion (Pet. 20-21), little import should be placed on the fact that the required allegation of no substantial justification is included in the subsequent sentence rather than the sentence with the time limit and the other three application requirements that must be "show[n]" by the applicant. Instead, the use of a second sentence is best explained as an effort to preserve parallel sentence structure and make clear that an application need only "allege," as opposed to "show," a lack of substantial justification. 28 U.S.C. 2412(d)(1)(B). Petitioner repeats this error by relying (Pet. 21-22) on the fact that Section 2412(d)(1)(A) places on the government the burden of showing that the govern-

2. The court of appeals' decision is 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); see H.R. Rep. No. 120, 99th Cong., 1st Sess. 7 (1985). Congress similarly rejected a proposal that would allow time extensions to be granted.[2] Congress was clearly attuned to the potential for high costs in resolving EAJA claims.[3] 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. 27 (1980) (add'l

---

ment's position is substantially justified. That simply underscores the need to separate lack of substantial justification, which need only be alleged, from the other factors in subsection 2412(b)(1)(B), as to which the application bears the burden of proof (*i.e.*, factors it must "show."). 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.

[2] *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).

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

views of Rep. LaFalce); see *1979 Senate Hearings* 43 (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). That interest in concision and precision reinforces the text's requirement that litigants turn square corners and make a timely filing that complies with the requirements of Section 2412(d)(1)(B). Congress envisioned a streamlined 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 "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 the government is in a position to assess the fee petition and that fee disputes will be resolved promptly and efficiently.[4]

---

[4] Petitioner argues in a footnote (Pet. 19 n.6) that an applicant should not be required to allege the amount of fees sought because that requirement might interfere with an applicant's ability to collect additional fees for applying for fees under EAJA. But that argument is in serious tension with petitioner's acknowledgment (Pet. 20-21) that the statutory requirement that the applicant show the amount of fees sought is contained within the same sentence imposing the 30-day jurisdictional filing requirement. In any event, petitioner makes no argument that an EAJA applicant

3. The court of appeals' decision also comports with this Court's recent intervening decision in *Edelman* v. *Lynchburg College*, 122 S. Ct. 1145 (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 a separate subsection of the statute, 42 U.S.C. 2000e-5(b). 122 S. Ct. at 1150.[5] The Court reasoned that the provision requiring verification "merely requires the verification of the charge, without saying when it must be verified." *Id.* at 1149. The time limit there, 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, which incorporates the time limit and the required application contents in the same subsection—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, is eligible, includes an itemization, and alleges that the government's position was not substantially justified. 28 U.S.C. 2412(d)(1)(B)

---

somehow will not know 30 days following a final judgment whether the government's position was substantially justified. Thus, like requiring that an applicant aver that he is a prevailing party below, EAJA requires an application to facially state an entitlement to fees because the government's position below was not substantially justified.

[5] 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."

(emphasis added). Unlike the ambiguous 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. 122 S. Ct. at 1150 n.8; accord *id.* at 1154 (O'Connor, J., 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 to relate back to an otherwise timely filed (albeit unverified) pleading. 122 S. Ct. at 1151. By contrast, courts, including this Court, regularly treat content requirements in a filing as necessary to confer jurisdiction. See, *e.g.*, *id.* at 1151 ("the timing and content requirements for the notice of appeal [are] 'jurisdictional in nature'"); *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 "submitt[ed]" (*ibid.*) under the statute. See, *e.g.*, *Commissioner* 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).

4. Petitioner urges (Pet. 11-17) 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. Cf. *Edelman*, 122 S. Ct. at 1150 (noting that Title VII is a "remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process."). 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 a EAJA filing.

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. 16 n.5) instances in which litigants did not file a timely EAJA application containing the requirements of Section 2412(d)(1)(B), those decisions were decided before the Federal Circuit's decision in this case. Moreover, the decision below recognizes that, as long as an applicant timely alleges

the basic jurisdictional prerequisites under EAJA, the applicant will be permitted "some latitude to supplement his application to flesh out the missing details." Pet. App. 8a. 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.

5. Certiorari review is also not warranted to consider petitioner's contention (Pet. 19-20) that the 30-day limitations period should be equitably tolled under this Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). The court of appeals addressed neither that issue nor the antecedent issue of whether EAJA's pleading requirements are subject to equitable tolling.[6] This Court should accordingly decline to consider those issues 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 whether equitable tolling should be unavailable under EAJA, because 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 the failure to follow clear statutory requirements is "at best a garden variety claim of excusable neglect." *Irwin*, 498 U.S. at 96.[7] Petitioner argues (Pet. 19) that his pleading defect

---

[6] Petitioner did not cite *Irwin* to the court of appeals until his reply brief. See Reply Br. at 4-5.

[7] Petitioner therefore errs in reading (Pet. 18) *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.

"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 the 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. App., *infra*, 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 to excuse petitioner's mistake in filing a defective EAJA application.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
WILLIAM KANTER
AUGUST E. FLENTJE
Attorneys

MAY 2002

APPENDIX

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 98-1590

RANDALL C. SCARBOROUGH, APPELLANT

v.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE

Filed: Oct. 4, 1999

ORDER

The appellant's premature application for attorney fees and expenses is filed today. It is ORDERED that the Secretary's response is due within 30 days after the date of this order.

FOR THE COURT:

ROBERT F. COMEAU
Clerk of the Court

By: ILLEGIBLE
Deputy Clerk

Copies to:

Peter J. Sarda, Esq.
Kirby, Wallace, Creech, Sarda
P.O. Box 12065
Raleigh, NC 27605

General Counsel (027)
Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, DC 20420