No. 02-1657

In the Supreme Court of the United States

RANDALL C. SCARBOROUGH, PETITIONER

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

The Equal Access to Justice Act, 28 U.S.C. 2412(d), provides in pertinent part that a party seeking an award of attorneys fees against the United States "shall, within thirty days of final judgment in the action, submit to the court an application * * * 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). The question presented in this case is:

Whether an award of fees under Section 2412(d) is barred if the applicant fails to file, within 30 days of final judgment, a fee application alleging that the government's position was not substantially justified.

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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 an earlier judgment of the court of appeals and remanding 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 order 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).

STATUTORY PROVISIONS INVOLVED

The provisions of 28 U.S.C. 2412 are set out in an appendix to this brief. App., *infra*, 1a-7a.

STATEMENT

1. a. Before 1980, 28 U.S.C. 2412 authorized courts to award costs to prevailing parties in civil litigation against the United States, but further provided that the awardable costs did "not includ[e] the fees and expenses of attorneys." 28 U.S.C. 2412 (1976).

In 1980, Congress enacted the Equal Access to Justice Act (EAJA), Pub. L. No. 96-481, Tit. II, 94 Stat. 2325. Among other reforms, EAJA amended Section 2412 by authorizing awards of attorneys fees against the United States. Former Section 2412, authorizing awards of costs but not attorneys fees, was amended slightly and became new Section 2412(a). See 8 U.S.C. 2412(a) (Supp. IV 1980). In new Section 2412(b), Congress authorized, "[u]nless expressly prohibited by statute," awards to prevailing parties of "reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a)." 28 U.S.C. 2412(b). Congress provided that attorneys fees may be awarded under Section 2412(b) "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." 28 U.S.C. 2412(b). Section 2412(b) allows courts to award attorneys fees against the government under generally applcable equitable exceptions to the "American Rule" (*i.e.*, "the general rule that, absent statute or enforceable contract, litigants pay their own attorneys' fees," *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421

U.S. 240, 257 (1975)), such as the exceptions allowing attorneys fees to be awarded against losing parties who disobey a court order or act in bad faith. In addition, attorneys fees may be awarded under Section 2412(b) pursuant to generally applicable statutory fee-shifting provisions that do not expressly authorize such awards specifically against the United States. See H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 25 (1980); H.R. Rep. No. 1418, 96th Cong., 2d Sess. 8-9 (1980); S. Rep. No. 253, 96th Cong., 1st Sess. 3-4, 19 (1979).

Whereas Section 2412(b) makes the government liable for attorneys fees to the same extent as private parties, another provision of EAJA, codified as 28 U.S.C. 2412(d), authorized awards of attorneys fees and expenses against the government in particular circumstances where an award could *not* be made against a private party. Section 2412(d)(1)(A) authorized courts to award attorneys fees to prevailing parties in certain civil litigation against the United States, "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) (Supp. IV 1980). As a prerequisite to obtaining an award of fees under Section 2412(d) as added by EAJA, a prevailing party had to file, within 30 days of the court's final judgment in the underlying action, a fee application "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 or expert witness representing or appearing in behalf of the party * * * . The party shall also allege that the position of the United States was not substantially justified." 28 U.S.C. 2412(d)(1)(B) (Supp. IV 1980).

Rather than making Section 2412(d) permanent like Section 2412(b), Congress made its authorization of those extraordinary attorneys fees temporary, providing that Section 2412(d) would be repealed automatically for actions not yet commenced as of October 1, 1984. Pub. L. No. 96-481, Tit. II, § 204(c), 94 Stat. 2329.

b. In October 1984, Section 2412(d) expired for future actions, in accordance with EAJA. In August 1985, however, Congress repealed EAJA's sunset provision and reenacted Section 2412(d) with minor revisions that are not relevant to the instant case. Act of Aug. 5, 1985 (1985 EAJA Amendments), Pub. L. No. 99-80, §§ 2, 6(a) and (b)(2), 99 Stat. 184, 186. Sections 2412(d)(1)(A) and (B) currently provide:

> (d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), 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.
>
> (B) 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 from any attorney or expert witness representing or appear-

> ing in behalf of the party 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. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

28 U.S.C. 2412(d)(1)(A) and (B).[1]

2. This case involves the application of the 30-day filing requirement of 28 U.S.C. 2412(d)(1)(B) to a request for attorneys fees in a case involving veterans' benefits.

a. A veteran who has a disability "resulting from personal injury suffered or disease contracted in line of duty" is entitled to disability benefits. 38 U.S.C. 1110, 1131. A veteran seeking such benefits must first present his claim to the Department of Veterans Affairs (formerly the Veterans Administration) (collectively, the VA). The veteran may appeal an adverse final decision of the VA to the Board of Veterans' Appeals (Board). 38 U.S.C. 511(a), 7104(a). If the Board denies the claim, its decision is reviewable by the Court of Appeals for Veterans Claims (CAVC). 38 U.S.C. 7252.

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[1] The 1985 EAJA Amendments made a "clarifying" change to Section 2412(d)(1)(A) to state that attorneys fees and expenses are available in proceedings for judicial review of agency actions, Pub. L. No. 99-80, § 2(a)(2), 99 Stat. 184. Section 2412(d)(1)(B) was amended to provide that whether or not the position of the United States was substantially justified must be determined on the basis of the record of the underlying civil action. § 2(b), 99 Stat. 184.

The United States Court of Appeals for the Federal Circuit has jurisdiction to review decisions of the CAVC for legal error, and its jurisdiction is exclusive. 38 U.S.C. 7292; see 38 U.S.C. 502.

b. Petitioner served in the United States Navy from 1972 until 1975. Pet. Br. 4; CAVC Rec. 164. In 1976, the regional office of the VA, noting that petitioner's claimed disability of chronic renal failure preexisted his service in the Navy, denied his claim for veterans' benefits based on that condition. Pet. App. 41a, 42a; CAVC Rec. 164. In July 1998, after additional benefits proceedings, the Board rejected petitioner's attempt to collaterally attack the VA's 1976 determination that his disability lacked a connection to military service. Pet. App. 22a, 41a-42a. On July 9, 1999, the CAVC vacated the Board's decision and remanded petitioner's case. *Id.* at 41a-44a; J.A. 1. The CAVC determined that, in light of "the law as it existed at the time of the [VA's] 1976 adjudication," the Board had failed to identify sufficient record evidence supporting the VA's conclusion that petitioner's renal failure was not connected to his naval service. Pet. App. 43a.

c. Thirteen days after the CAVC issued its opinion in petitioner's case, the CAVC received from petitioner's counsel an application for an award of attorneys fees and costs under EAJA. J.A. 2, 4-5. On July 23, 1999, the CAVC returned the application to petitioner's counsel, explaining that the application was premature because the CAVC's judgment would not become final until (1) the judgment was entered following the expiration of the time for filing post-decision motions, and (2) the 60-day time limit for taking an appeal to the Federal Circuit ran following entry of the judgment. J.A. 6-7.

On August 2, 1999, the CAVC entered its judgment in petitioner's benefits case. J.A. 2. On August 19, 1999, the court received a second application for an award of fees and costs under EAJA. J.A. 2, 8-9. In the application, petitioner's counsel sought attorneys fees of $19,334 and costs of $118. J.A. 9. Counsel stated that petitioner was "the prevailing party [in the CAVC's proceeding] as defined in 28 U.S.C. 2412"; that petitioner's net worth did not exceed the $2 million limit for eligibility to recover under Section 2412(d), see 28 U.S.C. 2412(d)(2)(B); that the counsel seeking fees and costs had represented petitioner since August 1998; and that counsel's fees were for matters before the CAVC and were itemized on an attached statement. J.A. 8-9.

The CAVC held counsel's second premature application until after the time for taking an appeal in the benefits case expired on October 1, 1999, and then, on October 4, 1999 (the following Monday), filed the fee application and directed the Secretary of Veterans Affairs to respond by November 3, 1999. J.A. 10. On November 3, the CAVC granted the government an extension of time, until December 3, 1999, for responding to the application. J.A. 2. On December 3, 1999, the government moved to dismiss the EAJA application. The government argued that the application was defective, and the court lacked jurisdiction to award fees under 28 U.S.C. 2412(d), because petitioner's counsel had failed to satisfy Section 2412(d)(1)(B)'s requirement of alleging, within 30 days of the final judgment, that the government's position in the underlying litigation lacked substantial justification. See Pet. App. 3a.

On December 9, 1999, petitioner filed a proposed amendment to his second fee application, in which he sought to add a new paragraph alleging that "[t]he gov-

ernment's position that [petitioner] had not shown clear and unmistakable error in the 1976 [VA] decision was not substantially justified." J.A. 11; see Pet. Resp. to Gov't Mot. to Dismiss and Mot. for Leave to Supplement Filing (filed Dec. 9, 1999).

d. The CAVC dismissed petitioner's EAJA application for lack of jurisdiction. Pet. App. 22a-25a. The court explained that "[i]n order 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)," Pet. App. 23a, which in this case began to run on October 1, 1999. "[I]n order to satisfy jurisdictional requirements," the court continued, "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 EAJA application contained no allegation that the government's position lacked substantial justification, and the proposed amendment seeking to add that allegation was filed more than a month after the expiration of the 30-day filing deadline on October 31, 1999 (a Sunday), the CAVC determined that the lack of a substantial justification had not been timely alleged and the court therefore "lack[ed] jurisdiction over [petitioner's] EAJA application." *Id.* at 25a.

3. The Federal Circuit affirmed. Pet. App. 26a-35a. It determined that "[t]he language of the EAJA statute is plain and unambiguous" in requiring that a party seeking fees under Section 2412(d) "'shall' submit an application including each of the four requirements enumerated, within the thirty-day time limit." *Id.* at 30a. The court acknowledged (*id.* at 30a-32a) that the

Third and Eleventh Circuits had held, in *Dunn* v. *United States*, 775 F.2d 99 (3d Cir. 1985), and *Singleton* v. *Apfel*, 231 F.3d 853 (11th Cir. 2000), that the filing of a timely request for fees satisfies the statutory timeliness requirement, and the application may be amended outside the 30-day period to satisfy the content requirements of Section 2412(d)(1)(B) if the government is not prejudiced and the applicant has complied with court orders. See 775 F.2d at 104; 231 F.3d at 858. The Federal Circuit, however, rejected the reasoning of those decisions, deeming them inconsistent with Section 2412(d)(1)(B)'s use of "the same mandatory language with respect to the thirty-day deadline and each of the four enumerated application requirements." Pet. App. 33a.

The court of appeals further stated that the language of Section 2412(d) "does not mandate strict compliance" with the four enumerated requirements for the content of a fee application, and therefore does not "foreclose supplementation where the details of the stated jurisdictional averments remain to be fleshed out or corrected." Pet. App. 33a. The court accordingly concluded that it is only "[w]hen the application completely fails to address one of the four statutory requirements by the thirty-day deadline" that inadequate content renders the application jurisdictionally defective. *Ibid.*

Applying those principles, the Federal Circuit held that the CAVC lacked jurisdiction over petitioner's fee application because the application "was entirely devoid of the required allegation that the Government's position was 'not substantially justified,'" and petitioner "failed to remedy the jurisdictional defect before the expiration of the thirty-day deadline." Pet. App. 35a.

4. On petition for a writ of certiorari, this Court granted the petition, vacated the judgment of the court

of appeals, and "remanded to the * * * Federal Circuit in light of *Edelman* v. *Lynchburg College*, [535 U.S. 106 (2002)]." Pet. App. 36a. In *Edelman*, the Court upheld a regulation of the Equal Employment Opportunity Commission (EEOC) pursuant to which an administrative charge of employment discrimination that is timely filed with the EEOC under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e)(1), may be amended after the charge-filing deadline to include the oath or affirmation required by 42 U.S.C. 2000e-5(b), and that subsequent verification relates back to the date on which the charge was filed. See 535 U.S. at 110 n.2, 112-119.

5. On remand, the Federal Circuit once again affirmed the CAVC's dismissal of petitioner's fee application. Pet. App. 1a-18a. The court of appeals reiterated its view that the rule of the Third and Eleventh Circuits, which allows applicants to satisfy the content requirements of Section 2412(d)(1)(B) after the expiration of the 30-day deadline absent prejudice to the government or violation of a court order, is inconsistent with the plain language of EAJA. See Pet. App. 4a-11a.

The court of appeals then addressed the *Edelman* decision and concluded that this Court's approval of the EEOC's relation-back rule is not controlling here, for three reasons. First, the court of appeals explained, 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, and *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 124 (1998)). By contrast, the court of appeals noted, EAJA "is directed to attorneys seeking attorney fees" and "paternalistic protection" against inadvertent forfeiture of rights "is not required." *Ibid.*

Second, the court of appeals observed that the two statutory requirements at issue in *Edelman*—timely filing of the discrimination charge and verification—"are contained in separate statutory provisions" that this Court determined are not interdependent. Pet. App. 13a (citing 42 U.S.C. 2000e-5(b) and (e)(1)). In EAJA, the court of appeals explained, the required allegation of no 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. The required allegation, the court continued, "is not a pro forma requirement" like the verification requirement in *Edelman*, "but rather requires an applicant to analyze the case record." *Ibid.*

Third, the court of appeals noted that whereas the statutory verification requirement in *Edelman* was "a tool to weed out frivolous claims," Pet. App. 14a; see *Edelman*, 535 U.S. 116, the substantial justification allegation "provide[s] a threshold for fee determination," Pet. App. 16a; see *id.* at 14a (substantial justification requirement "operates as a * * * threshold for fee eligibility") (quoting *Commissioner, INS* v. *Jean*, 496 U.S. 154, 160 (1990)). The court of appeals determined that the requirement of alleging that the government's position was not substantially justified is "more akin to" insufficient content in a notice of appeal, which this Court treats as a jurisdictional defect that cannot be waived or excused, see *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988), than to the oath or affirmation that was allowed to relate back in *Edelman*. Pet. App. 16a.

For those reasons, *Edelman* did not alter the Federal Circuit's conclusion that petitioner's "absolute noncompliance with [the] jurisdictional threshold" of alleging

that the government's position was not substantially justified "is fatal." Pet. App. 18a.

Chief Judge Mayer dissented Pet. App. 19a-21a. In his view, the requirement of alleging a lack of substantial justification is comparable to the verification requirement in *Edelman*, in that both "are aimed at stemming irresponsible litigation." *Id.* at 19a. He further expressed the view that a fee applicant's failure to include the required allegation within the 30-day filing period "does not prejudice the government's response to the application" and that applying the allegation requirement as a prerequisite to recovery of fees is inconsistent with EAJA's purpose of "eliminat[ing] the financial disincentive for those who would defend against unjustified governmental action." *Id.* at 20a.

On April 17, 2003, the court of appeals denied a petition for rehearing. Pet. App. 37a-38a.

SUMMARY OF ARGUMENT

I. As this Court has indicated and lower courts uniformly have concluded, the requirement of alleging a lack of substantial justification for the government's position, like the other mandatory content requirements that apply to fee applications under 28 U.S.C. 2412(d)(1)(B), is subject to the statute's 30-day filing deadline. The sentence containing the allegation requirement immediately follows, and refers back to, the sentence containing the 30-day deadline and the other content requirements for a fee application. Moreover, Congress would not have established a 30-day deadline for satisfying *some* of the mandatory content requirements, without setting a deadline for satisfying *all* of them.

II. Petitioner argues that fee applicants generally may satisfy the content requirements of Section

2412(d)(1)(B) after the 30-day deadline, if they submitted a fee application of some sort within the filing period. That approach ignores the principles of sovereign immunity that apply in this case. The 30-day deadline and the content requirements of Section 2412(d)(1)(B) are limitations on the government's waiver of its sovereign immunity. As conditions on the waiver, those express requirements must be strictly construed. If a fee applicant does not comply with the statutory content requirements within the time established by Congress, then the terms of the waiver of sovereign immunity have not been satisfied and the court may not award fees.

Provisions of the Federal Rules of Civil Procedure that broadly allow late amendments to civil complaints and certain other pleadings, see Fed. R. Civ. P. 15(c), and that establish flexible filing requirements for most attorneys-fee requests, see Fed. R. Civ. P. 54(d)(2), are inapplicable by their terms to fee applications under Section 2412(d). Likewise, *Edelman* v. *Lynchburg College*, 535 U.S. 106 (2002), does not support petitioner's proposed relation-back rule. *Edelman* involved the application of an agency regulation to private litigation, not a waiver of sovereign immunity. None of the reasons that the Court gave for upholding the agency's relation-back approach in *Edelman* applies to the filing requirements of Section 2412(d). To the contrary, the statutory language in this case is critically different than the language in *Edelman*, and that difference compels a different result. Here, both the timing and content requirements appear in a single paragraph of the statute, rather than in two independent provisions, as in *Edelman*. The legislative history of Section 2412(d), and the policies underlying the provision, also show

that Congress did not intend to adopt a relation-back rule like the one urged by petitioner.

III. This Court should not address petitioner's argument that the 30-day deadline established for filing a complete fee application under Section 2412(d) is subject to equitable tolling. Petitioner emphasized below that his case involves only straightforward attorney error in failing to allege a lack of substantial justification for the government's position. Furthermore, petitioner did not preserve his equitable tolling argument in the court of appeals, and no court of appeals ever has addressed petitioner's assertion that equitable tolling of the 30-day deadline is appropriate under *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990).

If, however, this Court were to address petitioner's equitable tolling argument, it should reject petitioner's position. *Irwin* rests on a determination that, when Congress waives the United States' sovereign immunity from suit, it generally intends that the government will be treated like a private litigant in the application of equitable tolling principles. That general rule does not apply here. Section 2412(b) of Title 28 subjects the government to liability for attorneys fees in the same manner as private parties are liable. Section 2412(d) is directed precisely at situations in which Section 2412(b) and the generally applicable rules developed in the private-party context *do not* authorize fee-shifting. *Irwin*'s reasoning that Congress likely incorporated generally applicable equitable tolling principles cannot properly be extended to this context, in which Congress, in waiving sovereign immunity, specifically decided *not to rely* on the fee-recovery rules that have been developed in private-party litigation.

ARGUMENT

I. FEE APPLICANTS UNDER SECTION 2412(d) MUST ALLEGE WITHIN 30 DAYS OF FINAL JUDGMENT THAT THE POSITION OF THE UNITED STATES WAS NOT SUBSTANTIALLY JUSTIFIED

Petitioner's threshold position, developed only at the end of his brief (at 36-40), is that "the 30-day limit [of Section 2412(d)(1)(B)] *does not apply* to the requirement that an EAJA applicant allege that the government's position was not substantially justified." Pet. Br. 17 (emphasis added). In *Commissioner, INS* v. *Jean*, 496 U.S. 154 (1990), this Court stated, to the contrary, that a fee application under Section 2412(d) must "be submitted to the court within 30 days of the final judgment in the action" and "must contain an allegation 'that the position of the United States was not substantially justified.'" *Id.* at 158, 160. The lower courts likewise have concluded that the mandatory allegation of a lack of substantial justification, like the other pleading requirements of Section 2412(d)(1)(B), is subject to the 30-day filing requirement. See, *e.g.*, Pet. App. 6a; *Fields* v. *United States*, 29 Fed. Cl. 376, 377 (1993); *Woods* v. *HHS*, 778 F. Supp. 976, 979 (N.D. Ill. 1991); *FDIC* v. *Addison Airport of Tex., Inc.*, 733 F. Supp. 1121, 1124 (N.D. Tex. 1990); see also *Dole* v. *Phoenix Roofing, Inc.*, 922 F.2d 1202, 1205 (5th Cir. 1991) (discussing similar language in 5 U.S.C. 504(a)(2)).

Those decisions are correct. The first sentence of Section 2412(d)(1)(B) states that "[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 * * * which shows": (1) prevailing-party status; (2) that the applicant is within the category of persons eligible to receive fees under 28 U.S.C.

2412(d)(2)(B)[2]; and (3) the itemized amount sought. 28 U.S.C. 2412(d)(1)(B). The second sentence of Section 2412(d)(1)(B) then provides: "The party shall also allege that the position of the United States was not substantially justified." 28 U.S.C. 2412(d)(1)(B).

The second sentence, in stating that the applicant "shall *also*" make the allegation of no substantial justification, expressly connects the allegation requirement of the second sentence to the timing and content requirements of the first sentence. Moreover, one meaning of "also" is "in the same manner," which expressly extends the 30-day deadline to the allegation requirement. See, *e.g.*, *Webster's Third New International Dictionary of the English Language Unabridged* 62 (1993) (def. 1); *The Random House Dictionary of the English Language (Unabridged)* 60 (2d ed. 1987) (def. 2); *Black's Law Dictionary* 77 (6th ed. 1990) ("in like manner").

It would have made little sense for Congress to exempt the allegation concerning a lack of substantial justification from the deadline that applies to the other content requirements for fee applications. Legislators wanted fee litigation under EAJA to be commenced and completed quickly. See, *e.g.*, H.R. Rep. No. 1005, 96th Cong., 2d Sess. Pt. 1, at 27 (1980) (Rep. LaFalce); *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. 43 (1979) (Sen. DeConcini). Congress, like this Court, did not want requests for attorneys fees

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[2] Section 2412(d)(2)(B) specifies that eligibility for fees under Section 2412(d) is limited to individuals with a net worth of $2 million or less at the time the action was filed, small businesses, and certain tax-exempt organizations. 28 U.S.C. 2412(d)(2)(B).

to "result in a second major litigation." *Pierce* v. *Underwood*, 487 U.S. 552, 563 (1988) (quoting *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983)). If the 30-day deadline did not apply to the no-substantial-justification allegation, then the deadline for submitting the other mandatory elements of the application would not provide any meaningful assurance that the fee application would be complete and ready for a response within 30 days of the final judgment. Furthermore, it would be illogical to set a deadline for submitting itemized statements justifying the *amount* of a fee request, if there were no deadline for making the no-substantial- justification allegation, which is necessary to establish the government's liability for fees in the first place.

Petitioner attaches significance to the fact that the mandatory allegation is required in a different sentence than the one stating the 30-day deadline. Pet. Br. 36-39. But there is an obvious stylistic and substantive reason why Congress would have chosen to state the requirements for a fee application in two sentences when, as petitioner asserts (*id.* at 39), it would have been grammatically possible to "merge[] both sentences into one." Congress's placement of the allegation requirement in a separate sentence highlights that it puts a different burden on the applicant than the requirements of the first sentence. Whereas the three elements mandated by the first sentence must be "show[n]" in the fee application, the absence of a substantial justification need only be "allege[d]," whereupon, if the applicant has made the showings required under the first sentence, the government has the burden of proving that its position in the underlying litigation was substantially justified, see 28 U.S.C. 2412(d)(1)(A).

II. THE 30-DAY DEADLINE FOR ALLEGING A LACK OF SUBSTANTIAL JUSTIFICATION IS NOT OVERRIDDEN BY A "RELATION-BACK" RULE

Petitioner further contends (Br. 24-29, 33-36) that, even if the 30-day deadline applies to the allegation requirement of Section 2412(d)(1)(B), the deadline nevertheless has little practical significance, because late allegations of a lack of substantial justification should "relate back" to the filing of the incomplete EAJA application. Petitioner thus urges (Br. 33) this Court to adopt the view of the Third Circuit in *Dunn* v. *United States*, 775 F.2d 99, 104 (1985), and the Eleventh Circuit in *Singleton* v. *Apfel*, 231 F.3d 853, 858 (2000), that a timely but defective fee application may be amended after the deadline to satisfy the statutory content requirements, absent prejudice to the government or noncompliance with court orders. The Federal Circuit correctly rejected that extreme version of the relation-back rule, which would excuse the complete omission of one or more of the four required elements of an EAJA fee petition.

A. The Requirements Of Section 2412(d)(1)(B) Are Conditions On A Waiver Of Sovereign Immunity And Must Be Strictly Construed

The requirement of filing a timely fee application that has the prescribed content is a condition on the federal government's waiver of sovereign immunity in Section 2412(d)(1)(A). See *Ardestani* v. *INS*, 502 U.S. 129, 137 (1991) ("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."). Accordingly, although this Court should not "narrow the waiver that Congress intended," *ibid.* (quoting *United States* v. *Kubrick*, 444 U.S. 111, 118

(1979)), the requirements of Section 2412(d)(1)(B) "must be strictly construed," *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 94 (1990). See *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981) ("[L]imitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.") (quoting *Soriano* v. *United States*, 352 U.S. 270, 276 (1957)).

Strict construction also is appropriate because Section 2412(d) establishes a fee-recovery regime that departs from the common law rule that parties generally are responsible for their own attorneys fees. See *Robert C. Herd & Co.* v. *Krawill Mach. Corp.*, 359 U.S. 297, 304-305 (1959) ("Any such rule of law, being in derogation of the common law, must be strictly construed, for '[n]o statute is to be construed as altering the common law, farther than its words import.'") (quoting *Shaw* v. *Railroad Co.*, 101 U.S. 557, 565 (1879)); *Lessee of Livingston* v. *Moore*, 32 U.S. (7 Pet.) 469, 495 (1833) ("Liens, being in derogation of common law, are to be construed strictly, and enforced literally.").

Consistent with those principles, the precise terms of the government's consent to be subject to fee awards under Section 2412(d) define a court's power to award fees. In particular, and as the courts of appeals consistently recognize, compliance with the 30-day filing requirement is a mandatory prerequisite to a fee award. See, *e.g.*, Pet. App. 6a (citing cases); *Dunn*, 775 F.2d at 103. To prevail on his relation-back argument, therefore, petitioner must demonstrate that, in requiring that a fee application containing the mandatory content "shall" be filed with the court "within thirty days of the final judgment," 28 U.S.C. 2412(d)(1)(B),

Congress itself incorporated an expansive relation-back exception that would excuse the complete omission of a required element specified in the statute. Petitioner cannot make that showing.[3]

B. Petitioner's Relation-Back Rule Is Not Supported By The Text Of Section 2412(d) Or The Federal Rules Of Civil Procedure

The Federal Circuit rejected the version of the relation-back rule adopted by the Third and Eleventh Circuits as contrary to "the plain language of the EAJA

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[3] Petitioner argues at length (Br. 19-24) that the filing requirements of Section 2412(d)(1)(B) are not "jurisdictional," because Congress did not expressly refer to jurisdiction in Section 2412(d)(1)(B) and courts that receive EAJA applications have jurisdiction over the underlying dispute that gave rise to the fee application. Congress does not have to use the word "jurisdiction" to establish a mandatory precondition for judicial consideration of a particular matter such as a fee application—especially when the relevant legislative history *does* use that term. See *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 314-317 (1988) (discussing mandatory requirements for filing a notice of appeal); see also pp. 28-30, *infra* (discussing legislative history of Section 2412(d)). Furthermore, Congress drafted the language of Section 2412(d)(1)(B) in parallel with the nearly identical language of 5 U.S.C. 504(a)(2), which applies to fee awards in agency proceedings that may present "jurisdictional" issues distinct from those in court proceedings. The courts of appeals uniformly interpret Section 2412(d)(1)(B) as establishing at least some "jurisdictional" requirements. See Pet. App. 6a (citing cases); *Dunn*, 775 F.2d at 103 (30-day requirement); *Clifton* v. *Heckler*, 755 F.2d 1138, 1144-1145 (5th Cir. 1985) (discussing cases before 1985 EAJA Amendments). Regardless of that label, however, an attorneys fee application under EAJA is a claim for money from the United States and in the absence of a waiver of sovereign immunity courts lack authority to grant fee requests. The relevant question therefore is whether an award of fees to petitioner would be consistent with the waiver of sovereign immunity contained in Section 2412(d).

statute." Pet. App. 8a, 9a. Petitioner does not attempt to argue that the rule is suggested by the text of Section 2412(d). Absolutely nothing in Section 2412(d) states or even implies that the 30-day deadline for filing the requisite information applies only when the government would suffer prejudice if it were not enforced. Because the "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied," *Nakshian*, 453 U.S. at 161 (quoting *Soriano*, 352 U.S. at 276), that should be the end of the Court's inquiry on this issue.

In an effort to overcome the text of EAJA, petitioner relies on Rule 15(c) of the Federal Rules of Civil Procedure, which provides that "[a]n amendment of a pleading relates back to the date of the original pleading" when certain requirements are satisfied. Fed. R. Civ. P. 15(c). As petitioner ultimately acknowledges (Br. 28), however, fee applications under EAJA are not "pleadings" subject to the relation-back regime of Rule 15(c). See Fed. R. Civ. P. 7(a). Furthermore, Rule 15 establishes "an amendment policy that is more liberal than that permitted at common law or under [earlier codes of procedure]," 6 Charles A. Wright et al., *Federal Practice and Procedure* 505 (2d ed. 1990), which makes it doubly inappropriate to extend Rule 15(c) to filings that are not covered by the Rule. See p. 19, *supra*. Finally, in light of the strict-construction rule that applies here because a waiver of sovereign immunity is involved, a federal rule of procedure, let alone petitioner's uncodified "Rule 15 principles" (Br. 28), cannot remotely justify inferring an exception to the 30-day rule of Section 2412(d)(1)(B).

Significantly, an EAJA application differs substantially from the pleadings to which Rule 15(c) applies, in

that the EAJA applicant possesses at the time of the final judgment every piece of information that is necessary to resolve the fee dispute. There is no policy imperative that EAJA applicants be given the same pleading flexibility that is afforded under the notice-pleading approach of the Federal Rules of Civil Procedure. To the contrary, this Court has warned against conceptualizing the EAJA fee application process as "a second major litigation." *Underwood*, 487 U.S. at 563 (quoting *Hensley*, 461 U.S. at 437); *Jean*, 496 U.S. at 163 (same). Petitioner's attempt to analogize amending a fee application to amending a civil complaint (Br. 26-27) therefore is misplaced.

Petitioner also relies (Br. 22-23) on Rule 54(d)(2) of the Federal Rules of Civil Procedure. Rule 54(d)(2) generally governs the filing of motions for attorneys fees in litigation. It states that "*[u]nless otherwise provided by statute or order of the court*, the motion must be filed no later than 14 days after entry of judgment" and must contain specified information such as "the judgment and the statute, rule, or other grounds entitling the moving party to the award." Fed. R. Civ. P. 54(d)(2)(B) (emphasis added). Rule 54(d)(2)(B) is inapplicable to the fee application in this case because, in contrast to 28 U.S.C. 2412(b), the authorization of extraordinary fee awards contained in Section 2412(d) does "otherwise provide[]" filing requirements for fee applications. Cases in which courts modify the default requirements of Rule 54(d)(2)(B), see Pet. Br. 23, likewise are unhelpful to petitioner, because the Rule expressly allows courts to do so.

The procedural rules on which petitioner relies do highlight what Section 2412(d) *does not say*. Cf. Pet. Br. 37 (citing "the principle of statutory construction that 'presume[s] that Congress acts intentionally and

purposely' when it 'includes particular language in one section of a statute but omits it in another'") (quoting *City of Chicago* v. *Environmental Def. Fund*, 511 U.S. 328, 338 (1994); *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993)). Section 2412(d) neither authorizes judicial departures from its mandates, as Rule 54(d)(2)(B) does, nor establishes guidelines for allowing untimely amendments, as Rule 15(c) does. Nor does Section 2412(d) incorporate filing requirements established under the common law and other statutory fee authorizations, as Section 2412(b) does. Moreover, Rule 15(c) (which predated EAJA) and Section 2412(b) show that Congress had ample models for authorizing judicial "relax[ation]" (Pet. Br. 23) of fee-recovery rules if it had intended to do so. The natural inference—and the only conclusion consistent with the principle that waivers of sovereign immunity must be strictly construed—is that Section 2412(d) does *not* authorize courts to ignore noncompliance with its requirements.

C. *Edelman* v. *Lynchburg College* Does Not Support Petitioner's Relation-Back Argument

Petitioner next argues (Br. 28) that the relation-back rule applied by the Third and Eleventh Circuits "is fully consistent with" *Edelman* v. *Lynchburg College*, 535 U.S. 106 (2002). See Pet. Br. 29, 36-38 (discussing *Edelman*). The court of appeals correctly rejected that argument. See pp. 10-12, *supra*. Unlike this case, *Edelman* did not involve a waiver of sovereign immunity. In *Edelman*, moreover, this Court gave six reasons for upholding the Equal Employment Opportunity Commission's rule allowing verifications of discrimination charges to relate back to the date of the charge, none of which supports the application of a similar relation-back rule in the instant case.

Statutory Text and Structure. First, the Court observed in *Edelman* that Title VII's charge-verification requirement, 42 U.S.C. 2000e-5(b), and the deadline for filing a charge of employment discrimination, 42 U.S.C. 2000e-5(e)(1), are separate provisions serving different purposes and "[n]either provision incorporates the other." *Edelman*, 535 U.S. at 112; cf. *Zipes* v. *TWA*, 455 U.S. 385, 393-394 (1982) (construing provision granting courts jurisdiction over Title VII claims as not contingent on strict satisfaction of "entirely separate" administrative charge-filing requirements). By contrast, and as already discussed (see pp. 15-17, *supra*), the requirement of alleging that the position of the United States was not substantially justified immediately follows Congress's statement of the 30-day filing deadline within the same subsection. The sentence requiring the allegation refers back to the sentence containing the 30-day deadline. The requirement of making the mandatory allegation also is functionally related to the requirement of showing prevailing-party status that is stated in the preceding sentence, inasmuch as both requirements pertain to court findings that constitute "one-time threshold[s] for fee eligibility" under Section 2412(d). *Jean*, 496 U.S. at 160. Furthermore, the 30-day filing requirement and the requirement of alleging that the position of the United States was not substantially justified similarly serve Congress's efficiency objectives and help to prevent fee applications from growing into "a second major litigation." *Underwood*, 487 U.S. at 563 (quoting *Eckerhart*, 461 U.S. at 437). Accordingly, unlike the separately codified timing and verification requirements discussed in *Edelman*, the timing and allegation requirements in

Section 2412(d)(1)(B) must be "read[] * * * together." *Edelman*, 535 U.S. at 112; see Pet. App. 13a-15a.[4]

Intended Beneficiaries. Second, allowing the verification of a discrimination charge to relate back to the date of the charge was consistent with "the nature of Title VII as 'a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process.'" 535 U.S. at 115 (quoting *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 124 (1998)); see *id.* at 122 (O'Connor, J., concurring in the judgment) ("Permitting relation back of an oath omitted from an original filing is reasonable because it helps ensure that lay complainants will not inadvertently forfeit their rights."). As the court of appeals explained in this case (Pet. App. 13a), exactly the opposite is true of fee applications under Section 2412(d). "The EAJA statute * * * is directed to attorneys seeking attorney fees," who require no special protection from the courts. *Ibid.* Indeed, the EAJA application in this case was submitted by petitioner's attorney on his own behalf, see J.A. 8-9, without any suggestion (until the attorney belatedly tried to cure the defect in his application, see J.A. 11-12) that petitioner has any interest in the fee litigation.

Burden on Opposing Party. Third, the Court in *Edelman* took comfort from an EEOC policy under which employers are not required to respond in any fashion to unverified discrimination charges. See 535 U.S. at 115 & n.9. That rule ensured that employers

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[4] Petitioner quotes (Br. 38 n.9) a passage from the government's brief in *Edelman* that discusses the lack of a textual connection between the relevant statutory provisions in that case. Because a strong textual connection exists in this case, the quoted passage has no application here.

would not have to bear the expense of contesting unverified charges. Under the relation-back rule of the Third and Eleventh Circuits, however, the government may deem it necessary to address the merits of the fee request in responding to a facially defective EAJA application, particularly given the substantial possibility that the court would allow a late amendment correcting the defect. The relation-back approach also engenders disputes about whether particular fee applications should be dismissed on account of the applicant's failure to include the mandatory content. The litigation surrounding those disputes can be "no small thing," *id.* at 115, as is apparent from the *four years* of proceedings on that issue in this case. Cf. *Dunn*, 775 F.2d at 104 ("Litigation over fee amounts has on some occasions been almost as protracted as the underlying lawsuit.").

Analogy to Signatures on Notices of Appeal. Fourth, *Edelman* likened the requirement of verifying a Title VII charge, through an oath or affirmation, to the requirement of signing a notice of appeal under Federal Rule of Civil Procedure 11(a). 535 U.S. at 115-116. Unlike the "content requirements" for notices of appeal, the Court explained, the requirement of signing a notice can be satisfied after the notice is filed. *Id.* at 116; see *Becker* v. *Montgomery*, 532 U.S. 757 (2001). That "reasonable" relation-back rule for signatures on notices of appeal led the Court to conclude that allowing relation back was likewise "a good rule" for the EEOC to adopt when applying the analogous verification requirement of Title VII. 535 U.S. at 116. In this case, by contrast, the flexible signature rule for notices of appeal under Rule 11(a) and *Becker* is inapposite be-

cause petitioner failed to satisfy a substantive "content requirement[]," 535 U.S. at 116, for the fee application.[5]

Background Judicial Practice. Fifth, this Court observed in *Edelman* that courts historically "have shown a high degree of consistency in accepting later verification as reaching back to an earlier, unverified filing." 535 U.S. at 116. Stating that Congress should be "presumed to have known of this settled judicial treatment of oath requirements when it enacted and later amended Title VII," the Court deemed that historical practice indicative of congressional intent to allow relation-back of verifications. *Id.* at 117; see *id.* at 122 (O'Connor, J., concurring in the judgment) ("The regulation is also consistent * * * with the common-law practice of allowing later verifications to relate back."). In this case, petitioner cites Federal Rule of Civil Procedure 15(c) as a background rule of law that suggests relation back. See Pet. Br. 25-29. But it is undisputed that Rule 15(c) does not allow relation back on the facts of this case. See p. 21, *supra.* Accordingly, and particularly given that this case arises in the context of a waiver of sovereign immunity, Congress cannot be said to have incorporated a clearly established background

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[5] Petitioner contends (Br. 35) that the Rule 11(a) signature requirement and the Section 2412(d)(1)(B) allegation requirement are comparable because "both go to the form or content of the document." *Edelman*, however, explains that *Becker* distinguished between the "the timing and content requirements for [a] notice of appeal," which are *not* subject to the relation-back rule, and a "signature defect" in the notice of appeal, which is subject to the relation-back rule. 535 U.S. at 116. As the Federal Circuit observed in this case (Pet. App. 17), the allegation requirement of Section 2412(d)(1)(B) addresses the "substantive content" of fee applications.

rule that would allow relation-back of petitioner's untimely amendment to his fee application.[6]

Legislative History. Finally, the *Edelman* Court noted that "Congress amended Title VII several times without once casting doubt on the EEOC's construction" that verifications relate back to the filing of the charge. 535 U.S. at 117 (footnote omitted). In this case, Congress likewise acted against the backdrop of an established interpretation when it reenacted Section 2412(d)(1)(B) in the 1985 EAJA Amendments. Here the established interpretation, of which Congress specifically was informed, was that the 30-day deadline "is jurisdictional and cannot be waived by the government or even the court." *Reauthorization of Equal Access to Justice Act: Hearing Before the Subcomm. on Admin. Practice and Proc. of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 32 (1983) (*1983 Hearing*); *id.* at 14 (same); *id.* at 75 ("[I]t has been held that the 30-day requirement from the time of final judgment is jurisdictional and may not be extended."); *Equal Access to Justice Act: Hearing Before the Subcomm. on Agency Admin. of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 126 (1982) ("[T]he courts * * * have generally held that the 30-day rule on filing an application is jurisdictional and a court * * * cannot extend that period."); *id.* at 36 (discussing *Wallis* v. *United States*, No. 453-79C (Ct. Cl. Nov. 25, 1981)); *id.* at 161 (reproducing law review article citing

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[6] *New York Central & Hudson River Railroad* v. *Kinney*, 260 U.S. 340 (1922), on which petitioner relies (Br. 28-29) as evidence of historical practice before Rule 15(c), addresses only the amendment of a civil complaint and, in any event, suggests that there was no unequivocally established rule in that context. See 260 U.S. at 346 ("Of course an argument can be made on the other side, but * * * we are of opinion that a liberal rule should be applied.").

Wallis); see also *Clifton* v. *Heckler*, 755 F.2d 1138, 1144-1145 (5th Cir. 1985) (discussing cases and holding that "the statutory time limitation, as an integral condition of the sovereign's consent to be sued, is a jurisdictional prerequisite to an award of attorney's fees under the EAJA").

The legislative history of the 1985 EAJA Amendments directly states the drafters' understanding that courts would not be able to excuse fee applicants from complying with the filing requirements of Section 2412(d)(1)(B). The Senate Report on the text that became the 1985 EAJA Amendments explains 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)[7]; accord H.R. Rep. No. 120, 99th Cong., 1st Sess. Pt. 1, at 7 (1985) ("[F]ee petitions *must* be filed within thirty days of [final] judgment.") (emphasis added). Moreover, during the reauthorization process, Congress rejected an amendment suggested by the Chairman of the Administrative Conference of the United States, under which courts could have extended the 30-day deadline "for good cause shown." *1983 Hearing* 15.

Petitioner's relation-back rule would frustrate congressional intent in another respect as well. Legislators sought in drafting the 1985 EAJA Amendments to "avoid any measure that will itself breed additional

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[7] Although Senate Report No. 586 addresses a version of the EAJA amendments that the 98th Congress passed and the President vetoed, the changes made by the 99th Congress to satisfy the President did not involve the 30-day filing period. See H.R. Rep. No. 120, *supra*, Pt. 1, at 6-8. This Court has looked to Senate Report No. 586 for guidance in interpreting the 1985 EAJA Amendments. See *Melkonyan* v. *Sullivan*, 501 U.S. 89, 96 (1991); *Jean*, 496 U.S. at 159 n.7.

litigation." H.R. Rep. No. 1005, *supra*, Pt. 1, at 28 (Rep. LaFalce). Yet such litigation would be the inevitable consequence of *sometimes* allowing applicants to cure defective applications after the 30-day deadline, rather than straightforwardly requiring compliance with the express filing requirements of Section 2412(d)(1)(B).

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Thus, none of the six threads of reasoning in *Edelman* supports the application of a relation-back rule under Section 2412(d).

D. The Policy Arguments Advanced In Support Of An Expansive Relation-Back Approach Are Unpersuasive

Although the interpretation of a waiver of sovereign immunity should not provide an opportunity for judicial policy-making, the Third Circuit in *Dunn*, echoed by the Eleventh Circuit in *Singleton*, justified its adoption of an expansive relation-back rule by invoking policy concerns. See *Dunn*, 775 F.2d at 103-104; *Singleton*, 231 F.3d at 858. The Third Circuit reasoned primarily that allowing applicants to "flesh[] out * * * the details" of their fee claims after the 30-day filing window would not prejudice the government. 775 F.2d at 104. That is incorrect, insofar as the statutory content requirements are at issue. Section 2412(d)(1)(B)'s allegation requirement, for instance, forces the EAJA applicant "to analyze the case record" before seeking fees, Pet. App. 14a, and thereby protects the government from incurring the time and expense of establishing a substantial justification for its position when the applicant's own lawyer has not concluded that such a justification was absent. Similarly, the applicant's mandatory showing concerning the amount of attorneys fees incurred and sought from the court may influence the government's decision whether to contest the fee

application. See H.R. Rep. No. 1005, *supra*, Pt. 1, at 14 (observation of Congressional Budget Office that "[i]n some cases, the cost in both time and dollars of [showing] such a justification may result in a Justice Department decision not to contest the awarding of fees, even when substantial justification may exist").

If, however, the Third Circuit was concerned that a fee applicant should have "some latitude to supplement his application to flesh out * * * missing details," that is precisely what the Federal Circuit allows—without broadly excusing compliance with the statutory filing deadline. Pet. App. 9a. Contrary to the understanding of the Third and Eleventh Circuits, see 775 F.2d at 104; 231 F.3d at 858, rejecting the expansive relation-back approach does not mean that fee applications are frozen when filed. The Federal Circuit allows supplementation to expand upon or correct the information in an application (for instance, the attorney's itemized statement of fees and expenses), provided that the applicant has not "completely fail[ed] to address one of the four statutory requirements by the thirty-day deadline." Pet. App. 9a.

The Eleventh Circuit expressed an additional concern that enforcement of the 30-day deadline may deter private parties from vigorously asserting their rights against the United States. 231 F.3d at 858. Chief Judge Mayer made the same argument in his dissenting opinion in this case. Pet. App. 20a. It is virtually inconceivable, however, that judicial enforcement of the clear and easily satisfied statutory requirements for fee applications would affect the underlying litigation. See *id.* at 13a. On the one hand, sophisticated litigants and attorneys who are aware of EAJA during the underlying litigation surely would plan on complying with the statute's straightforward requirements when seeking a

possible fee award in the future. On the other hand, litigants and attorneys who are not aware of EAJA's fee-recovery provisions would be entirely uninfluenced by judicial enforcement of EAJA. Accordingly, excusing non-compliance with Congress's filing requirements would not further the policies underlying EAJA.

III. THE 30-DAY DEADLINE FOR ALLEGING A LACK OF SUBSTANTIAL JUSTIFICATION IS NOT SUBJECT TO EQUITABLE EXTENSION

In *Irwin* v. *Department of Veterans Affairs*, this Court announced that "[o]nce Congress has made [a waiver of sovereign immunity]" covering a particular claim, a "rebuttable presumption of equitable tolling" applies under that waiver "in the same way that it is applicable to private suits." 498 U.S. at 95-96. Petitioner contends that, if (1) the allegation requirement of Section 2412(d)(1)(B) is subject to the 30-day deadline and (2) his amendment does not relate to back the filing date of the defective fee application, then "[t]he *Irwin* presumption applies here" (Br. 20) and makes his amendment timely under equitable principles.

The correct application of *Irwin* to Section 2412(d)(1)(B) need not be considered in this case because, even if *Irwin* were relevant, petitioner would not be entitled to equitable relief. Furthermore, petitioner's equitable tolling argument was not properly presented to the Federal Circuit and no court of appeals, including the Federal Circuit in this case, has ever considered the issue. But if this Court nevertheless addresses petitioner's equitable tolling argument, it should conclude, in light of the language, structure, and history of Section 2412(d) as well as the Court's reasoning in *Irwin*, that equitable tolling does not apply

and the 30-day filing deadline is not subject to judicial extension.

A. Equitable Doctrines Do Not Excuse The Neglect Of Petitioner's Counsel In Failing To Comply With The 30-Day Deadline

A determination that the 30-day filing deadline in Section 2412(d)(1)(B) is subject to equitable extension would not benefit petitioner. As *Irwin* states, the doctrine of equitable tolling is "extended * * * only sparingly," and does not immunize litigants from the consequences of their "garden variety * * * excusable neglect." 498 U.S. at 96.

Baldwin County Welcome Center v. *Brown*, 466 U.S. 147 (1984) (per curiam), specifically held that a party's mere failure to satisfy an express statutory filing deadline—there, a 90-day deadline for filing a court complaint under Title VII, 42 U.S.C. 2000e-5(f)(1)—does not "call for the application of the doctrine of equitable tolling." 466 U.S. 151. The Court explained that "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Ibid.*

The courts of appeals likewise reject the view that missed filing deadlines can be equitably extended when the party (or the party's attorney) is responsible for the lateness of a submission. See, *e.g.*, *Martinez* v. *United States*, 333 F.3d 1295, 1318 (Fed. Cir. 2003) (en banc) ("[T]here must be a compelling justification for delay, such as 'where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.'") (quoting *Irwin*, 498 U.S. at 96), petition for cert. pending, No. 03-41; *Johnson* v. *Hendricks*, 314 F.3d 159, 162 (3d Cir. 2002) ("Equitable tolling is permitted if (1) the defendant has actively

misled the plaintiff, (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) the plaintiff has timely asserted his rights mistakenly in the wrong forum.") (citations and internal quotation marks omitted), cert. denied, 123 S. Ct. 1950 (2003); *id.* at 163 ("[C]ourts of appeals * * * have consistently rejected the argument that an attorney's mistake in determining the date a habeas petition is due constitutes extraordinary circumstances for purposes of equitable tolling.") (citing cases); *Jihad* v. *Hvass*, 267 F.3d 803, 805 (8th Cir. 2001) ("Equitable tolling is proper only when extraordinary circumstances beyond [the party's] control make it impossible to file a petition on time."); *Harris* v. *Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) ("[A]ny resort to equity must be reserved for those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result."); see also *Baldayaque* v. *United States*, 338 F.3d 145, 152 (2d Cir. 2003) (distinguishing "extreme situations" that support equitable tolling from "normal errors made by attorneys").

Petitioner argued in the CAVC that his proposed amendment to the fee application should be allowed because "the omission of the allegation as to substantial justification was the error of counsel," involving "an oversight in drafting." Pet. Resp. to Gov't Mot. to Dismiss and Mot. for Leave to Supplement Filing 3 (filed Dec. 9, 1999). Petitioner's uncontroverted record representation that the defect in the fee application was due to a mere attorney error necessarily defeats his equitable tolling argument.

Nevertheless, petitioner contends (Br. 29-31) that his late amendment should have been allowed in light of

Irwin's reference to decisions in which a late filing was deemed timely "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period." *Irwin*, 498 U.S. at 96; see *id.* at 96 n.3 (citing cases). The cases to which that language refers involved factors specific to the interpretation of particular statutory and procedural rules, rather than general equitable tolling principles. See *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 554 (1974) (adopting tolling rule as "the rule most consistent with federal class action procedure"); *Burnett* v. *New York Cent. R.R.*, 380 U.S. 424, 427-436 (1965) (dismissal for improper venue of state-court actions brought under the Federal Employers' Liability Act (FELA)); *Herb* v. *Pitcairn*, 325 U.S. 77 (1945) (interpreting FELA, without reference to equitable tolling). As *Irwin* itself makes clear, those cases did not approve the dispensation of equitable relief solely to protect parties from the consequences of their own "neglect." *Id.* at 96.

Petitioner next argues that his pleading defect "was induced by the government's misconduct." Br. 31-32; see *Irwin*, 498 U.S. at 96; but see 4 Charles A. Wright et al., *Federal Practice and Procedure* § 1056 (Supp. 2001) (distinguishing between equitable tolling and equitable estoppel and citing cases); *OPM* v. *Richmond*, 496 U.S. 414, 430 (1990) ("The whole history and practice with respect to claims against the United States reveals the impossibility of an estoppel claim for money in violation of a statute."). Petitioner suggests (Br. 31-32) that, due to his attorney's error in submitting the EAJA application to the CAVC before it permissibly could be filed under Section 2412(d)(1)(B) (*i.e.*, before the CAVC's final judgment), the government effectively became obligated under a local rule of the CAVC

to notify petitioner of the defect in his pleading before the 30-day period for filing an EAJA application expired. That theory does not come close to demonstrating the sort of "induce[ment] or tricke[ry] by [government] misconduct" that the Court discussed in *Irwin*, 498 U.S. at 96.

As a threshold matter, it is highly doubtful that the government's mere failure to inform an opposing party about a defect in that party's submission to a court *ever* could constitute misconduct that would justify equitable tolling. Furthermore, petitioner's contentions concerning the government's obligations in the CAVC are incorrect. When petitioner's counsel filed his second fee application in August 1999, the CAVC already had made clear in rejecting petitioner's first application that if petitioner submitted another fee request before the CAVC's judgment became final, it would be deemed "premature" and not accepted for filing. J.A. 6. Therefore, if the government had filed a motion to dismiss the fee application within 30 days of petitioner's submission to the CAVC, it might have relied solely on petitioner's failure to comply with the CAVC's instructions concerning timeliness—without addressing the content of the fee application itself.

Furthermore, on October 4, 1999 (the same day that the CAVC filed petitioner's fee application after holding it for nearly two months as a courtesy to petitioner), the CAVC issued a briefing order under which the government's response was due on November 3, 1999—two days after the last day for filing a complete EAJA application. See J.A. 2. Thus, from the outset, the government's response to the fee application was due *after* petitioner's time for making the required allegation of no substantial justification. The government timely filed its motion to dismiss the fee application after

requesting and receiving one extension of time from the court. See J.A. 2.[8]

B. Petitioner's Equitable Tolling Argument Was Not Pressed Or Passed On In The Courts Below And Has Not Been Addressed By Any Court Of Appeals

The equitable tolling issue discussed in the petition is not ripe for an additional reason. The question whether equitable tolling doctrines apply to the 30-day deadline under Section 2412(d)(1)(B) was not properly raised or decided below. See, *e.g.*, *Glover* v. *United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below."); *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below.").

Petitioner faults the court of appeals (Br. 19) for failing to "cite, much less discuss" *Irwin*'s treatment of equitable tolling, but that was because petitioner did not preserve an argument based on *Irwin*. In opposing the government's motion to dismiss in the CAVC, petitioner never suggested that his attempt to amend the fee application was timely under equitable tolling principles. Instead, consistent with the relation-back

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[8] In 2001, the CAVC amended its rules to state expressly that the government need not respond to premature EAJA applications that are not accepted for filing. Pet. Br. App. 2a-4a. That subsequent amendment conformed the CAVC's rules to the court's actual practice as reflected in this case, which avoids wasteful briefing about the timeliness of premature fee applications that, if dismissed, could be refiled in the same form at the proper time. The CAVC's amendment of its rules underscores that the government "turn[ed] square corners" (Pet. Br. 32) in responding to petitioner's fee application. See H.R. Rep. No. 120, *supra*, Pt. 1, at 18 n.26 (premature EAJA application "should be treated as if it were filed during the thirty-day period following the final decision").

argument he makes in this Court, petitioner contended that his late amendment should be allowed because it assertedly would not have prejudiced the government. See Pet. Resp. to Gov't Mot. to Dismiss and Mot. for Leave to Supplement Filing 1-4. Petitioner mentioned *Irwin* and equitable tolling for the first time in his reply brief in the Federal Circuit, by which time it was too late to introduce a new argument. See *Novosteel SA* v. *United States*, 284 F.3d 1261, 1273-1274 (Fed. Cir. 2002).

A further consideration is that, to our knowledge, no court of appeals ever has addressed whether the "rebuttable presumption" discussed in *Irwin* applies to claims for fees under Section 2412(d). Particularly given that petitioner did not properly raise that issue in the Federal Circuit, and that petitioner could not satisfy the requirements for equitable extension of the 30-day deadline in any case, this Court should allow the courts of appeals to consider in the first instance the application of *Irwin* to Section 2412(d), guided by this Court's resolution of the other issues in this case.[9]

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[9] Petitioner suggests (Br. 30-31) that the Third, Sixth, and Eleventh Circuits have "in effect * * * adopted" equitable tolling principles under Section 2412(d). That is incorrect, as the cases on which petitioner relies did not involve equitable tolling. The Third Circuit's decision in *Dunn*, 775 F.2d at 104, with which the Eleventh Circuit agreed in *Singleton*, 231 F.3d at 858, adopted an expansive relation-back theory under which amendments to cure defects in the mandatory contents of the fee application are allowed after the end of the 30-day filing period, provided that the government is not prejudiced and court orders have not been violated. In *United States* v. *True*, 250 F.3d 410 (2001), the Sixth Circuit relied on *Dunn* and *Singleton*, but held only that "the pleading requirements of § 2412(d)(1)(B)," as opposed to the 30-day filing deadline for submitting a fee application, "are not jurisdictional." *Id.* at 421.

C. *Irwin*'s Rationales For Equitable Tolling Do Not Apply In This Case

If the Court does address the application of *Irwin* to Section 2412(d) despite the foregoing considerations, it should conclude that the "rebuttable presumption" of equitable tolling recognized in *Irwin*, 498 U.S. at 95, is inapplicable in light of the text, structure, and history of that fee provision.

The *Irwin* decision rests on this Court's determination that, when Congress waives its sovereign immunity from suit, it generally intends that the government will be treated like a private litigant in the application of equitable tolling principles. The Court stated that "[o]nce Congress has made such a waiver, * * * making the rule of equitable tolling applicable to suits against the Government, *in the same way that it is applicable to private suits*, amounts to little, if any, broadening of the congressional waiver." 498 U.S. at 95 (emphasis added). *Irwin*'s reasoning does not apply here because, rather than subjecting the government to the same litigation rules that apply to private parties, Section 2412(d) authorizes fee awards against the government under rules that have no analogue in private litigation.

EAJA provides in 28 U.S.C. 2412(b) for fee awards when there is analogous fee liability in private litigation. Section 2412(b) states that "[t]he United States shall be liable for [attorneys] fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." 28 U.S.C. 2412(b). Congress sought through Section 2412(b) to place the government "on a completely equal footing" with private parties in its liability for fee awards. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9

(1980). Accordingly, consistent with *Irwin*, Section 2412(b) subjects the government to the same rules applicable to private parties in fee proceedings. See, *e.g.*, *Jackson* v. *United States Postal Serv.*, 799 F.2d 1018, 1023 (5th Cir. 1986).

Section 2412(d) is different. It authorizes fee awards against the government when there is *not* an analogous basis for recovery in private-party litigation. Section 2412(d) "not only waives the sovereign immunity of the United States, but also creates a new basis for an award of attorney's fees beyond other common-law or statutory exceptions to the American Rule." Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 La. L. Rev. 217, 223 (1994). Section 2412(d) takes effect precisely when there is no basis for recovery under Section 2412(b) and the rules for private litigation.

Irwin does not dictate the application of equitable tolling doctrines in this case by analogy to private litigation, because *there is no analogous private litigation*. Cf. *Feres* v. *United States*, 340 U.S. 135, 141-142 (1950) (government not amenable to suit, despite waiver of sovereign immunity under Federal Tort Claims Act, where negligence suits by soldiers against military defendants have no close parallel in general tort law); *Rosenfeld* v. *United States*, 859 F.2d 717, 724 (9th Cir. 1988) ("The inquiry into the availability of interim [attorneys] fees under [the Freedom of Information Act], therefore, is informed by the fact that interim fees are available under analogous fee-shifting provisions in other statutes."). To the contrary, ordinary principles of statutory construction, reinforced by interpretive rules limiting deviation from both the American Rule and the terms of a waiver of sovereign immunity, sug-

gest that the 30-day deadline of Section 2412(d) should be enforced without resort to the principles of equitable tolling.

Additional factors reinforce the inapplicability of the *Irwin* presumption. Congress drafted Section 2412(d) at a time, before *Irwin*, when the background presumption was that statutes of limitations in suits against the government were not subject to equitable tolling. See *Irwin*, 498 U.S. at 99 n.2 (White, J., concurring in part and in the judgment). Moreover, disputes concerning whether equitable tolling doctrines excuse a late filing on particular facts easily could expand into full-scale litigation in their own right, requiring the parties to develop, and the courts to consider, facts that are not contained in the record of the underlying litigation for which fees are requested. The 1985 EAJA Amendments added new language to Section 2412(d) that was aimed at avoiding collateral fact-gathering in fee proceedings. See 28 U.S.C. 2412(d)(1)(B) ("Whether or not the position of the United States was substantially justified shall be determined on the basis of the record * * * which is made in the civil action for which fees and other expenses are sought."); H.R. Rep. No. 120, *supra*, Pt. 1, at 6-7 (discussing new provision). Consistent with that congressional objective, the bright-line 30-day rule that the Federal Circuit applies makes timeliness disputes resolvable on the face of the fee application, thus helping to ensure that fee issues can be decided promptly and efficiently. See *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 609, 610 (2001) (judicial interpretation of fee provisions should promote "ready administrability" and avoid "spawn[ing] a second litigation of significant dimension").

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

Section 2412 of Title 28 of the United States Code provides:

Costs and Fees

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(2) A judgment for costs, when awarded in favor of the United States in an action brought by the United States, may include an amount equal to the filing fee prescribed under section 1914(a) of this title. The preceding sentence shall not be construed as requiring the United States to pay any filing fee.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction

of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), 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.

(B) 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 from any attorney or expert witness representing or appearing in behalf of the party 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. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(D) If, in a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful

violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this subparagraph shall be paid only as a consequence of appropriations provided in advance.

(2) For the purposes of this subsection—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of

1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of Title 5;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978;

(F) "court" includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government; and

(I) "demand" means the express demand of the United States which led to the adversary adjudication, but shall not include a recitation of the maximum statutory penalty (i) in the complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with

any proceeding to which section 7430 of the Internal Revenue Code of 1986 applies (determined without regard to subsections (b) and (f) of such section). Nothing in the preceding sentence shall prevent the awarding under subsection (a) of section 2412 of title 28, United States Code, of costs enumerated in section 1920 of such title (as in effect on October 1, 1981).

(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.