NO. 02-1657

IN THE
# Supreme Court of the United States

RANDALL C. SCARBOROUGH,

*Petitioner,*

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,

*Respondent.*

On Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

## PETITIONER'S BRIEF


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## QUESTION PRESENTED

Whether an applicant for attorney's fees under the Equal Access to Justice Act is barred from obtaining a fee award by the Act's 30-day statute of limitations solely because the applicant's timely-filed fee application did not initially allege that the position of the government in the underlying litigation lacked substantial justification.

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The opinion of the United States Court of Appeals for the Federal Circuit affirming the dismissal of petitioner's application for attorney's fees, on remand from this Court, is reported at 319 F.3d 1346 (Fed. Cir. 2003), and is reproduced in the appendix to the petition for a writ of certiorari ("Cert. App.") at 1a. The opinion of the United States Court of Appeals for Veterans Claims dismissing petitioner's fee application is reported at 13 Vet. App. 530 (2000), and is reproduced at Cert. App. 22a. The original opinion of the United States Court of Appeals for the Federal Circuit affirming the dismissal of petitioner's application for attorney's fees is reported at 273 F.3d 1087 (Fed. Cir. 2001), and is reproduced at Cert. App. 26a. The decision of this Court granting petitioner's first petition for a writ of certiorari and vacating the original judgment of the Federal Circuit for reconsideration in light of *Edelman v. Lynchburg College*, 535 U.S. 106 (2002), is reported at 536 U.S. 920 (2002), and is reproduced at Cert. App. 36a. The unreported post-remand decision of the United States Court of Appeals for the Federal Circuit denying panel rehearing and rehearing en banc is reproduced at Cert. App. 37a. The Federal Circuit's unreported decision denying rehearing and rehearing en banc after its original ruling is reproduced at Cert. App. 39a. The unreported decision of the United States Court of Appeals for Veterans Claims in favor of petitioner on the merits of his disability claim is reproduced at Cert. App. 41a.

## JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit affirming the dismissal of petitioner's fee application was entered on February 13, 2003. Cert. App. 1a. Petitioner filed a timely petition for rehearing en banc on February 24, 2003, which the Federal Circuit treated as a

petition for panel rehearing and for rehearing en banc and denied on April 17, 2003. Cert. App. 37a. The petition for a writ of certiorari was filed on May 9, 2003, and granted on September 30, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

The Equal Access to Justice Act, 28 U.S.C. § 2412(d), provides in relevant part:

> (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.

## STATEMENT OF THE CASE

In a ruling at odds with all other federal appellate precedent, the Federal Circuit below affirmed the dismissal of petitioner Randall Scarborough's application for attorney's fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). It did so on the ground that the application was jurisdictionally barred because it did not allege within the statute's 30-day limitations period that the position of the United States was not substantially justified, even though the application itself was timely filed and Mr. Scarborough promptly amended the application to supply the allegation. As shown below, the Federal Circuit's decision finds no support in EAJA's text or in decisions of this Court regarding limitations periods that run in favor of the federal government. *See, e.g., Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). It is also flatly inconsistent with the doctrines of relation back and equitable tolling under which the amendment to Mr. Scarborough's fee application should have been accepted, even assuming the no-substantial-justification allegation should have been made within the 30-day period. *See Becker v. Montgomery*, 532 U.S. 757 (2001); *Edelman v. Lynchburg College*, 535 U.S. 106 (2002); *Irwin*, 498 U.S. at 96.

### A. The Underlying Litigation

Petitioner Randall C. Scarborough served in the United States Navy from 1972 to 1975, when he was discharged because of chronic kidney failure. CAVC Record 56. In 1993, he applied for and was granted disability benefits from the Department of Veterans Affairs ("VA"). The VA agreed with Mr. Scarborough that his kidney failure was incurred during his military service and awarded him a 100% disability rating. CAVC Record 343. A dispute arose, however, concerning the effective date of Mr. Scarborough's disability. Mr. Scarborough contended that his service-connected disability dated back to 1975, and he challenged an earlier March 1976 VA finding that his kidney disease was not service-connected. The Secretary of Veterans Affairs, the respondent in this Court, opposed retroactive benefits, arguing that the VA's 1976 finding was not "clear and unmistakable error," the standard for setting aside that earlier finding.

Mr. Scarborough pursued his case to the Board of Veterans' Appeals ("BVA"), which rejected Mr. Scarborough's claim that the VA had committed clear and unmistakable error. Mr. Scarborough appealed the BVA's decision to the United States Court of Appeals for Veterans Claims ("CAVC"). The CAVC's July 9, 1999, decision began by noting that Mr. Scarborough's case was appropriate for decision by a single judge because it was one "of relative simplicity and the outcome [was] not reasonably debatable." Cert. App. 41a (quoting *Frankel v. Derwinski*, 1 Vet. App. 23, 25-26 (1990)). The CAVC then reversed the BVA's decision on the ground that the BVA had failed to consider the legal standards governing whether the 1976 finding was clearly and unmistakably erroneous. The CAVC therefore remanded the case for further determinations regarding that finding. Cert.

App. 42a-43a. On remand, Mr. Scarborough was awarded retroactive benefits for the period 1975 to 1993.

Meanwhile, as the prevailing party in the CAVC, Mr. Scarborough filed the application for attorney's fees under EAJA that gave rise to this case.

### B. Applicable EAJA Principles

To understand the dispute over Mr. Scarborough's fee application, it is necessary briefly to review applicable EAJA principles. EAJA was first enacted in 1980 as a three-year experiment "to diminish the deterrent effect of seeking review of, or defending against, governmental action." Pub. L. 96-481, § 202(c)(1), 94 Stat. 2325 (1980). In 1985, Congress reenacted EAJA and made it permanent. Pub. L. 99-80, 99 Stat. 183 (1985). The heart of EAJA — and the section at issue here — is 28 U.S.C. § 2412(d). Under it, attorney's fees and expenses "shall" be awarded to eligible parties who have prevailed in civil litigation against the federal government, "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). The fee application must be filed "in [the] court having jurisdiction" over the "civil action" in which the fee applicant prevailed on the merits. *Id.* "Eligible" parties include individuals whose net worth does not exceed $2 million, as well as certain corporations and other organizations. *Id.* § 2412(d)(2)(B). To establish its substantial justification defense, the government bears the burden of showing that its position had a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

Congress's goals in enacting section 2412(d) were to "encourag[e] private parties to vindicate their rights and [to]

'curb[] excessive regulation and the unreasonable exercise of Government authority.'" *Comm'r, INS v. Jean*, 496 U.S. 154, 164-65 (1990) (quoting H.R. Rep. 1418, at 12 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4991). In other words, "the specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." *Jean*, 496 U.S. at 163.

Of particular relevance here, EAJA provides that a party seeking fees shall submit its fee application within 30 days of "final judgment in the action." 28 U.S.C. § 2412(d)(1)(B). That limitations period is set forth in the first sentence of subsection (d)(1)(B), which describes the information to be included with the fee application:

> 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.

*Id.*

The next sentence of subsection (d)(1)(B) — not the sentence containing the 30-day filing period — states that "[t]he party shall also allege that the position of the United States was not substantially justified." *Id.*

When Congress reenacted EAJA in 1985, it defined the statutory term "final judgment" as "a judgment that is final and not appealable...." 28 U.S.C. § 2412(d)(2)(G). Thus, under this definition, the 30-day limitations period does not begin to run until the time to appeal from a judgment on the merits has expired. H.R. Rep. No. 99-120, pt. 1, at 18 n.26 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 146. In crafting this amendment, Congress urged that the limitations period not be construed in an "overly technical" manner as a "trap for the unwary." *Id;* H.R. Rep. No. 99-120, pt. 2, at 6 & n.26 (1985), *reprinted in* 1985 U.S.C.C.A.N. 151, 156.

### C. Proceedings On Mr. Scarborough's Fee Application In The Court Of Appeals For Veterans Claims

On July 20, 1999, just 11 days after he prevailed on the merits in the CAVC, Mr. Scarborough submitted an EAJA application seeking attorney's fees and expenses of $19,333.75 and served the application on counsel for the government. JA 4. However, the Clerk of the CAVC did not file the application. Instead, under a notice dated July 23, 1999, the Clerk returned the application to Mr. Scarborough on the ground that his EAJA application was filed too soon. According to the Clerk, an application may only be filed within 30 days "after the Court's judgment becomes final," and that finality does not occur until after the time for filing post-decision motions and appealing to the Federal Circuit has expired. JA 6.

On August 2, 1999, the CAVC issued a "judgment," which noted that the time for filing post-decision motions had expired. On August 19, 1999, Mr. Scarborough submitted a second EAJA application (the one at issue here). At the same

time that Mr. Scarborough submitted that fee application, he served it on counsel for the government. It is undisputed that Mr. Scarborough's fee application was submitted "within thirty days of final judgment" and contained all of the information called for by the first sentence of 28 U.S.C. § 2412(d)(1)(B). *See* JA 8-9. The application did not, however, contain an allegation that the government's position was not substantially justified.

Under then-applicable CAVC Rule 39(c), the government was required to serve and file its response to the application within 30 days of *service* of the fee application upon it, but the government failed to do so.[1] Meanwhile, Mr. Scarborough's fee application was not immediately filed by the CAVC Clerk. Rather, the Clerk again deemed the application "premature," this time apparently on the ground that the CAVC's mandate had not yet issued in the underlying litigation and, therefore, there was still no "final judgment" in the action. Cert. App. 23a. On October 4, 1999, 46 days after the second fee application was served, the CAVC issued the mandate. On the same date, the CAVC Clerk filed Mr. Scarborough's fee application, which, according to the Clerk, was filed on the first day of EAJA's 30-day filing period. *See* JA 10.[2]

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[1]The version of CAVC Rule 39 in effect when Mr. Scarborough filed his fee application is reproduced in the appendix to this brief at 1a.

[2]The 60-day period to appeal from the CAVC's judgment expired on October 1, 1999. *See* 38 U.S.C. § 7292(a). Thus, properly computed, EAJA's 30-day period commenced on October 2, 1999, and expired on October 31, 1999. Mr. Scarborough's fee application was thus filed on the third day of the 30-day period.

Although the outcome of this case is not affected by it, the

(continued...)

After the application was filed, the government sought, and, with Mr. Scarborough's consent, obtained an extension of time to answer the fee application to December 3, 1999. *See* JA 2. On that date, the government moved to dismiss the fee application for lack of subject matter jurisdiction. The government argued that although the fee application was timely filed, Mr. Scarborough was also required to allege that the government's position lacked substantial justification within the 30-day period, which had expired 33 days earlier, on October 31, 1999. *See supra* note 2.

Immediately after receiving the government's motion to dismiss, Mr. Scarborough filed an amendment to his fee application alleging that "[t]he government's position that the Appellant had not shown clear and unmistakable error in the 1976 [VA] decision was not substantially justified." JA 11 (filed Dec. 9, 1999). At the same time, Mr. Scarborough opposed the motion to dismiss, arguing that his omission of the no-substantial-justification allegation was not a jurisdictional defect. Mr. Scarborough also urged that the limitations period be tolled, and that the government be estopped from enforcing it, because the government itself had delayed the case by seeking an extension to file its response to the application and had never demanded Mr. Scarborough's views on the

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[2](...continued)
CAVC Clerk erred when he twice rejected Mr. Scarborough's fee application as "premature." The CAVC mistakenly views EAJA's 30-day filing period as fixing not only the *last day* by which a fee application *must* be filed but also the *first day* on which a fee application *may* be filed. EAJA does not establish the latter requirement. *See Shalala v. Schaefer*, 509 U.S. 292, 303 (1993) (holding EAJA fee application timely even where no final judgment was ever entered).

substantial justification question despite having been served with the application months earlier.

On June 14, 2000, the CAVC dismissed Mr. Scarborough's fee application on the grounds urged by the government. Cert. App. 22a-25a.

### D. Initial Proceedings And Decision In The Federal Circuit

Mr. Scarborough appealed to the Federal Circuit. He contended that EAJA requires only that the application itself, not the no-substantial-justification allegation, be made within the 30-day period. He also argued that the government was estopped from relying on that deadline because it had a lengthy opportunity to bring the alleged defect to Mr. Scarborough's attention if it truly desired the missing information or wanted to avoid delay. In this regard, Mr. Scarborough pointed to CAVC Rule 39(c), which, as noted above, required the government to respond to the fee application within 30 days of service of the application and which, if complied with, would have brought the omission to Mr. Scarborough's attention well before the 30-day period expired.[3]

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[3]As Mr. Scarborough put it below:

> Clearly government's counsel saw the defect in the application and knew that if the government responded within the 30 day requirement of Rule 39, the Veteran would have amended the application to comply with 28 U.S.C. §2412. Rather than show its cards to the Veteran, the government decided to wait until 30 days had passed the final judgment date when it would [in the government's
>
> (continued...)

Mr. Scarborough also relied on this Court's decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), which held that, absent statutory language to the contrary, limitations periods for claims against the federal government, like those involving private defendants, are not jurisdictional bars, but rather are subject to ordinary equitable principles, such as tolling and estoppel. Finally, Mr. Scarborough noted that EAJA mandates an award of fees to a prevailing party "unless" the court finds that the government's position is substantially justified, 28 U.S.C. § 2412(d)(1)(A), and thus EAJA requires the government to carry the burden on the substantial justification issue whenever it wishes to avoid payment of fees to a prevailing party. Therefore, Mr. Scarborough maintained, the requirement should not be seen as jurisdictional.

The Federal Circuit affirmed. The court held that "the thirty-day time limit for submitting a fee application under the EAJA [is] jurisdictional in nature" (Cert. App. 30a), and that this purported jurisdictional bar applied not only to the filing of the application but also to EAJA's four "pleading requirements," including the allegation that the government's

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[3](...continued)
view] be too late for the Veteran to make a timely supplement to the application.

Brief for Appellant, at 10, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Sept. 29, 2000). The government did not deny that it knew of the alleged defect and deliberately waited for the 30-day period to pass, but maintained that "the timing of the Government's filing does not relieve an applicant of the jurisdictional burden to submit a complete and timely EAJA application." Brief for Respondent-Appellee, at 7 n.4, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Jan. 9, 2001).

position lacked substantial justification. Cert. App. 33a. The court acknowledged that its decision conflicted with all other circuit authority, under which a timely-filed EAJA fee application may be supplemented to provide information on those four topics, absent prejudice to the government. *See* Cert. App. 30a-32a.

### E. Initial Proceedings Before This Court And The Intervening Decision In *Edelman*

On March 13, 2002, Mr. Scarborough filed his first petition for a writ of certiorari. *See Scarborough v. Principi*, No. 01-1360. Shortly thereafter, this Court decided *Edelman v. Lynchburg College*, 535 U.S. 106 (2002). In that case, plaintiff Edelman had filed a letter with the EEOC claiming that Lynchburg College had discriminated against him in violation of Title VII of the Civil Rights Act of 1964. 535 U.S. at 109. Although the parties disagreed about whether the letter constituted a formal "charge" of discrimination, the Court assumed that it was a "charge" for the purposes of its decision. *See id.* at 110. Edelman and the College agreed that the letter was filed within the relevant limitations period set forth in subsection 706(e)(1) of the Act, 42 U.S.C. § 2000e-5(e)(1), which requires that a charge such as Edelman's be filed within 300 days of the alleged discrimination. Another provision of the same section of the Act, subsection 706(b), 42 U.S.C. § 2000e-5(b), requires that a charge be verified, *i.e.*, "be in writing under oath or affirmation...." Edelman met this requirement as well, but not until after the limitations period of section 706(e)(1) had expired. 535 U.S. at 110.

Edelman relied on an EEOC regulation that provides that a charge is "sufficient" when the EEOC receives from the complaining party "a written statement sufficiently precise to

identify the parties, and to describe generally the action or practices complained of." 535 U.S. at 110 n.2 (quoting 29 C.F.R. § 1601.12(b)). Under that regulation, a charge may be amended to cure "technical defects or omissions, including failure to verify the charge" and such amendments "will relate back to the date the charge was first received." *Id.* The Fourth Circuit held the regulation invalid and Edelman's charge untimely. That court reasoned that because the statute required Edelman's charge to be filed within 300 days and separately required that a charge be verified, it must also require that Edelman's charge be verified within 300 days. *Id.* at 110-11.

This Court reversed. It immediately took issue with the Fourth Circuit's syllogism: "Section 706(b) merely requires verification of a charge, without saying when it must be verified; §706(e)(1) provides that a charge must be filed within a given period, without indicating whether the charge must be verified when filed." *Edelman*, 535 U.S. at 112. The Court then explained why the EEOC's relation-back regulation is an "unassailable interpretation of §706." *Id*. at 118. First, the Court said, applying the limitations period to verification "would ignore the two quite different objectives of the timing and verification requirements." *Id.* at 112. The former puts the employer on notice of a claim before it gets stale and promotes speedy resolution of claims; the latter, by contrast, only seeks to assure that a complainant is "serious enough and sure enough" of the claim to support it under penalty of perjury. *Id.* at 113. Thus, the EEOC simply requires a complaint to be completed and verified before it requires the employer to respond. *Id.* at 115 & n.9.

The Court also noted that it would be "hard pressed" to take a different view in light of its recent ruling in *Becker v. Montgomery*, 532 U.S. 757 (2001). *Edelman*, 535 U.S. at 115.

In *Becker*, the question was whether a timely-filed but unsigned notice of appeal was jurisdictionally defective because an amended notice providing the signature was filed only after the time to appeal had expired. In reversing the Sixth Circuit, *Becker* held that although a notice of appeal, like other district court filings, must be signed, signature is not a jurisdictional requirement. Therefore, so long as the notice itself was timely filed, the amendment containing the signature related back to the original filing. *See Edelman*, 535 U.S. at 116 (discussing *Becker*). *Edelman* noted that permitting relation back in the EEOC administrative context was at least as reasonable as permitting it in the judicial context in *Becker*. *Id.* ("[C]ourts have shown a high degree of consistency in accepting later verification as reaching back to an earlier, unverified filing") (citing cases).

On June 17, 2002, this Court granted Mr. Scarborough's first petition, vacated the Federal Circuit's decision, and remanded the case for further consideration in light of *Edelman*. Cert. App. 36a.[4]

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[4]One final point regarding *Edelman* is significant. This Court was urged to decide whether the EEOC's relation-back regulation was entitled to deference as a reasonable interpretation of purportedly ambiguous statutory provisions. However, it did not reach that issue, which allowed it to avoid the complicated question whether the EEOC regulation was the kind of administrative pronouncement entitled to deference. *Compare Edelman*, 535 U.S. at 114 & nn.7-8 (majority opinion), *with id.* at 122-24 (O'Connor, J., concurring in the judgment). Rather, the Court found no ambiguity: "We find the EEOC rule not only a reasonable one, *but the position we would adopt even if there were no formal rule and we were interpreting the statute from scratch*." *Id.* at 114 (emphasis added). Thus, *Edelman*'s holdings arose solely from the statute itself, and the EEOC's (continued...)

### F. The Federal Circuit's Decision on Remand

After supplemental briefing before the same panel that heard the original appeal, the Federal Circuit again affirmed dismissal of Mr. Scarborough's fee application, this time in a 2-1 decision, with Chief Judge Mayer dissenting. The panel majority reaffirmed its prior decision, holding that both EAJA's filing deadline *and* the pleading requirements contained in 28 U.S.C. § 2412(d)(1)(B) are "jurisdictional" and therefore must all be met within the 30-day time period. The majority also concluded that *Edelman* was inapposite. Cert. App. 14a.

Chief Judge Mayer disagreed, explaining that *Edelman* "implies that failure to timely include a simple allegation that does not prejudice the opposing party may relate back to a timely filed application." Cert. App. 19a. In addition, he noted that the majority had "unnecessarily narrow[ed] the waiver that Congress intended because the statutory language of ... EAJA does not mandate strict compliance or foreclose supplementation" of the fee application. *Id.* The purpose of the no-substantial-justification allegation, he maintained, was not to erect a jurisdictional bar, but only "to place the burden on the government to make a positive showing that its position and actions during the course of the proceedings were substantially justified...." Cert. App. 20a (quoting S. Rep. No. 96-974, at 10 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4726, 4992).

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[4](...continued)
regulation has no bearing on the applicability of *Edelman*'s reasoning to Mr. Scarborough's case.

## SUMMARY OF ARGUMENT

As the Solicitor General put it just a few months ago: "This Court has made clear that, unless strict compliance with a filing deadline is a prerequisite to the jurisdiction of the court, '[s]tatutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling.'" Brief for the United States, at 10, in *Kontrick v. Ryan*, No. 02-819 (July 17, 2003) ("U.S. Br. in *Kontrick*") (quoting *United States v. Locke*, 471 U.S. 84, 94 n.10 (1985)). Thus, because an EAJA application is filed in a court that *already* has jurisdiction over the underlying action, EAJA's 30-day time period is a statute of limitations, subject to various equitable doctrines such as relation back and tolling, and it is not, as the Federal Circuit held, an inflexible "jurisdictional" bar. This general rule should not be discarded here because it is the *government* that seeks to take advantage of the purported time bar. Rather, under *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), once Congress has waived the government's sovereign immunity (as it has in EAJA), limitations periods that run in favor of the government, like those involving private parties, are not jurisdictional unless Congress has explicitly so provided.

Applying those equitable doctrines, the decision below should be reversed for two reasons. First, Mr. Scarborough's amendment alleging that the government's position was not substantially justified relates back to his timely-filed fee application under the standard set by Federal Rule of Civil Procedure 15(c)(2) and under this Court's recent decisions in *Edelman v. Lynchburg College,* 535 U.S. 106 (2002), and *Becker v. Montgomery*, 532 U.S. 757 (2001). Second, the 30-day period should have been equitably tolled. Mr. Scarborough "actively pursued his judicial remedies by filing a [purportedly]

defective pleading during the statutory period" and the government's failure to respond to Mr. Scarborough's fee application as required by the applicable CAVC rule induced Mr. Scarborough "into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96 & n.3

Even if the 30-day time limit *is* an absolute bar to consideration of an *untimely* fee application, the Federal Circuit nevertheless erred in affirming dismissal of Mr. Scarborough's *timely* fee application because the 30-day limit is not a jurisdictional bar to a timely, but incomplete application. Such an application may be amended to provide the missing information, absent prejudice to the government, as every circuit to have addressed the question, except for the Federal Circuit, has held. *See, e.g., Dunn v. United States*, 775 F.2d 99 (3d Cir. 1985). The Federal Circuit's aberrant view is at odds with this Court's decision in *Becker*, 532 U.S. 757, which held that an amendment supplying a missing signature on a timely-filed notice of appeal must be allowed even after the time to appeal has expired, if the amendment is filed promptly after the defect is brought to the appellant's attention.

The Federal Circuit also erred on another ground. EAJA's 30-day period is contained in the same sentence as three of EAJA's pleadings requirements, but not in the next sentence, which concerns the no-substantial-justification allegation at issue here. *See* 28 U.S.C. § 2412(d)(1)(B). The latter sentence contains no limitations period at all. Thus, the 30-day limit does not apply to the requirement that an EAJA applicant allege that the government's position was not substantially justified. Mr. Scarborough's fee application was therefore timely in all respects.

## ARGUMENT

In the pages that follow, Mr. Scarborough first argues that EAJA's 30-day time limit is not "jurisdictional" and that, therefore, equitable doctrines, such as relation back and tolling, apply whether or not the application is filed on time. Mr. Scarborough then argues that even if the 30-day limit is an absolute bar to an *untimely* fee application, it is does not bar *timely* but incomplete fee applications that are promptly amended to supply the missing information or allegation. Finally, Mr. Scarborough shows that EAJA contains no limitations period at all as to the requirement that an EAJA applicant allege that the government's position was not substantially justified.

We recognize that, by proceeding in this order, we are presenting narrower bases for resolving this case after the broader argument. We do so for three reasons. First, by addressing the question whether EAJA's 30-day limit is "jurisdictional," the Court would confront what we believe is the Federal Circuit's fundamental error in this case — its belief that the government is entitled to special treatment when it raises a limitations defense, an assumption that is inconsistent with this Court's decision in *Irwin* and susbequent decisions. Second, by addressing this overarching issue, the Court will have the best opportunity to test the Federal Circuit's ruling against that of *Edelman v. Lynchburg College,* 535 U.S. 106 (2002), the case that prompted the Court's remand when Mr. Scarborough first petitioned the Court last year. 536 U.S. 920 (2002). Finally, a ruling that this Court meant what it said in *Irwin* will preempt, in similar cases under EAJA and other statutes, further mischief and wasteful litigation of the kind that occurred in Mr. Scarborough's case and in the wake of the decisions below. *See* Cert. Pet. 19-20 & n.6 (citing cases);

Cert. Reply 10 (same); *see also Billey v. Principi*, 2003 WL 21190651 (Vet. App. 2003).

## I. EAJA'S 30-DAY TIME LIMIT IS NOT JURISDICTIONAL, BUT RATHER IS SUBJECT TO EQUITABLE DOCTRINES SUCH AS RELATION BACK AND TOLLING, UNDER WHICH MR. SCARBOROUGH'S FEE APPLICATION SHOULD HAVE BEEN CONSIDERED TIMELY AND COMPLETE.

### A. EAJA's 30-Day Limitations Period Is Not Jurisdictional.

The Federal Circuit's most basic error was that it treated EAJA's 30-day time limit as "jurisdictional," *i.e.*, as an absolute time bar not subject to any exceptions. Thus, under the Federal Circuit's view, EAJA requires dismissal of an untimely or incomplete application without any inquiry into the circumstances of the submission, the opposing party's conduct, or whether prejudice would result if an exception were made. That view cannot be reconciled with decisions of this Court or EAJA's text.

The Federal Circuit's understanding is flatly at odds with *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). *Irwin* is the leading case on the construction of statutes of limitations that run in favor of the federal government, yet the Federal Circuit did not cite, much less discuss, *Irwin* in either of its opinions below. In *Irwin*, the Court held that 42 U.S.C. § 2000e-16(c) — which allowed an employee aggrieved by final action of the EEOC 30 days to file a Title VII action in federal court — is not jurisdictional, but rather operates like a statute of limitations subject to equitable principles, such as

tolling, waiver, and estoppel. The Court concluded, as a general matter, that once Congress has waived the government's sovereign immunity (as it has in EAJA), there is a rebuttable presumption that those equitable principles apply to the same extent as in a suit among private parties, and that, therefore, limitations periods in actions against the government are not jurisdictional unless Congress has explicitly so provided. *Id.* at 96; *see also Franconia Associates v. United States*, 536 U.S. 129, 145 (2002) (rejecting special accrual rule where federal government is defendant and noting "that limitations principles should generally apply to the Government 'in the same way that' they apply to private parties") (quoting *Irwin*, 498 U.S. at 95).

The *Irwin* presumption applies here because Congress did not provide, in EAJA's text, that the 30-day limit is jurisdictional. In proceedings below, the government adverted to one — and only one — textual justification for the notion that EAJA's filing period is jurisdictional: The statute says that the fee application "shall" be filed within 30 days of final judgment in the action. *See, e.g.,* Supp. Brief for Resp.-Appellee, at 7, in *Scarborough v. Principi*, No. 00-7172 (Fed. Cir. filed Nov. 12, 2002). But that argument was specifically considered and rejected in *Irwin*. The Court held that a statutory limitations period running in favor of the government is not jurisdictional simply because it uses assertedly mandatory language such as "shall." That approach, the Court held, "would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress." *Irwin*, 498 U.S. at 95.[5]

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[5]As noted in *Irwin*, Congress is free to erect a jurisdictional time bar in suits against the government if it so chooses. Under 26

(continued...)

But that is not all. In this case, the *Irwin* presumption is accompanied by important textual reasons why the statutory time limit is not jurisdictional. First, EAJA's provision containing the 30-day period, 28 U.S.C. § 2412(d)(1)(B), "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982). More important, where EAJA does "speak in jurisdictional terms," it forcefully favors Mr. Scarborough's position. The first sentence of EAJA provides that fees shall be awarded to the prevailing party "in any civil action ... brought by or against the United States *in any court having jurisdiction of that action*." 28 U.S.C. § 2412(d)(1)(A) (emphasis added). The highlighted language recognizes that a court entertaining an EAJA application *already* has jurisdiction, a truism that the government nevertheless tries to escape. *See* Opp. 16 (stating that an "incomplete EAJA application [fails to] confer jurisdiction on the district court"). If the term "jurisdictional" is to serve any purpose, other than as a legalistic way of saying "you lose," it should, as its name indicates, apply, if at all, only where the filing at issue establishes subject matter *jurisdiction* in the court in which it is filed.

The Court made this point in *Zipes*, 455 U.S. at 393,

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[5](...continued)
U.S.C. § 6213(a), a taxpayer seeking to challenge an IRS tax deficiency notice must file a petition in the United States Tax Court within 90 days after the notice is mailed to the taxpayer, and "[t]he Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed ...." Courts have held that this deadline is "jurisdictional." *See, e.g., Tadros v. Comm'r*, 763 F.2d 89, 91 (2d Cir. 1985).

indicating that for a statutory time limit to be "jurisdictional" it must be "a jurisdictional prerequisite to suit in federal court." And it reiterated this view more recently in *United States v. Cotton*, 535 U.S. 625 (2000), where the Court first lamented its sometimes loose use of the term "jurisdictional," and then made clear "what the term means today, *i.e.*, 'the courts' statutory or constitutional *power* to adjudicate the case.'" *Id.* at 630 (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) (emphasis in original)); *see also Luna v. Dept. of HHS*, 948 F.2d 169, 173 (5th Cir. 1991) (rejecting government's argument that EAJA's time limit is jurisdictional and indicating that district court's jurisdiction was founded not on EAJA, but on Social Security Act, which was basis for plaintiff's claim on merits); *Dunn v. United States*, 775 F.2d 99, 103 (3d Cir. 1985) (rejecting position accepted by the Federal Circuit below and noting that "[w]e are, of course, dealing with an issue of statutory construction. It is not helpful in approaching that task to attach labels such as 'jurisdictional' to the actions of Congress before first examining the language of the statute and the context in which that language was used.").[6]

Mr. Scarborough's position is also supported by case

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[6]As noted above (at 16), the government made this very point in *Kontrick v. Ryan*, No. 02-819 (argued Nov. 3, 2003), where it appears as amicus because "the United States is a creditor in many bankruptcies." U.S. Br. in *Kontrick*, at 1. The question in *Kontrick* is whether the time deadline for objecting to a debtor's discharge under Bankruptcy Rule 4004(a) — which provides that an objection "*shall* be filed no later than 60 days after the first date set for the meeting of creditors" — is jurisdictional. We agree with the government's position in *Kontrick* that a filing period cannot be "jurisdictional" if, by its terms, it "does not limit *jurisdiction* to those cases in which there has been a timely filing." U.S. Br. in *Kontrick*, at 13 (quoting *Zipes*, 455 U.S. at 393) (emphasis added).

law under Federal Rule of Civil Procedure 54(d)(2), which sets procedures for attorney's fee motions in federal district court. Of relevance here, Rule 54(d)(2)(B) 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." This Rule effectively sets the limitations period for dozens of federal fee-shifting statutes, which generally do not have their own limitations periods, with the notable exception of EAJA. Despite its use of "must," which is, if anything, more demanding than EAJA's "shall," courts have consistently held that Rule 54(d)(2)(B)'s filing period is not jurisdictional and may be waived by the opposing party and relaxed by the court. *See, e.g., Mints v. Educational Testing Serv.*, 99 F.3d 1253, 1260 (3d Cir. 1996); *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 60 F.3d 305, 308-09 (7th Cir.1995); *see also Soberay Mach. & Equipment Co. v. MRF Ltd., Inc.*, 181 F.3d 759, 770 (6th Cir. 1999) (same for objections to costs under Rule 54(d)(1)). These decisions reflect the lower federal courts' understanding that it is nonsensical to deem *jurisdictional* a limitations period for a filing that does not invoke a court's *jurisdiction*, *i.e.*, the power to decide a case in the first instance.

In this case, Mr. Scarborough properly invoked the CAVC's jurisdiction in 1998 when he filed his disability appeal, and he was not required, when filing his EAJA application, to invoke that jurisdiction again. That fact alone differentiates this case from cases involving notices of appeal upon which the Federal Circuit relied (Cert App. 16a-17a), and it distinguishes EAJA's limitations period from the statutory deadline for initiating a tax deficiency action (discussed *supra* note 5): Both a notice of appeal and a Tax Court petition give a court authority over a case in the first instance. *See also* U.S. Br. in *Kontrick*, at 14 (distinguishing notice of appeal on same

ground). An EAJA fee application does not.[7]

### B. The Amendment To Mr. Scarborough's Fee Application Should Have Been Allowed Under The Relation Back And Equitable Tolling Doctrines.

#### 1. Mr. Scarborough's Amendment Relates Back To His Timely-Filed Fee Application.

In most cases involving whether a statutory deadline should be subject to an exception, the claimant has filed late and the issue is whether the circumstances permit the limitations period to be tolled or whether the party seeking dismissal has waived enforcement of the deadline or should be estopped from enforcing it. This case is different because Mr. Scarborough filed his fee application on time. Thus, because the 30-day period is not jurisdictional (as demonstrated

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[7]Despite the *Irwin* presumption and EAJA's text, a number of circuit courts, in addition to the Federal Circuit, have held that EAJA's 30-day limit for filing the fee application (though not for meeting EAJA's pleading requirements) is jurisdictional. *See* Cert. App. 6a (citing cases). None of those cases even cites *Irwin*, and most of them rely on pre-*Irwin* precedents that simply assume that the government is entitled to special treatment when invoking a time bar — exactly the opposite approach from that taken in *Irwin*. *See, e.g., Yang v. Shalala*, 22 F.3d 213, 215 n.4 (9th Cir. 1994) (relying on *Columbia Mfg. v. NLRB*, 715 F.2d 1409, 1410 (9th Cir. 1983)); *Buck v. Sec'y of HHS*, 923 F.2d 1200, 1202 (6th Cir. 1991) (relying on *Allen v. Sec'y of HHS*, 781 F.2d 92, 94 (6th Cir. 1986)). *Contra Luna*, 948 F.2d at 173; *see also Bacon v. Sec'y of HHS*, 786 F. Supp. 434, 438 (D.N.J. 1992) (EAJA's 30-day period not jurisdictional under *Irwin*); *Golbach v. Sullivan*, 779 F. Supp. 9, 11-12 (N.D.N.Y. 1991) (same).

immediately above), the Court can resolve this case most easily by asking whether Mr. Scarborough's amendment alleging that the government's position was not substantially justified relates back to his timely-filed fee application. Mr. Scarborough's amendment easily meets the standards for relation back as applied in civil litigation generally and in the decisions of this Court.

**a.** In civil litigation, an action is commenced by the filing of a complaint, which must include "a short and plain statement" of the basis for the court's subject matter jurisdiction and "of the claim showing that the pleader is entitled to relief," plus a demand setting forth the relief sought by the plaintiff. Fed. R. Civ. P. 8(a). Thus, in the simple complaint for negligence described on Form 9 of the Federal Rules of Civil Procedure, in which a car driven by the defendant runs into the plaintiff-pedestrian, the plaintiff must allege the basis for federal jurisdiction, the basic facts, and the legal basis for the claim (negligence), and she must demand damages or some other relief. *See* Fed. R. Civ. P., Form 9.

Much as an EAJA applicant is expected to allege that he or she is a prevailing party within 30 days of final judgment, a civil plaintiff is expected, of course, to meet the Federal Rules' pleading requirements within the applicable statute of limitations. However, *as long as the initial complaint is filed on time*, a failure to properly set forth the claim that the plaintiff wishes to pursue is not generally fatal. To the contrary, an amendment filed after expiration of the limitations period "relates back" to the initial pleading if "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original [timely-filed] pleading." Fed. R. Civ. P. 15(c)(2).

Under this standard, "amendments that merely correct technical deficiencies or expand or modify the facts alleged in the earlier pleading . . . will relate back," Wright, et al., 6A *Federal Practice and Procedure* § 1497, at 74 (2d ed. 1990), as will amendments to cure defective statements of *subject matter jurisdiction*, *id.* at 80, one of the basic pleading requirements imposed by Federal Rule of Civil Procedure 8(a). The key question is whether the amendment's alteration of, or addition to, the original pleading is "so substantial" that the original pleading cannot be said to have provided the defendant "adequate notice" of the amended claim. *Id.* at 79. If, however, notice is adequate, the amendment relates back to the date of the original complaint.

As this Court has put it, "[t]he rationale of Rule 15(c) is that a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 150 n.3 (1984); *see also Schiavone v. Fortune*, 477 U.S. 21 (1986) (linchpin of Rule 15(c) is notice of claim within the limitations period); 1966 Adv. Comm. Note to Rule 15(c) (in determining whether amendment relates back, question is whether adverse party "was put on notice of the claim within the stated [limitations] period"). This focus on notice, which promotes fairness to the adverse party, is essentially the same standard embraced by the Third and Eleventh Circuits for allowing amendments to a timely-filed EAJA application: *Absent prejudice to the government*, an application may be supplemented after the 30-day period has expired to meet the statute's pleading requirements. *See Dunn v. United States*, 775 F.2d 99 (1985)*; Singleton v. Apfel*, 231 F.3d 853 (2000); *accord United States v. True*, 250 F.3d 410, 418 n.5 (6th Cir. 2001).

Thus, if, in the car accident case described on Form 9, the plaintiff amends after expiration of the limitations period to provide the date on which the accident occurred, or to claim mental as well as physical injury, or to supply the previously omitted basis for federal subject matter jurisdiction, *i.e.*, to supply an allegation that is genuinely "jurisdictional," those amendments will relate back because they provide information arising from a transaction or occurrence of which the defendant has already been notified. *See Edelman v. Lynchburg College,* 535 U.S. 106, 115-16 (2002). Under this standard, it is undisputed that Mr. Scarborough's amendment stating that the government's position was not substantially justified arises out of the same "conduct, transaction, or occurrence" that is the subject of the initial fee application — namely, the claim for fees arising from the CAVC's disability determination.

Of particular relevance here, amendments that do nothing more than modify a party's *legal* allegations almost invariably relate back. "The fact that an amendment changes the legal theory on which the action initially was brought is of no consequence if the factual situation upon which the action depends remains the same and has been brought to defendant's attention by the original pleading." Wright, et al., 6A *Federal Practice and Procedure* § 1497, at 94-95 (citing cases). Indeed, even an amendment that presents "an entirely new claim for relief" relates back provided that the amendment, as a factual matter, meets Rule 15(c)(2)'s "conduct, transaction, or occurrence" standard. *Id.* at 99; *accord Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574, 580-81 (1945).

This line of authority supports Mr. Scarborough's position here because his omission was not that he failed to plead a *factual* basis for the no-substantial-justification allegation, which EAJA does not require, but simply that he did

not plead a particular formulaic legal conclusion. Courts have consistently allowed relation back where the only defect is an alleged failure to plead a legal conclusion. *See Bernstein v. National Liberty Int'l Corp.*, 407 F. Supp. 709, 712 (E.D. Pa. 1976) ("The failure to attach a legal conclusion, such as sexual discrimination, to the factual occurrences complained of has been interpreted to be a 'technical defect' . . . and, as such, an amended charge remedying the defect relates back to the original filing date."); *accord Wetzel v. Liberty Mutual Ins. Co.*, 511 F.2d 199, 202 (3d Cir. 1975), *vacated on other grounds*, 424 U.S. 737 (1976); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462 (5th Cir. 1970). In sum, under the Rule 15(c)(2) formulation, even assuming that the no-substantial-justification allegation was required to have been made within the 30-day period, Mr. Scarborough's amendment should have been allowed.

**b.** Mr. Scarborough acknowledges that Rule 15 applies here only indirectly, because it concerns amendments to "pleadings," *see* Fed. R. Civ. P. 15(a), and a fee application is not a "pleading" under the Federal Rules. *See* Fed. R. Civ. P. 7(a). However, an attorney's fee application, like a complaint, a counterclaim, and other pleadings, *see id.*, is a request for affirmative relief, and, therefore, the Court should be guided here by Rule 15 principles.

Applying the principles embodied in Rule 15 to a fee application is fully consistent with this Court's precedents, which have employed relation back even where Rule 15 was not expressly applicable. Prior to the promulgation of the Federal Rules, the Court embraced the relation back doctrine and expressly allowed a plaintiff to amend his complaint to add a new legal theory based on facts alleged in the original claim. *See New York Central & Hudson River Railroad Co. v. Kinney*,

260 U.S. 340 (1922); *see also* 1937 Adv. Comm. Note to Rule 15(c) (noting that relation back doctrine was "well recognized" prior to Federal Rules). And, quite recently, in *Edelman,* 535 U.S. 106*,* the Court interpreted Title VII's provisions regarding the filing of EEOC discrimination charges — which are not "pleadings" — to permit relation back. In construing the statute, the Court relied in large part on state and federal court cases embracing the relation back doctrine, 535 U.S. at 116, explaining that "if relation back is a good rule for courts of law, it would be passing strange to call it bad for an administrative agency." *Id*.; *see also id.* at 116 n.10 (noting parallel to Rule 15(c)). Moreover, *Edelman* referred to this Court's decision in *Becker v. Montgomery*, 532 U.S. 757 (2001), discussed below (at 35-36), as involving the doctrine of "relation back," *Edelman*, 535 U.S. at 116, even though the document at issue in *Becker* — a notice of appeal — is not a Rule 7(a) "pleading."

In sum, if the Rule 15(c)(2) standard "is a good rule" for complaints and other pleadings that come at the beginning of a case, "it would be passing strange to call it bad for" a fee application that comes only after the parties have litigated a case to judgment on the merits. *Id.*

**2. Mr. Scarborough's Amendment Should Have Been Accepted Under Equitable Tolling Principles.**

Non-jurisdictional statutes of limitations are subject not only to the relation back doctrine, but to equitable tolling principles as well. *Irwin* discussed two distinct bases for establishing equitable tolling: "[1] where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or [2] where the complainant has been induced or tricked by his adversary's

misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96 & n.3 (citing cases); *see also Young v. United States*, 535 U.S. 43, 49-50 (2001) (reiterating *Irwin*'s tolling categories and noting that they are not exclusive). Both apply here.

**a. Tolling Involving A Timely-Filed, But Defective Pleading.** The first of *Irwin*'s tolling categories — involving a timely-filed, but defective pleading — is the easier one to resolve in this case because it only requires consideration of objective, uncontroverted facts. *According to the government*, Mr. Scarborough "fil[ed] a defective pleading during the statutory period," and it cannot be disputed that Mr. Scarborough — who repeatedly filed his fee application *before* the limitations began to run — "actively pursued his judicial remedies" under EAJA. In other words, even assuming that omitting the no-substantial-justification allegation was a defect, it is undisputed that Mr. Scarborough's otherwise complete application was filed "during the statutory period." And Mr. Scarborough's "active pursuit" of his EAJA remedy is further demonstrated by his amendment supplying the missing allegation immediately after the purported omission was brought to his attention. *See Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999) (under *Irwin*, "equitable tolling is available where a plaintiff has actively pursued judicial remedies but filed a defective pleading, as long as the plaintiff has exercised due diligence").

This tolling principle is, in effect, the rule adopted for EAJA's statute of limitations by all the courts of appeals to have addressed the question other than the Federal Circuit. Those courts hold that an application filed "during the statutory period" that is "defective" because it omits some of the allegations or information required by 28 U.S.C. §

2412(d)(1)(B) can be cured at a later date, asbent prejudice to the government. *See True*, 250 F.3d 410; *Singleton,* 231 F.3d 853; *Dunn*, 775 F.2d 99. That tolling principle is also quite similar to the relation back doctrine as applied in *Becker v. Montgomery*, where this Court emphasized that the plaintiff had acted with due diligence by filing the required amendment to his notice of appeal shortly after the defect was brought to his attention. 532 U.S. at 761, 764. For these reasons, the 30-day deadline was tolled by the filing of the fee application, and the CAVC was required to accept as timely the amendment to Mr. Scarborough's fee application.

**b. Tolling Based On An Adversary's Inducement Or Trickery.** Mr. Scarborough is also entitled to have the 30-day limitations period tolled on the ground that the pleading defect, if any, was induced by the government's misconduct. As noted earlier, Mr. Scarborough submitted his fee application to the CAVC and served it on government counsel *before the 30-day period even started to run*. If the government had complied with CAVC Rule 39(c), which required it to answer the fee application within 30 days of *service* (*see* App. 1a), the alleged defect would have been brought to Mr. Scarborough's attention well before EAJA's 30-day period expired.

In the courts below, the government never denied that it learned of the omission at the time of service and simply waited for the 30-day period to expire. The government did maintain that it "was in compliance with all applicable [CAVC] rules." Brief for Respondent-Appellee, at 7 n.4, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. filed Jan. 9, 2001). That is not correct. On November 1, 2001, after the CAVC proceedings in this case, the CAVC amended Rule 39(c) to state that the government shall respond to an EAJA application within 30 days after the application is "filed" (not

"served," as was previously the case). In comments accompanying the amendment, the CAVC explained its purpose: "Subsection (c) is amended (in light of the premature submission in some cases of EAJA applications prior to judgment becoming final), so as to start the Secretary's 30-day response time from the Court's filing of the EAJA application, *rather than upon service of an application on the Secretary, which occurs at the time when a premature application is submitted*." CAVC Misc. Order No. 8-01 (Nov. 1, 2001) (emphasis added) (attached at App. 4a). Therefore, when Mr. Scarborough served his application in 1999, the government did *not* comply with then-applicable CAVC Rule 39(c). This non-compliance indicates that the government knowingly caused Mr. Scarborough to become ensnared in a procedural trap by waiting to respond until after the 30-day period expired, in contravention of Congress's expressed desire that EAJA's limitations period not be employed as a "trap for the unwary." *See* H.R. Rep. No. 99-120, pt. 1, at 18 n. 26 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 146; H.R. Rep. No. 99-120, pt. 2, at 6 & n.26 (1985), *reprinted in* 1985 U.S.C.C.A.N. 151, 156.

The government has justified the decision below on the ground that, no matter what the circumstances or how harsh the consequences, EAJA requires "litigants to turn square corners and make a timely filing." Opp. in No. 01-1360 at 8. As shown above, this view of EAJA's limitations period as absolute and inflexible is wrong for a number of reasons. But at the very least, it is intolerable for the government to be permitted to impose a time bar on the theory that EAJA requires "litigants to turn square corners," where the problem would have been avoided if the government itself had "turn[ed] square corners" and followed the applicable procedural rule for serving its response.

## II. EAJA'S 30-DAY LIMITATIONS PERIOD IS NOT A "JURISDICTIONAL" BAR TO A TIMELY-FILED, BUT INCOMPLETE, FEE APPLICATION.

Part I above shows that EAJA's 30-day time limit is not a jurisdictional bar in any circumstance. However, even if the Court disagrees, the decision below should be reversed because, at the very least, the 30-day limit is not a jurisdictional bar to a timely but incomplete fee application.

**1.** As the Third, Sixth, and Eleventh circuits have held, even if the 30-day limit is a jurisdictional bar to an application that is not filed on time, it is not a jurisdictional bar to a *timely* application that fails to meet all of EAJA's pleading requirements before the 30-day period expires. Rather, if the fee application itself is timely, it may be amended later to satisfy the pleading requirements, absent prejudice to the government. *See United States v. True*, 250 F.3d 410 (6th Cir. 2001); *Singleton v. Apfel*, 231 F.3d 853 (11th Cir. 2000); *Dunn v. United States*, 775 F.2d 99 (3d Cir. 1985).

The leading case is the Third Circuit's decision in *Dunn*, 775 F.2d 99, in which the district court had dismissed, as "jurisdictionally" defective, a fee application that did not initially include the specific amount requested, an itemized statement of attorney time expended, or the rate at which fees were to be computed, even though the fee applicant had supplied the missing information shortly after the 30-day period had expired. *Id.* at 101-02. *Dunn* explained that section 2412(d)(1)(B) contains two separate requirements — a deadline for filing and a pleading standard — and that "[t]he two requirements serve different purposes." *Id.* at 103. Although filing the fee claim within a certain time period serves the

government's interest in finality and reliance, *id.* at 103-04, the court noted that "once the claim is filed, whether or not it is as complete as it should be, the interests of proof of timeliness and of finality and reliance have been satisfied." *Id.* at 104; *see also Edelman*, 535 U.S. at 112 (superimposing the statutory time deadline for filing an EEOC charge on the distinct requirement that a charge be verified "would ignore the two quite different objectives of the timing and verification requirements").

*Dunn* went on to explain that "[w]hat remains [after the filing of a timely EAJA application] is the fleshing out of the details, and the government has pointed out no governmental interest which is in any way affected by the fact that the details of the fee claim came shortly after the claim was filed." 775 F.2d at 104; *accord True*, 250 F.3d at 421; *Singleton*, 231 F.3d at 858. Thus, because there was no conceivable reason why Congress would have wanted EAJA's pleading requirements to be jurisdictional, *Dunn* concluded that a court must permit supplementation of the fee application after expiration of the 30-day filing period, absent prejudice to the government. *Dunn*, 775 F.2d at 104; *see Singleton*, 231 F.3d at 858.

The fundamental difference between the timely filing of an EAJA claim and its litigation — "the fleshing out of the details," *Dunn*, 775 F.2d at 104 — is particularly clear in Mr. Scarborough's case because EAJA only requires that an applicant *allege* a lack of substantial justification; the "details" are necessarily litigated later and only if the government raises the substantial justification defense. Put otherwise, the government's attempt to equate EAJA's filing and pleading requirements is especially weak in this case because omitting the no-substantial-justification allegation could not possibly disturb the government's interest in finality, and the government has not argued otherwise.

**2.** This Court's decision in *Becker v. Montgomery*, 532 U.S. 757 (2002), provides Mr. Scarborough further support. That case posed the question whether the Sixth Circuit had properly dismissed, as jurisdictionally defective, Mr. Becker's timely-filed, but unsigned, notice of appeal. A timely notice of appeal is "jurisdictional" — that is, it is a prerequisite for invoking the jurisdiction of a federal court of appeals, *id.* at 765 — and, as its name connotes, its purpose is to put the appellee *on notice* that appellate review has been sought. However, *signing* the notice does not serve that purpose, the Court held, but rather is "aimed at stemming the urge to litigate irresponsibly." *See Edelman*, 535 U.S. at 116 (explaining *Becker*'s rationale). Thus, because Mr. Becker filed an amended notice containing the required signature promptly after the omission was brought to his attention, the amendment should have been accepted, and the Sixth Circuit erred in dismissing the appeal. *See Becker*, 532 U.S. at 768.

The parallels between Mr. Scarborough's case and *Becker* are difficult to ignore. Even if one assumes (wrongly, in our view) that EAJA's 30-day *filing* deadline is "jurisdictional," that deadline — and only that deadline — is analogous to the time period for *filing* a notice of appeal in *Becker*. On the other hand, EAJA's *pleading* requirements, particularly its technical requirement that the applicant allege that the government's position was not substantially justified, are analogous to the *non-jurisdictional* signature requirement in *Becker*, because both go to the form or content of the document and not to its filing, and neither is central to the policy behind the limitations period: putting the adverse party on notice of the claim. Finally, just as Mr. Becker promptly provided his signature after the omission was brought to his attention, Mr. Scarborough provided the no-substantial-justification allegation immediately after he learned of the

purported defect — insuring that no prejudice would result, assuming any prejudice were possible.[8]

## III. THE DECISION BELOW SHOULD BE REVERSED BECAUSE THE 30-DAY LIMIT DOES NOT APPLY TO THE NO-SUBSTANTIAL-JUSTIFICATION ALLEGATION.

Even assuming that EAJA's limitations period can be an absolute bar to fee applications that, in some respects, do not meet 28 U.S.C. § 2412(d)(1)(B)'s pleading requirements within 30 days of final judgment, the decision below should nevertheless be reversed. The Federal Circuit held that the 30-day limit applies to *all four* pleading requirements contained in section 2412(d)(1)(B). *See* Cert. App. 4a, 5a. But that is not what the statute says. Section 2412(d)(1)(B) contains two distinct and differently-worded sentences. The first sentence —

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[8] *Becker* and *Edelman* provide one further parallel to this case that applies to the no-substantial-justification allegation but not to EAJA's other pleading requirements. The signature requirement at issue in *Becker,* like the verification requirement at issue in *Edelman*, is intended to discourage irresponsible litigation. *See Edelman*, 535 U.S. at 116. It is difficult to discern a purpose for requiring an EAJA fee applicant to allege that the government's position lacked substantial justification, given that the government has the burden of proof on the substantial justification issue. However, it is possible that Congress wanted the no-substantial-justification allegation to serve a purpose similar to that which gave rise to the signature and verification requirements at issue in *Becker* and *Edelman*: to encourage the fee applicant to ponder the government's position on the merits before filing the application. If that is so, then the remedy here should be the same as in *Becker* and *Edelman*: An amendment supplying the missing allegation must be allowed, absent prejudice to the government.

which contains the 30-day filing deadline for an "application" — says that the "application" shall contain statements concerning prevailing-party status, the applicant's eligibility (net worth), and the amount of fees sought. The next sentence — which does not include any reference to the 30-day period or to the "application" — says that the "party shall also allege that the position of the United States was not substantially justified." *See* 28 U.S.C. § 2412(d)(1)(B). Thus, EAJA requires only that the party allege that the government's position lacked substantial justification — which Mr. Scarborough did in this case — and it does not require that it be done within 30 days of final judgment or in the fee application itself. This conclusion follows from 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." *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994) (internal quotation marks and citation omitted).

This view — that EAJA's 30-day limitations period does not apply to the no-substantial-justification allegation — is further supported by this Court's decision in *Edelman v. Lynchburg College*, which relied on the same principle of statutory construction in a circumstance highly analogous to that presented here. As explained in detail above (at 12-14), *Edelman* held that the requirement that an EEOC charge be filed within 300 days of the alleged discrimination, contained in one subsection of Title VII, did not apply to the requirement that the charge be verified, contained in another subsection that has no limitations period. Thus, the Court held, verification of a charge may occur after the filing period has expired and relate back to a timely filed unverified charge. *Edelman*, 535 U.S. at 112-16. Just as in *Edelman,* EAJA's 30-day filing requirement, contained in the first sentence of 28 U.S.C. § 2412(d)(1)(B),

should not be superimposed on the no-substantial-justification allegation requirement, which is contained in the second sentence and has no deadline at all.[9]

In addition to the powerful analogies between this case and *Edelman*, a distinction between the two cases also supports Mr. Scarborough's position. In *Edelman*, the statutory verification requirement of 42 U.S.C. § 2000e-5(b) applied to a "charge" of discrimination. Therefore, verification could plausibly, if not convincingly, be considered one of the characteristics "charges" must have in advance of the statutory deadline for filing them. *See Edelman*, 535 U.S. at 120 (O'Connor, J., concurring in the judgment). Here, by contrast, the second sentence of section 2412(d)(1)(B) does not refer to the "application" at all but only states what a "party" must allege. This point underscores that the second sentence does not describe a characteristic of the initial fee "application" that must be filed within 30 days of final judgment.

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[9]The Solicitor General filed a brief in *Edelman* arguing that the limitations period for filing an EEOC charge did not apply to verification of that charge. His argument there cannot be squared with his position here. As the Solicitor General put it:

> Section 706(b), which contains the verification requirement, does not refer to the time limits in Section 706(e), and Section 706(e) is silent as to whether the "charge" that must be filed within 300 days of the alleged discriminatory act must also be verified *at the time of filing*. While there is a statute of limitations for filing a charge, there is simply no statute of limitations for verification.

Brief for the United States and the EEOC, at 10, in *Edelman v. Lynchburg College*, No. 00-1072 (Aug. 30, 2001) (emphasis in original).

The government's only response to the plain language of section 2412(d)(1)(B) is to speculate that Congress placed what an application must "show" in a different sentence from what a party must "allege" in "an effort to preserve parallel sentence structure." *See, e.g.*, Opp. 8 n.1. That argument makes no sense because even if it were grammatically difficult to list all four pleading items in the first sentence of 28 U.S.C. § 2412(d)(1)(B), that would not explain why Congress did not include a 30-day time period in the second sentence of that section if it wanted that sentence to bear the meaning given to it by the government. In any event, use of two separate sentences was not grammatically necessary nor was use of one sentence the least bit difficult. If Congress had wanted to merge the two sentences into one, to subject the no-substantial-allegation requirement to the 30-day limit, it could have done so very easily, just as the Solicitor General did twice in its brief in opposition. Opp. 8, 15. The Federal Circuit also merged both sentences into one without grammatical incident. Cert. App. 4a.

Given EAJA's plain language, the Court need not inquire why Congress exempted the no-substantial-justification allegation from the 30-day limitations period. But there is good reason why Congress might have done so. As noted earlier, EAJA places the burden of demonstrating substantial justification on the government, not on the fee applicant to demonstrate a lack of substantial justification. *See* 28 U.S.C. § 2412(d)(1)(A) (fees "shall" be awarded to the prevailing party, "unless" the court finds the position of the government was substantially justified). Thus, the government must carry that burden to avoid payment of fees to a prevailing party. *See, e.g., True*, 250 F.3d at 419 n.7 (citing cases); H.R. Rep. No. 120, pt. 1, at 11, 13 (1985), *reprinted in* 1985 U.S.C.C.A.N. 140, 141; H.R. Rep. No. 96-1418, at 10-11, 16, 18 (1980), *reprinted in*

1980 U.S.C.C.A.N. 4989, 4995, 4997; *see also* Cert. App. 20a ("The legislative history pointedly reveals that this simple allegation was included 'to place the burden on the government to make a positive showing that its position and actions during the course of the proceedings were substantially justified.'") (quoting S. Rep. No. 96-974, at 10 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4726, 4992) (Mayer, C.J., dissenting). In light of that fact, it is difficult to believe that Congress would, in 28 U.S.C. § 2412(d)(1)(B), have erected an absolute bar against applicants who do not make the no-substantial-justification allegation in their initial filing — a bar that would impose serious harm on otherwise eligible fee applicants without any countervailing benefit.

## CONCLUSION

The Federal Circuit's decision should be reversed and the case remanded for proceedings on the merits of Mr. Scarborough's fee application.

Respectfully submitted,

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November 2003

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# APPENDIX

## UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS
## RULE 39
## [in effect in August 1999]

**a) Time for Filing.** An application pursuant to 28 U.S.C. § 2412 for award of attorney fees and other expenses in connection with an appeal must be filed with the Clerk within 30 days after this Court's judgement becomes final. See also 28 U.S.C. § 2412(d)(2)(G) and 38 U.S.C. § 7291(a). Such an application may be filed by facsimile sent to the Clerk of the Court.

**b) (Rescinded)**

**c) Response.** Within 30 days after service of the application, the Secretary shall file and serve a response, stating which elements of the application are not contested and explaining the Secretary's position on those elements which are contested.

**d) Reply.** Within 30 days after service of the Secretary's response, the applicant may file and serve a reply addressing those matters contested by the Secretary.

**e) Appendices.** The parties shall file as appendices to the application, response, and reply those relevant papers which are not already before the Court.

**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

MISC. NO. 8-01

IN RE: RULES 39, 41, AND 42 OF THE RULES OF PRACTICE AND PROCEDURE

Before KRAMER, *Chief Judge,* and FARLEY, HOLDAWAY, IVERS, STEINBERG, and GREENE, *Judges*

ORDER

Pursuant to the authority of 38 U.S.C. §§ 7263(b) and 7264(a) and consistent with 28 U.S.C. § 2071 (b) and (e), the Court has determined that there is an immediate need to amend Rules 39(a), (b), and (c), 41(b), and 42 of its Rules of Practice and Procedure. Accordingly, it is

ORDERED that the attached amendments to Rule 39(a), (b), and (c), 41(b), and 42 are published and will be effective on November 9, 2001. It is further

ORDERED that public comment on the amendments made by this order is invited. Such comment must be submitted to the Clerk of the Court at 625 Indiana Avenue, NW, Suite 900, Washington, DC 20004, by December 28, 2001.

DATED: November 1, 2001 BY THE COURT:

KENNETH B. KRAMER
Chief Judge

Attachments

## ATTACHMENT TO MISCELLANEOUS ORDER NO. 8-01

## RULE 39. ATTORNEY FEES AND EXPENSES

**(a) Time for filing**. An application pursuant to 28 U.S.C. § 2412 for award of attorney fees and/or other expenses in connection with an appeal or petition must be filed with the Clerk within 30 days after this Court's judgment becomes final, which occurs 60 days after entry of judgment under Rule 36 or, consistent with Rule 41(b), upon the issuance of an order on consent dismissing, terminating, or remanding a case. See Rule 25 (Filing and Service).

**(b) Supplemental application.** An appellant or petitioner whose application described in subsection (a) of this rule has been granted in whole or in part may, not later than 30 days after the Court action granting such application, file a supplemental application for attorney fees and other expenses in connection with the submission or defense of such subsection (a) application. See Rule 25.

**(c) Response.** Within 30 days after the date on which an application described in subsection (a) or a supplemental application described in subsection (b) is filed, the Secretary shall file and serve a response to the application or supplemental application, stating which elements of the application or supplemental application are not contested and explaining the Secretary's position on those elements that are contested.

*[Comment: The amendment to subsection (a) is issued concurrent with the Court's discontinuation of the practice of including in Clerk's orders regarding consent dispositions a caution regarding the filing deadline for an application under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (EAJA).*

*The amendment specifies the time at which a judgment of the Court becomes final. In light of the additional language, the statutory citations are deleted as unnecessary; the last sentence is replaced by a reference to Rule 25. Subsection (b) is added to provide specifically for the submission, once an initial EAJA application is granted, of a supplemental EAJA application requesting fees and expenses for the fee litigation itself; another reference to Rule 25 is added. Subsection (c) is amended (in light of the premature submission in some cases of EAJA applications prior to judgment becoming final), so as to start the Secretary's 30-day response time from the Court's filing of the EAJA application, rather than upon service of an application on the Secretary, which occurs at the time when a premature application is submitted. In the case of premature applications, unless previously returned to the appellant or petitioner by the Court, filing occurs, upon the Court's initiative, after judgment becomes final. Subsection (c) is also amended to provide a 30-day period for the Secretary to file a response to a supplemental EAJA application as provided for in new subsection (b).]*