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 REPLY BRIEF

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INTRODUCTION

An EAJA application is supposed to be filed within 30 days of final judgment. That application should contain three elements, which the government admits were timely provided in Mr. Scarborough's application. The applicant is also required to allege the following 10 words: "The position of the United States was not substantially justified." Although Mr. Scarborough did not utter those words within the 30-day period — which he maintains is not required — he supplied them immediately after the government brought the alleged omission to his attention. The government has never claimed any conceivable prejudice from this omission, nor does it contend that anything more than a pro forma recitation of the 10 words was required. Unlike the other elements of the application, on which Mr. Scarborough bore the burden of proof, Mr. Scarborough was not obliged to make any showing regarding substantial justification, which is an affirmative defense on which the government has the burden.

Despite all this, the government's position is that Congress barred the courts from considering Mr. Scarborough's fee application because the omission of the 10 words is a "jurisdictional" defect. The government persists in this argument, even though the fee litigation would have proceeded exactly the same way if Mr. Scarborough's amendment had been accepted, as it would had the 10 words been included in the initial application. The logic of the government's position is that, if the omission had gone unnoticed, and the fee issue had come to this Court on its merits, the Court would have been required to dismiss it because the Court of Appeals for Veterans Claims lacked "jurisdiction" over the fee application. As demonstrated in our opening brief, and as further shown below, the government's position cannot be sustained.

I. EAJA'S 30-DAY TIME LIMIT IS NOT JURISDICTIONAL, BUT RATHER IS SUBJECT TO THE COMMON-LAW DOCTRINES OF RELATION BACK AND TOLLING.

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

1. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), presented the question left open in *United States v. Locke*, 471 U.S. 84, 94 n.10 (1985) — "whether principles of equitable tolling, waiver, and estoppel apply against the Government when [the case] involves a statutory filing deadline." 498 U.S. at 94. The Court gave a simple, affirmative response: When Congress has waived the government's immunity, common-law exceptions to statutes of limitations apply "in the same way" as they do in "private suits." *Id.* at 95. Thus, unless Congress explicitly "provide[s] otherwise," the "general rule" is that statutory time limits running in favor of the government are not "jurisdictional." *Id.* at 95-96.

The government tries to limit *Irwin* drastically by implying that it applies only to claims of equitable tolling. Gov't Br. 32, 39. However, *Irwin* applied by its terms to waiver, tolling, and estoppel. Moreover, any such argument was put to rest by *Franconia Associates v. United States*, 536 U.S. 129 (2002), where the Court applied the *Irwin* presumption to the accrual of a limitations period running in favor of the government and reaffirmed its "recognition that *limitations principles* should generally apply to the Government 'in the same way that' they apply to private parties." *Id.* at 145 (emphasis added) (quoting *Irwin*, 498 U.S. at 95).

The government's brief never once mentions this "general rule" and instead operates under pre-*Irwin* precedents,

which assume that the government is entitled to special treatment when it invokes a limitations defense. *See* Gov't Br. 19 (citing pre-Irwin cases, including *Soriano v. United States*, 352 U.S. 270 (1957), whose reasoning was specifically repudiated in *Irwin*, 498 U.S. at 94-95). That assumption is fundamentally at odds with *Irwin*. Nor does the government point to anything in EAJA's text by which Congress overrode the presumption that limitation periods that run in favor of the government are not jurisdictional.

2. Far from overriding the *Irwin* presumption, EAJA's text provides additional support for the position that the 30-day period is not jurisdictional, because it reflects the fact that an EAJA application is filed in a court that *already* has jurisdiction over the underlying action. *See* Opening Br. 21. Before a time limit for a court filing can be considered "jurisdictional," the filing must, at the least, confer adjudicative power on the court in the first instance, and an EAJA application plainly does not do that. *See id.* at 21-22. The government's only response caricatures our position: that Congress must literally use the word "jurisdiction" "to establish a mandatory precondition for judicial consideration of a particular matter." Gov't Br. 20 n.3. That is not what we said. What we actually said is *exactly* what the government told this Court in *Kontrick v. Ryan*: "[U]nless 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.'" Br. for the United States, at 10, in *Kontrick v. Ryan*, No. 02-819 (U.S. July 17, 2003) (citation omitted). The Solicitor General wholly ignores the contrary position he just took in *Kontrick*, leaving the conclusion that when the government seeks to protect its financial interest as "a creditor in many bankruptcies," *id.* at 1, it will rely on the general rule that statutes of limitations are not "jurisdictional," but when it

invokes a limitations period, it will disregard that rule.[1]

3. Unable to find statutory language that supports its position, the government resorts to so-called "legislative history" — what it artfully describes as the "Senate Report on the text that became the 1985 EAJA," which said that EAJA's filing period "is jurisdictional and cannot be waived." Gov't Br. 29 (quoting S. Rep. No. 98-586, at 16 (1984)). Even if this report were genuine legislative history, it would not assist the government because a single snippet in a committee report cannot overcome the principle of statutory construction set forth in *Irwin*, which may only be rebutted if "Congress ... provide[s] otherwise." *Irwin*, 498 U.S. at 96.

In any event, the government's "legislative history" warrants no consideration. In fact,"[n]o Senate Report was submitted with th[e EAJA] legislation" enacted by the *99th Congress* in 1985. 1985 U.S.C.C.A.N. 132. As the government grudgingly concedes, Gov't Br. 29 n.7, the Senate Report upon which the government relies was prepared for a 1984 version of EAJA passed by the *98th Congress* and *vetoed* by the President. *See* H.R. Rep. No. 99-120, pt. 1, at 6 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 134; *cf. Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J.,

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[1]The Court recently issued its decision in *Kontrick*. The Court agreed with the government that the time limit established by Bankruptcy Rule 4004(a) is not "jurisdictional" because an objection to discharge filed under that Rule, like an EAJA application, does not invoke the court's subject-matter jurisdiction, *i.e.*, it does not serve to "delineat[e]" a "class[] of cases" "within a court's adjudicatory authority." *Kontrick v. Ryan*, ___ U.S. ___, 2004 WL 57261, *7 (Jan. 14, 2004). *Kontrick* held that the enforcement of Rule 4004(a)'s time limit had been forfeited by failure to timely raise a tardiness objection, and it did not reach the question whether equitable tolling might also have excused the late filing. *Id.* at *8.

concurring). The inherent unreliability of that report is demonstrated by the more in-depth House Report that accompanied the bill that actually became law. That House Report contains the same general discussion of EAJA's limitations period and cites the same authority as did the 1984 Senate Report, *but it omits the language upon which the government relies.* H.R. Rep. No. 99-120, pt. 1, at 19-20 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 148. Indeed, it would have been anomalous for the 99th Congress to have made the limitations period strictly jurisdictional because, at the same time, it urged that the period not be construed in an "overly technical" manner as a "trap for the unwary." *Id.* at 18 n.26; H.R. Rep. No. 99-120, pt. 2, at 6 & n.26 (1985), *reprinted in* 1985 U.S.C.C.A.N. 151, 156.[2]

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[2]The government's other "legislative history" is feeble at best. The government says that, when considering reauthorization of EAJA in 1983, Congress was "specifically informed" that the "established backdrop" was that the 30-day period is "jurisdictional." Gov't Br. 28. However, the government's citation is to a prepared statement of an Assistant Attorney General, who, in urging a statutory definition of "final judgment" that Congress did not enact, mentioned in passing that the period is "jurisdictional," without citing any authority. *Reauthorization of EAJA: Hearing Before the Subcomm. on Admin. Practice and Proc. of the Senate Comm. on the Judiciary* ("1983 Hearing"), 98th Cong., 1st Sess. 32 (1983). The government's other citations are even weaker: a private lawyer's EAJA practice manual, which cites a lone, pre-*Irwin* Court of Claims' decision, *id.* at 75; a brief synopsis of that decision in a 1982 digest of EAJA cases prepared by DOJ's Office of Legal Policy, *EAJA: Hearing Before the Subcomm. on Agency Admin. of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 36 (1982); and a law review article citing that same decision. *Id.* at 161. Finally, the government makes the absurd statement that "Congress rejected an amendment" that would have permitted extensions of the 30-day period. Gov't Br. 29. Congress never "rejected" anything. The government's citation is not to a floor vote, an introduced bill, or even a committee mark-up, but to a brief suggestion from the Chair

(continued...)

4. The government suggests that the *Irwin* presumption may be disregarded here because that presumption applies only where a statute creates a right of action against the government that is precisely analogous to a right of action against a private party. Gov't Br. 39-41. This argument fails for two reasons.

First, *Irwin* does not demand a private analogue. *Irwin* holds, quite simply, that there is a "*general rule*" under which limitations doctrines applicable in private litigation also apply in litigation involving the government, unless Congress provides otherwise. *See also Franconia Associates*, 536 U.S. at 145. Litigation against the government exists because Congress has enacted legislation creating rights against the government. Those rights are often peculiar to the relationship between the government and the citizenry, concerning matters such as the administration of government benefit programs or how the government contracts with private parties. Thus, many statutes creating causes of action against the government will apply only to government defendants and will not themselves contain a right of action applicable to private litigants. In other words, the government's demand for a private analogue would render *Irwin* largely a nullity.

The D.C. Circuit recently made this very point in a case involving whether equitable tolling applies under the Privacy Act, 5 U.S.C. § 552a, which creates rights only against federal agencies:

> We think th[e government's position] too narrow a reading of *Irwin*. Because much litigation against the

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[2](...continued)
of the Administrative Conference that he believed "worthy of the [Senate Judiciary] Committee's consideration." 1983 Hearing at 14-15.

> Government arises under statutes that do not apply to private parties, a rule that excluded such litigation would hardly be a "general rule to govern ... suits against the Government." Although the Court pointed out that "[t]ime requirements in lawsuits between private litigants are customarily subject to 'equitable tolling,'" we do not believe it thereby intended to make the presumption it was announcing contingent upon the presence of a parallel cause of action against a private party in the statute at issue. Rather, we believe the Court meant simply that it is reasonable to presume the Congress, unless it said otherwise, expected the Government to face equitable tolling in litigation because equitable tolling is a traditional feature of the procedural landscape.

Chung v. U.S. Dep't of Justice, 333 F.3d 273, 276 (D.C. Cir. 2003) (citations omitted).

Second, even if some sort of private analogue were required by *Irwin*, it surely exists in this case. Subsection (d) of EAJA is a fee-shifting statute that abrogates the "American Rule" and allows, under specified circumstances, prevailing parties to recover their attorney's fees against the United States. It is analogous to dozens of other "prevailing party" fee-shifting statutes that do, in fact, apply to suits between private litigants. *See, e.g.*, 42 U.S.C. § 2000e-5(k) (Title VII); 15 U.S.C. 1692k(a)(3) (Fair Debt Collection Practices Act); 29 U.S.C. § 2617(a)(3) (Family and Medical Leave Act). The government's brief proves our point. It maintains that EAJA subsection (b), 28 U.S.C. § 2412(b) — which authorizes fees against the United States under common-law exceptions to the "American Rule" — is analogous to private-party litigation, *not because EAJA subsection (b) itself provides fees to private*

parties but because some other source of law already does so. *See* Gov't Br. 39. That is precisely the situation here. EAJA subsection (d) is directly analogous to *other* fee-shifting statutes that govern private litigation.[3]

For all of these reasons, the *Irwin* presumption applies here. Thus, the remaining question, to which we now turn, is whether Mr. Scarborough's fee application should have been considered timely under two doctrines ordinarily applicable to statutes of limitations — relation back and tolling.

B. 1. Relation Back. Like the accrual rule at issue in *Franconia Associates,* or the tolling, estoppel, and waiver concepts referenced in *Irwin*, relation back is a traditional common-law doctrine meant to mitigate the unfairness of unyielding applications of statutes of limitations. Relation back is also the doctrine that best fits the situation here. Unlike a tolling, estoppel, or waiver case, where the party seeking forbearance has filed late, Mr. Scarborough filed on time. As with any legitimate relation-back request, Mr. Scarborough sought only to amend his timely filing on a matter on which the government already had notice.

The government does not deny that Mr. Scarborough's amendment qualifies for relation back, as that amendment arose out of the same transaction or occurrence that is the subject of the fee application itself. It argues only that relation back under

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[3] *Franconia Associates*, 536 U.S. 129, confirms that, if a private analogue is required, the analogy between EAJA and other fee-shifting statutes is sufficient. That case involved a contract suit under the Tucker Act, which establishes no private analogue, though there are roughly similar private contractual rights of action. *Franconia Associates* did not hesitate to apply the *Irwin* presumption, *id.* at 145, without suggesting that a private analogue was required, or, if it was, that one was lacking.

EAJA "is not supported by the text of section 2412(d) or the Federal Rules of Civil Procedure." Gov't Br. 20. That argument misses the mark. Given the *Irwin* presumption, we need not show that EAJA's text explicitly refers to relation back. Rather, relation back applies here because it is consistent with the "presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States v. Texas,* 507 U.S. 529, 534 (1993).

For the same reason, Mr. Scarborough need not point to direct textual support in the Federal Rules of Civil Procedure for the proposition that relation back is allowed under EAJA. It is enough that Rule 15(c) carries forward a long-standing common-law tradition, *see* Opening Br. 28-29, and that relation back was "well recognized" before its codification in the Federal Rules. 1937 Adv. Comm. Note to Rule 15(c). In this regard, the government criticizes our citation to *New York Central & Hudson River Railroad Co. v. Kinney*, 260 U.S. 340 (1922), implying that its emphatic embrace of the relation-back doctrine was aberrational and stating that, prior to the Federal Rules, "there was no unequivocally established rule." Gov't Br. 28 n.6. That is not so. *Kinney* is one of any number of pre-Federal Rules cases showing that relation back was a well-entrenched general rule. *See, e.g., Seaboard Air Line Ry. v. Koennecke*, 239 U.S. 352, 353-54 (1915); *Missouri, Kansas, & Texas Ry. Co. v. Wulf*, 226 U.S. 570 (1913). More important, the government does not cite a single case — whether involving amendments to complaints, to other pleadings, or to administrative filings — that either questions the legitimacy of the relation-back doctrine or remotely suggests that Mr. Scarborough's amendment should have been rejected under it.

Finally, the government fundamentally misapprehends

our reliance on *Edelman v. Lynchburg College*, 535 U.S. 106 (2002). The government goes to great length (at 26-34) to explain why, in its view, the considerations regarding EEOC discrimination charges under which relation back was permitted in *Edelman* are not pertinent here. But that detour into EEOC practice misses our point (and presumably this Court's point in remanding this case for reconsideration in light of *Edelman*, *see* 536 U.S. 920 (2002)). Our reliance on *Edelman* is simple. *See* Opening Br. 29. *Edelman* explained that both state and federal courts consistently employ the relation-back doctrine. 535 U.S. at 116. Principally for that reason, the Court held that relation back also applies to amendments to EEOC discrimination charges, and it strongly suggested that the doctrine would apply to administrative law generally. *See id.* ("if relation back is a good rule for courts of law, it would be passing strange to call it bad for an administrative agency."). At bottom, then, the government's position is that relation back is a good rule for complaints and other pleadings, *see* Fed. R. Civ. P. 15(c); for administrative agencies, *Edelman*, 535 U.S. 106; and for most court filings that are not pleadings, *see id.* at 116 (discussing *Becker v. Montgomery*, 532 U.S. 757 (2001)); but it is not a good rule for fee applications, at least where fees are sought from the government. That position is at odds with EAJA, decisions of this Court, and common sense.[4]

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[4]In any event, the government's bases for distinguishing *Edelman* are either irrelevant or favor Mr. Scarborough. For instance, the government claims that, although an employer need not respond to an unverified EEOC charge, the government faces a significant burden in responding to an incomplete EAJA application. Gov't Br. 26. As explained in our opening brief (at 36 & n.8, 39-40), omission of the no-substantial-justification allegation cannot possibly harm the government since it has the burden of showing substantial justification if it wishes to avoid fees. Moreover, fees may be denied in the highly unlikely event that the (continued...)

2. Equitable Tolling. The government argues that Mr. Scarborough waived his equitable tolling argument. It also maintains that the equitable tolling doctrine does not excuse Mr. Scarborough's omission of the no-substantial-justification allegation. Neither contention is correct.

a. The government's waiver argument borders on the frivolous. The government asserts that Mr. Scarborough did not raise the tolling argument or cite *Irwin* until his reply brief in the Federal Circuit. However, Mr. Scarborough raised equitable tolling, as well as the equitable principles enunciated in *Dunn v. United States*, 775 F.2d 99 (3d Cir. 1985), and *Singleton v. Apfel*, 231 F.3d 853 (11th Cir. 2000), in *both* his opening and reply briefs in the Federal Circuit. Brief for Appellant, at 3-4 (arguing that, in light of government's misconduct, "the government should be estopped to assert the defense of a defective pleading."), 5-10 (same), in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Sept. 29, 2000); Reply Brief for Appellant, at 3-5, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Jan. 24, 2001). Indeed, in the Federal Circuit itself, the government responded to Mr. Scarborough, asserting that, regardless of the facts, his application was barred because the 30-day period imposed an absolute jurisdictional bar. Brief for Respondent-Appellee, at 7 n.4, in *Scarborough v. Gober*, No.

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[4](...continued)
government is actually prejudiced by a pleading omission. *See, e.g., Singleton v. Apfel*, 231 F.3d 853, 858 (11th Cir. 2000). The government also claims that although "background judicial practice" favored relation back in *Edelman*, it disfavors relation back under EAJA. Gov't Br. 27. That argument cuts the other way. As explained in the text, *Edelman* transported "background judicial practice" to the administrative law context. Mr. Scarborough seeks only to apply "background judicial practice" in a *judicial* context.

00-7172 (Fed. Cir. Jan. 9, 2001).[5]

Equally important, at three stages before the Federal Circuit and this Court — in his first petition for rehearing en banc, in his first petition for certiorari, and in briefing on remand from this Court — Mr. Scarborough continued to press his equitable tolling argument, and all three times the government argued the merits of equitable tolling without mentioning waiver. *See* S. Ct. Rule 15.2 (respondent's brief in opposition should bring to this Court's attention any purported defect in issue raised in petition). Not until its response to Mr. Scarborough's second request for rehearing en banc after this Court's remand did the government breathe a word about waiver. And there it briefly suggested only that Mr. Scarborough should be defaulted for failing to use the magic word "tolling," while acknowledging that he raised the substance of the argument. *See* Corrected Appellee's Resp. to Pet. for Rehearing En Banc, at 14 & n.8, in *Scarborough v. Principi*, No. 00-7172 (Fed. Cir. Apr. 3, 2003). Thus, if anyone has waived an argument, it is the government, by arguing the merits of the tolling issue over the course of many briefs without even suggesting that Mr. Scarborough had forfeited it. *See, e.g., Engle v. Isaac*, 456 U.S. 107, 125 n.26 (1981) (declining to consider habeas corpus petitioner's claim that

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[5]The fact that Mr. Scarborough initially called his argument "estoppel" rather than "tolling" is not a basis for finding waiver, particularly given the close relation between the two doctrines. *See Nelson v. Adams*, 529 U.S. 460, 469 (2000) (rule that issues must be raised below to be preserved "does not demand the incantation of particular words; rather it requires that the ... court be fairly put on notice of the substance of the issue."). Indeed, what this Court in *Irwin* characterized as a basis for tolling, the D.C. Circuit has characterized as a basis for estoppel. *See Chung*, 333 F.3d at 278-79. *See also Elder v. Holloway*, 510 U.S. 510 (1994) (no need to cite a particular case to preserve argument).

government waived an argument because petitioner's waiver argument had itself been waived); *see also Kontrick*, 2004 WL 57261, *8-*9.[6]

b. On the merits, the government's entire argument is premised on the erroneous notion that tolling is never available where a lawyer has made an avoidable mistake. Gov't Br. 32-34. To get to that point, the government must overlook that there are two entirely distinct tolling categories — (1) "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period" and (2) where the claimant has been "induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96. To be sure, the second tolling category demands more than a claimant's lawyer's "garden variety claim of excusable neglect" (which makes sense, since the focus in the second category is on the *adversary's* misconduct). *Id*. But it is clear that this requirement does not apply to the first tolling category, since, by definition, in those cases, the lawyer has made an avoidable mistake — filing a defective pleading. Indeed, the category-one cases cited with approval in *Irwin* involved avoidable mistakes: The lawyers filed timely, but defective, pleadings in the wrong court, *id.* at 96 n.3, and they did not claim any misconduct by an adversary.[7]

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[6]As in its opposition to certiorari (at 13), the government also claims that the tolling issue is "not ripe" because it was not "decided below." Gov't Br. 37. That argument makes no sense. The Federal Circuit did not *explicitly* address tolling for an obvious reason: It held that EAJA's pleading requirements are "jurisdictional" and not subject to *any* exceptions. Cert. App. 5a-10a.

[7]Indeed, all five cases cited by the government for the proposition that tolling never applies when the claimant "is responsible for the lateness (continued...)

Aside from its efforts to entirely evade category-one tolling, the government does not question that Mr. Scarborough meets the test for tolling. He filed a (purportedly) "defective pleading" well within the "statutory period," and no one disputes that he "actively pursued" his EAJA remedies. As noted, *Irwin* cited cases in which tolling was allowed even though the litigant timely filed a complaint *in the wrong court*, which might lead to confusion or prejudice. If anything, the litigants in those cases were less deserving of forbearance than Mr. Scarborough. He "actively pursued his judicial remedies" *in the correct court*, by filing a timely fee application that was defective, if at all, only because it was missing a one-sentence legal conclusion, whose omission prejudiced no one.

Mr. Scarborough also contends that he meets *Irwin*'s second tolling category — that his purported error was induced by the government's misconduct. In this regard, *the government does not deny that it deliberately avoided responding to Mr. Scarborough's fee application to induce what it later claimed was an irreparable jurisdictional defect.* Thus, we respond only to three points.

First, the government claims that "[p]etitioner's

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[7](...continued)
of a submission," Gov't Br. 33, are *category-two* cases where the claimant simply filed late, *see, e.g., Johnson v. Hendricks*, 314 F.3d 159 (3d Cir. 2002), not *category-one* cases, such as Mr. Scarborough's, where the claimant filed a timely, but purportedly defective, pleading. *See Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999). Ironically, four of these five cases hold or reaffirm that the habeas corpus filing period under the Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. § 2244(d), is *not* jurisdictional, but rather is subject to equitable tolling. *See, e.g., Baldayaque v. United States*, 338 F.3d 145, 150 (2d Cir. 2003); *Johnson,* 314 F.3d at 162.

uncontroverted ... representation" that his omission "was due to a mere attorney error necessarily defeats his equitable tolling argument." Gov't Br. 34. That statement is misleading. Although Mr. Scarborough omitted the no-substantial-justification allegation in his *initial* filing, his argument is that the government's violation of CAVC Rule 39(c) induced the untimeliness of his *amendment*.

Second, the government claims it had no duty to respond to the fee application, at a point when Mr. Scarborough could timely amend, because the application was filed "prematurely." Gov't Br. 36. That argument is wrong on its own terms. At the relevant time, Rule 39(c) required the government to respond to *all* EAJA applications — "premature" or not — within 30 days of service on the government, *see* Opening Br. at App. 1a, and, in later amending Rule 39(c), the CAVC acknowledged just that. *Id.* at App. 4a. More fundamentally, the government's premise is wrong. As explained in our opening brief (at 8 n.2), Mr. Scarborough's fee application was not premature and should have been filed by the CAVC Clerk when it was submitted.

Finally, the government says an October 4, 1999, CAVC order permitted the government to respond to Mr. Scarborough's August 19, 1999 fee application "after the last day for filing a complete EAJA application." *See* Gov't Br. 36. That order is irrelevant. The salient fact is that, under CAVC Rule 39(c), the government was required to respond to the fee application by September 20, 1999, *before the CAVC order was issued*, and *that response* would have put Mr. Scarborough on notice of the alleged defect well before the 30-day period had run. In sum, if the government had played by the rules, the amendment would have been filed within the 30-day period.

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

Even if EAJA's 30-day limit is a "jurisdictional" bar to an *untimely* fee application, it is not a bar to a *timely* but incomplete application, which may be amended to supply missing allegations, absent prejudice to the government. That is the view of every circuit to have addressed the question, except for the Federal Circuit. *United States v. True*, 250 F.3d 410, 420-21 (6th Cir. 2001); *Singleton*, 231 F.3d at 857-58; *Dunn*, 775 F.2d at 103-04. The government responds by branding these rulings "judicial policy-making" and proclaiming EAJA's pleading requirements "jurisdictional" in all respects because they involve "the interpretation of a waiver of sovereign immunity." Gov't Br. 30. That broad assertion is addressed in Part I.A. above; as for the remaining arguments on this point, we rest on our opening brief (at 33-36).

III. THE 30-DAY LIMIT DOES NOT APPLY TO THE NO-SUBSTANTIAL-JUSTIFICATION ALLEGATION.

EAJA's 30-day period is contained in the same sentence of 28 U.S.C. § 2412(d)(1)(B) as the three EAJA pleading requirements on which the applicant has the burden, but not in the sentence concerning substantial justification, on which the government has the burden. Thus, the limitations period does not apply to the no-substantial-allegation requirement.

The government has two responses, one based on text and one based on policy, and both unpersuasive. First, the government argues that the second sentence incorporates the 30-day limitations period, because by saying that a party shall

"also" make a no-substantial-justification allegation, that sentence "expressly extends the 30-day deadline to the allegation requirement." Gov't Br. 16. It achieves this result by proclaiming that, in some dictionaries, "one meaning of 'also' is in the same manner." *Id.* But this syntactic magic does violence to the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted).

The usual meaning of "also" is "in addition" or "too," *see, e.g.*, *Webster's II New Riverside University Dictionary* 96 (1994) (def. 1) — as in "Mary's brief is due on Wednesday, and John's brief is *also* due on Wednesday" — and that is the meaning intended in section 2412(d)(1)(B). The first sentence lists three items to be included in an EAJA "application," and the second sentence lists *another* item that the "party," not the "application," shall *also* allege. Indeed, the two key differences between the sentences — the lack of the 30-day requirement in sentence two and that sentence one refers to the "application" while sentence two refers to the "party" — simply reinforce that "in the same manner" is *not* the definition of "also" that Congress intended. *See* Opening Br. 37-38.

Second, the government says it "would have made little sense" to have exempted the no-substantial-justification allegation from the limitations period. But this statement flows from the government's fundamental misunderstanding that "making the no-substantial-justification allegation ... is necessary to establish the government's liability for fees in the first place." Gov't Br. 17. That is not so. The government has the burden of showing substantial justification, and the fee applicant need not prove anything about the strength of the

government's position on the merits. *See* Opening Br. 39-40. Therefore, substantial justification is the only topic listed in section 2412(d)(1)(B) that need not be adjudicated before an award can be made. "[T]his simple allegation" reminds the government that, to avoid paying its adversary's fees, it must "make a positive showing that its position and actions during the course of the proceedings were substantially justified.'" Cert. App. 20a (Meyer, C.J., dissenting). Thus, Congress had no need to subject it to the 30-day limitations period.

IV. THE GOVERNMENT'S POLICY ARGUMENTS UNDERMINE ITS POSITION.

The government says that this Court must apply a hard-and-fast rule, lest EAJA applications be delayed and spawn "a second major litigation." *E.g.*, Gov't Br. 24. As for the latter, it is inconceivable that allowing amendments to simple pleading requirements will greatly complicate litigation. After all, three circuits allow amendments to EAJA applications, and the government, which is the defendant in all EAJA cases, has not offered a shred of evidence that EAJA practice in those circuits has caused any problem. Moreover, EAJA pleading omissions will not proliferate under the relation-back rule advanced by Mr. Scarborough, since such omissions offer no opportunity for gamesmanship, and no sensible lawyer would omit a required pleading intentionally. *Compare Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988). Moreover, under a relation-back rule, amendments that actually prejudice the government may be denied.

The delay argument is difficult to take seriously. As with any claim for a money judgment, delay *benefits* the defendant, which can hang on to money that may ultimately be payable to a claimant. On the other hand, the EAJA applicant,

being "hungry to see some cash," *McDonald v. Schweiker*, 726 F.2d 311, 314 (7th Cir. 1983), will generally file for fees as soon as possible.

Mr. Scarborough's situation is a case in point. He filed his application immediately after he won on the merits, only to be told — wrongly — that his application was premature. Despite the government's lament that this fee dispute has taken "*four years*," Gov't Br. 26 (emphasis in original), if the government had wanted to avoid delay, after service of the fee application, it could have brought the alleged defect to Mr. Scarborough's attention or simply not raised it (given the small chance that the CAVC would have noticed such a minor matter on its own). But just the opposite occurred. The government aggressively pressed its jurisdictional defect argument. And while Mr. Scarborough adhered to briefing deadlines before the CAVC, the Federal Circuit, and this Court, the government sought (and received) extensions at every turn in every forum. *E.g.*, CAVC docket entry 11/3/99; Fed. Cir. docket entries 3, 5, 14, & 16. Although the government had the right to do so, its claim of delay rings hollow.

The government attempts to mitigate its harsh and picayune position by adopting the Federal Circuit's view that, if the application does not "completely fail" to address one of the pleading requirements, the applicant will be given "some latitude" to supplement the application. Gov't Br. 31 (quoting Cert. App. 9a). The "some latitude" standard provides no guidance to litigants or the courts. Indeed, under that standard, the Federal Circuit has excused an EAJA applicant's failure to make any allegation about his fee eligibility (net worth) on the ground that the net-worth allegation is "subsumed" by an applicant's statement that he was the prevailing party, *see Bazalo v. West*, 150 F.3d 1380, 1384 (Fed. Cir. 1998), even

though there is no obvious relation between the two concepts. By contrast, the Federal Circuit affirmed the dismissal of Mr. Scarborough's application on the ground that it did not include a no-substantial-justification allegation, even though it contained the prevailing-party allegation, which, if it "subsumes" anything, should subsume the closely-related allegation that the government's position was not substantially justified. Moreover, it is the *government* that, in the first instance, will have to be trusted not to file motions to dismiss where "some latitude" should be allowed. If recent CAVC decisions are any indication, the "some latitude" standard will result in all sorts of government-provoked disputes of the kind that the government claims to deplore and lead to decisions even more hyper-technical than the decision below. *See Urquhardt v. Principi*, 2003 WL 1463586 (Vet. App. 2003); *Billey v. Principi*, 2003 WL 21190651 (Vet. App. 2003).[8]

CONCLUSION

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

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[8]The government implies that harsh interpretations such as the Federal Circuit's would only deprive lawyers, not their clients, of money. Gov't Br. 25. Not so. As in Mr. Scarborough's case, in veterans disability cases, the lawyer's statutory contingency fee, which is usually 20% of the veteran's past-due benefits, 38 U.S.C. § 5904(d)(1), is reduced dollar-for-dollar by the EAJA award. *See* Pub. L. No. 102-572, § 506(c), 106 Stat. 4513 (1992). Thus, an EAJA award puts money in the prevailing veteran's pocket. The same is true in social security cases, *see* Pub. L. No. 99-80, § 3, 99 Stat. 186 (1985), which comprise the great majority of EAJA awards. Admin. Office of the U.S. Courts, *1990 Annual Report of the Director — Report of Fees and Expenses Awarded Under the Equal Access to Justice Act* I-24 & Table 20.

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