No. 25-1223

# In the Supreme Court of the United States

KEVIN ISAAC MONTOYA PALACIOS, PETITIONER,

*v.*

VERNON LIGGINS, ACTING FIELD OFFICE DIRECTOR, BALTIMORE FIELD OFFICE, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL.

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

## UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AND BRIEF OF *AMICI CURIAE* EVA DALEY AND ADOLPH MICHELIN IN SUPPORT OF NEITHER PARTY


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**UNOPPOSED MOTION FOR LEAVE TO FILE OUT OF TIME BRIEF OF EVA DALEY AND ADOLPH MICHELIN IN SUPPORT OF NEITHER PARTY**

Pursuant to Rules 21 and 37.2 of the Rules of this Court, Eva Daley and Adolph Michelin respectfully move for leave to file the accompanying brief as *amici curiae* in opposition to the petition for a writ of certiorari out of time:

This case is currently scheduled for consideration at the Court's June 18, 2026 Conference. The proposed amicus brief is being filed promptly after counsel for *amici* learned of this case, the petition for certiorari, and the government's response supporting review.

*Amici* are immigrants who successfully challenged prolonged immigration detention through habeas corpus and then obtained attorneys' fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). Their cases present the same question raised here: whether habeas actions challenging immigration detention qualify as "any civil action" under EAJA. The Third and Tenth Circuits resolved that question in *amici*'s favor in recent published, precedential opinions. *See Michelin v. Warden Moshannon Valley Corr. Ctr.*, 169 F.4th 418 (3d Cir. 2026), *reh'g en banc denied*, 169 F.4th 160 (3d Cir. 2026); *Daley v. Ceja*, 158 F.4th 1152 (10th Cir. 2025), *reh'g en banc denied*, No. 24-1191 (10th Cir. Apr. 3, 2026).

Under Rule 37.2, an amicus curiae brief submitted in connection with a petition for certiorari is due no later than the deadline for the brief in opposition, and an amicus must ensure that counsel of record for all parties receive notice of its intention to file at least 10 days before that deadline. *Amici* were unable to comply with either requirement because they had no notice—actual or constructive—that this case existed. *Amici* therefore respectfully move, pursuant to Rules 21 and 37.2, for leave

to file the accompanying brief out of time and without having provided 10 days' advance notice to the parties.

The notice and timing requirements of Rule 37.2 presuppose that potential *amici* can learn that a case is pending. Here, ordinary public notice was absent. The Fourth Circuit issued no published or unpublished opinion; it entered only a two-sentence order granting "appellant's consent motion for summary affirmance." That order was not readily accessible in ordinary legal databases and generated none of the public visibility that an appellate decision on a question of this significance ordinarily would—for affected litigants, immigrant-rights organizations, or counsel litigating the identical question in other circuits. Counsel for *amici*—who represent the prevailing parties in the Third and Tenth Circuit decisions presenting the same question—first learned of this case on June 9, 2026, when government counsel in the district court proceedings in *Michelin* advised that a petition for certiorari had been filed here and that the government had supported review. By that date, both the deadline for an amicus brief and the date by which 10 days' notice could have been given had passed.

Upon learning of this case, counsel for *amici* acted immediately. Counsel obtained and reviewed the Supreme Court docket and filings (which, pursuant to Rule 34.6 and Paragraph 9 of the Court's Guidelines for electronic filings, are not publicly available through the Court's online docket), prepared the accompanying amicus brief, and on June 10, 2026 notified counsel of record for all parties of *amici*'s intention to file—one day after first learning this case existed. This motion and the accompanying brief are being submitted two days after counsel learned of the case. *Amici* have thus provided the parties the maximum notice, and the Court the earliest filing, that the circumstances permitted.

The accompanying brief will assist the Court because it brings to the Court's attention serious vehicle defects the parties have not adequately presented—indeed, not presented at all. In particular, *amici* explain that petitioner's EAJA fee application was filed, denied, and appealed before the statutory window for filing that application even opened; petitioner then affirmatively sought summary affirmance of the judgment against him, skipped rehearing, and petitioned for certiorari with the government's support. *Amici* respectfully submit that this sequence makes the case an exceptionally poor vehicle for deciding the question presented.

The proposed brief also explains why, if the Court is interested in the EAJA question, it should await or consider a proper vehicle. *Amici*'s cases present the same question in recent, reasoned, precedential decisions after ordinary adversarial litigation—and involving timely fee requests submitted after the judgment became final. Those cases remain available for orderly consideration: the government has obtained an extension of time to seek certiorari from the Third Circuit's decision in *Michelin*, and the time to seek certiorari from the Tenth Circuit's decision in *Daley* has not expired.

Granting leave will not prejudice the parties. The Court's Rules no longer require party consent for amicus filings, and the purpose of the 10-day notice requirement—affording parties an opportunity to address an amicus submission—is fully served here: both parties support certiorari, both have been served with the accompanying brief, and both retain a full opportunity to respond before the petition is considered. The accompanying brief is short and addresses only the suitability of this case as a vehicle—a matter squarely relevant to the Court's discretionary review and not addressed by either of the parties. Should the Court conclude that the parties require additional time to

respond, *amici* respectfully suggest that consideration of the petition be deferred to a later Conference, including pending the government's decision—currently due on July 1 and July 2, 2026, respectively—whether to seek certiorari in *Michelin* and/or *Daley*. This Court regularly grants motions to submit out-of-time cert-stage amicus briefs. *E.g.*, *Seila Law LLC v. Consumer Prot. Bureau*, 589 U.S. 1031 (2019) (granting two such motions); *Cloer v. Sebelius*, 566 U.S. 956 (2012); *DeWeese v. American Civil Liberties Union of Ohio Found., Inc.*, 565 U.S. 930 (2011).

*Amici* have notified counsel for all parties of their intent to file this motion and accompanying brief. Petitioner and respondents do not oppose this motion.

For these reasons, *amici* respectfully request that the Court grant leave to file the accompanying brief as *amici curiae* in opposition to certiorari out of time.

Respectfully submitted.

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**TABLE OF CONTENTS**


Page

Interest of *Amici Curiae* ..... 1

Introduction ..... 1

Argument ..... 2

I. This case is a defective vehicle ..... 2

II. If review is warranted, the Court should await a proper vehicle such as *amici*'s cases ..... 4

Conclusion ..... 5

## INTEREST OF *AMICI CURIAE*[1]

Eva Daley and Adolph Michelin are immigrants who successfully challenged their prolonged immigration detention through habeas petitions under 28 U.S.C. § 2241. After they prevailed in those habeas actions and their judgments became final, *amici* sought and obtained attorneys' fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d).

The government appealed the fee awards in *amici*'s cases, presenting the same question raised by the petition here: whether a habeas action challenging immigration detention qualifies as "any civil action" under EAJA. The Third and Tenth Circuits answered yes in published precedential opinions. *See Michelin v. Warden Moshannon Valley Corr. Ctr.*, 169 F.4th 418 (3d Cir. 2026), *reh'g en banc denied*, 169 F.4th 160 (3d Cir. 2026); *Daley v. Ceja*, 158 F.4th 1152 (10th Cir. 2025), *reh'g en banc denied*, No. 24-1191 (10th Cir. Apr. 3, 2026).

*Amici* have a direct interest in the question presented. An adverse ruling in a poorly postured vehicle could undermine the fee awards *amici* obtained after full, adversarial litigation in the circuits below. *Amici* therefore have a strong interest in ensuring that if this Court takes up the question, it does so in a case that actually permits clean, reliable resolution. This case does not.

## INTRODUCTION

This case is a defective vehicle. The Court is being asked to decide a recurring statutory question on a record that lacks both a timely EAJA application and the ordinary indicia of adversarial testing. Petitioner's EAJA

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amici* or its counsel made a monetary contribution to its preparation or submission.

fee application was filed, denied, and appealed before the underlying habeas judgment became "final" and thus before the statutory period for filing such an application even opened. That timing problem creates a substantial antecedent question whether this Court can or should reach the EAJA issue in this case at all. And in their haste to place this case before the Court quickly, the parties abandoned the ordinary adversarial process that would have exposed that and other latent defects.

Myriad procedural irregularities reflect the lack of adversity. After securing a denial of his premature fee application, petitioner asked the Fourth Circuit to summarily affirm the judgment against him, and the government consented. Petitioner then skipped rehearing and sought certiorari, and the government supported review without flagging the vehicle problems. Neither party addressed whether the premature filing, denial, and appeal of petitioner's fee application poses an obstacle to this Court's review. Neither party addressed whether the judgment below might rest on alternative grounds.

This Court need not decide now whether the EAJA question ultimately warrants review. It should decide only that this case is not the right vehicle.

## ARGUMENT

### I. THIS CASE IS A DEFECTIVE VEHICLE

EAJA provides that a party "shall" file its fee motion "within thirty days of final judgment in the action," and defines "final judgment" as "a judgment that is final and not appealable." 28 U.S.C. §§ 2412(d)(1)(B), (d)(2)(G).

Petitioner did not follow that timing rule. After the district court's grant of habeas relief on January 22, 2026, the government had 60 days to appeal, until March 23. Fed. R. App. P. 4(a)(1)(B). The judgment thus was still appealable when petitioner filed his EAJA motion on February 16. It was still appealable when the district

court denied that motion on February 19. And it was still appealable when petitioner appealed the EAJA fee denial on February 20.

Whether the Fourth Circuit could even review the district court's denial of petitioner's premature fee application is itself an open question. In *Melkonyan v. Sullivan*, 501 U.S. 89 (1991), this Court described an EAJA application filed before entry of a "final judgment" as premature and indicated that a district court lacks authority to entertain it. *Id.* at 103. Relying on *Melkonyan*, the Second Circuit vacated an EAJA denial entered on a premature application—notwithstanding the government's express decision not to contest prematurity. *United States v. 27.09 Acres of Land*, 1 F.3d 107, 110-11 (2d Cir. 1993). To be sure, this Court later held that § 2412(d)(1)(B)'s requirements are not "jurisdictional." *Scarborough v. Principi*, 541 U.S. 401, 413-14 (2004). But how *Melkonyan*'s rule should be characterized after *Scarborough*—and what follows for a merits denial entered and appealed before the statutory filing window opened—are unsettled questions that would precede any decision on the question presented.

The lack of adversarial testing at every stage makes this an unsuitable vehicle. The government apparently did not oppose petitioner's fee application as premature. Petitioner asked the Fourth Circuit to affirm the judgment against him, giving that court no incentive to take a hard look at the application of the law to the facts of this case. The Fourth Circuit instead issued an order granting summary affirmance on "consent." Pet. App. 1a.

Nor did the proceedings below give affected stakeholders ordinary notice that this issue was being positioned for immediate review in this Court. The Fourth Circuit issued no opinion. It merely affirmed.

After petitioner skipped rehearing and raced to this Court, the government supported certiorari without

taking any extensions or analyzing any vehicle issues. The government did not mention, as it has in many other cases, *e.g.*, *Baha v. United States*, 2020 WL 7587777, at *3 (Fed. Cl. Dec. 21, 2020), that petitioner's fee submission was facially premature under the statute—and thus petitioner lacked any entitlement to an EAJA award regardless of the merits of his case. Nor did the government raise the possibility that the judgment might be affirmed on alternative grounds—*e.g.*, because the government's position was "substantially justified" or "special circumstances make an award unjust," 28 U.S.C. § 2412(d)(1)(A).[2] This contrasts with the government's routine practice of opposing review on the ground that a petitioner would lose on remand. *See, e.g.*, BIO at 14-15, *Barnes v. United States*, No. 25-936 (U.S. May 2026).

Granting certiorari under these circumstances is risky. Just last Term, after full merits briefing and oral argument, the Court dismissed the writ in a closely watched class-action case when a threshold dispute emerged over whether the operative certification order was properly before the Court. *Lab'y Corp. of Am. Holdings v. Davis*, 605 U.S. 327 (2025) (per curiam); *see id.* at 330–31 (Kavanaugh, J., dissenting from dismissal of certiorari as improvidently granted). There, at least, the respondents raised the defect. Here, no party raised it.

## II. IF REVIEW IS WARRANTED, THE COURT SHOULD AWAIT A PROPER VEHICLE SUCH AS *AMICI*'S CASES

*Amici*'s cases present the same question in proper vehicles. *Amici* obtained EAJA fee awards after they prevailed in their habeas actions, those judgments became final, and they demonstrated a fee award was warranted because they satisfied all of the statutory

[2] Tr. of Oral Argument at 18, *Chatrie v. United States*, No. 25-112 (U.S. Apr. 27, 2026) (statement of Alito, J.) ("[W]e can affirm on any ground that would support the judgment and was raised below.").

requirements. The government appealed. The parties fully litigated whether an immigration habeas action is a "civil action" under EAJA. National immigrant-rights organizations filed amicus curiae briefs. The Third and Tenth Circuits issued published precedential opinions squarely resolving the EAJA question in *amici*'s favor.

Those opinions provide what this case lacks: unquestionably clean vehicles, timely fee litigation, adversarial appellate presentation, reasoned analysis, and transparent development of the issue. They address the phrase "any civil action," EAJA's express exception for tort cases, the historic civil character of habeas corpus, the civil nature of immigration detention, the sovereign-immunity canon, the government's "hybrid" theory, and the contrary Fourth and Fifth Circuit decisions. *See Michelin*, 169 F.4th 418; *Daley*, 158 F.4th 1152.

Those cases remain available for this Court's orderly consideration. In *Michelin*, the government sought and obtained an extension until July 1, 2026, to file a certiorari petition, for the stated purpose of allowing the Solicitor General to decide whether to seek review. Seven days after seeking that extension, the Solicitor General filed a response in this case consenting to certiorari on the same question. The Tenth Circuit case likewise remains available; the government's deadline to seek certiorari is July 2, 2026.

There is no need to decide this important question through a case that has been rushed to this Court. If the Court concludes that the EAJA issue warrants review, it should await a petition in a case that has been fully litigated and presents the question cleanly.

## CONCLUSION

The petition for a writ of certiorari should be denied or deferred to a later Conference.

Respectfully submitted.

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