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.,

*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

## REPLY BRIEF FOR PETITIONER


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## INTRODUCTION

In light of the Solicitor General's reasoned agreement that this case is "a suitable vehicle for resolving" the deep circuit conflict "on an important and recurring legal question," Gov't Br. 4-5, Mr. Montoya Palacios did not intend to file a reply brief. This reply addresses the brief submitted late by Eva Daley and Adolph Michelin, litigants in other cases who assert the existence of "vehicle problems" with this petition. Daley/Michelin Br. 2.

That assertion lacks any merit whatsoever. Daley and Michelin primarily claim that Mr. Montoya Palacios's fee petition is somehow untimely because he filed it too *early*, while the district court's decision was "still appealable." Daley/Michelin Br. 2-3. That is wrong. This Court has already held that EAJA sets only a deadline, not a limit on filing too early: where an order "remained 'appealable' at the time that [the plaintiff] filed his application for EAJA fees," it follows that "the application was timely." *Shalala v. Schaefer*, 509 U.S. 292, 303 (1993). Every court of appeals to consider the issue agrees that a fee petition may be filed before the judgment becomes final.

And more fundamentally, the Court does not need to consider this meritless objection at all. Daley and Michelin concede the issue is not jurisdictional and that no party raised it. (Far from it: the Solicitor General has affirmatively represented that this case is a proper vehicle.) So the Court should simply ignore it—as the Court usually does with such tangential, non-jurisdictional issues no party has raised at the certiorari stage. *See* Sup. Ct. R. 15.2.

The Solicitor General's acquiescence brief confirms that the need to resolve the circuit split on the question presented is pressing and that review should be granted *before* the summer recess. Mr. Montoya Palacios agrees. After all, the question presented is frequently recurring, affecting scores of habeas proceedings each and every month. There have been 115 more district court decisions on this issue in the past two months. In dozens of those cases, fee petitions are being wrongly denied and appeal is pointless under circuit precedent. Daley and Michelin's attempt at dust-kicking provides no reason to delay. Daley and Michelin appear primarily to want the Court to wait for petitions in the cases in which *they* prevailed. Yet they leave it unclear whether they will then support review in those cases.

## ARGUMENT

### A. Daley and Michelin's vehicle arguments are irrelevant and wrong.

1. As the government correctly represents to the Court, "this case cleanly presents the question whether EAJA authorizes attorney's fees in habeas proceedings challenging immigration detention" because Mr. Montoya Palacios "preserved the issue in both the district court and the court of appeals" and "resolution of the question presented was the sole basis for the lower courts' determination that [he] is not entitled to attorney's fees under EAJA." Gov't Br. 8. Daley and Michelin contend (at 1) that this case is a "defective vehicle" based on the premise that the government should not have agreed that Mr. Montoya Palacios properly "preserved the issue," Gov't Br. 8. Daley and Michelin claim there is actually no "timely EAJA application" because Mr. Montoya Palacios filed

his fee application before the time for the government to appeal expired. Daley/Michelin Br. 1-3. Both the conclusion and the premise are false.

a. Starting with the conclusion, Daley and Michelin's timeliness argument would create no vehicle issue even if it had any possible merit. Daley and Michelin concede, as they must, that any issue of timeliness is "not 'jurisdictional.'" *Id.* at 3 (quoting *Scarborough v. Principi*, 541 U.S. 401, 414 (2004)). Indeed, *Scarborough* squarely holds that the "30–day deadline for fee applications … [is] not properly typed 'jurisdictional.'" 541 U.S. at 414. And Daley and Michelin further concede that "no party raised" this supposed timeliness problem. Daley/Michelin Br. 4.

In light of those concessions, the Court need not consider this issue at all. Under this Court's Rule 15.2, non-jurisdictional arguments are "properly 'deemed waived'" if not raised in the brief in opposition. *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 306 (2010). Thus, the proper way to handle Daley and Michelin's late-breaking non-jurisdictional objection is to pay it no heed—which is the Court's normal practice for issues that no party raised and that do not go to jurisdiction.[1] Daley and Michelin never actually explain how this forfeited, non-jurisdictional issue has

[1] *Accord, e.g.*, *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 129 (2011) (similar); *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 235 n.1 (2019) (similar); *Brumfield v. Cain*, 576 U.S. 305, 322-323 (2015) (similar).

any bearing on the suitability of this case as a vehicle to decide the question presented.[2] It does not.

Daley and Michelin's response is to posit (at 4) that the government did not "analyz[e] any vehicle issues." That is demonstrably incorrect. The Solicitor General chose to take the unusual step of acquiescing in certiorari. In doing so he affirmatively represented to the Court that "[t]his case is a suitable vehicle," and he explained why, including that "[p]etitioner preserved the issue." Gov't Br. 8; *accord* Pet. 25-26. That representation alone, from the officer responsible for determining the position of the United States, is more than sufficient reason to disregard a non-jurisdictional argument raised only by amici whose interest in the matter is questionable.

b. But if the Court were to examine the premise, Daley and Michelin are flatly wrong.

"An EAJA application may be filed until 30 days after a judgment becomes 'not appealable'—*i.e.*, 30 days after the time for appeal has ended." *Shalala v. Schaefer*, 509 U.S. 292, 302 (1993). The statute contains no prohibition on filing too early. In *Schaefer* this Court considered an EAJA application filed before a formal judgment was entered and, thus, while the district court's order "remained 'appealable.'" *Id.*

[2] In contrast, the problem that surfaced in *Laboratory Corp. of American Holdings v. Davis*, 605 U.S. 327 (2025), was *jurisdictional*. *See* Tr. of Oral Arg. at 107, No. 24-304 (U.S. Apr. 29, 2025) ("squirrelly complication" arose when the court of appeals had "no jurisdiction over the August order that you're asking us to rely on") (statement of Gorsuch, J.); *id.* at 115 (respondent's counsel arguing "this Court's rules are clear that … the failure to raise *jurisdictional* objections at the certiorari stage doesn't deem them forfeited" (emphasis added)).

at 303. But because "EAJA's 30-day time limit runs from the *end* of the period for appeal, not the *beginning*," this Court held that "the application was timely under § 2412(d)(1)." *Id.* Daley and Michelin therefore are demonstrably wrong to argue that a claimant is "not follow[ing] [EAJA's] timing rule" simply because he files when the judgment is "still appealable." Daley/Michelin Br. 2-3.

Going back more than 40 years, every circuit to consider this timing issue has held that "a party need not wait until the judgment is final to move for attorney's fees" under EAJA. *Lizardi v. Wilkinson*, 986 F.3d 1294, 1295 (9th Cir. 2021) (citing *Auke Bay Concerned Citizen's Advisory Council v. Marsh*, 779 F.2d 1391, 1393 (9th Cir. 1986)); *Bly v. Shulkin*, 883 F.3d 1374, 1377 n.1 (Fed. Cir. 2018) ("[C]ourts generally treat as timely EAJA applications filed even before a judgment becomes final."); *Welter v. Sullivan*, 941 F.2d 674, 675-676 (8th Cir. 1991) (same); *James v. U.S. Dep't of Hous. and Urb. Dev.*, 783 F.2d 997, 998 & n.2 (11th Cir. 1986) ("[A] fee application may be filed before a 'final judgment.'"); *Taylor v. United States*, 749 F.2d 171, 175 n.8 (3d Cir. 1984) ("The EAJA establishes only a deadline after which EAJA petitions may not be filed: earlier filing is possible."); *McDonald v. Schweiker*, 726 F.2d 311, 314 (7th Cir. 1983) (similar). This Court recently explained why a similar rule has applied "for well over a century" to notices of appeal filed before final judgment. *Parrish v. United States*, 605 U.S. 376, 383-384 (2025).

Daley and Michelin do not have any cases actually holding otherwise, and they badly mischaracterize the two decisions they cite. Daley and Michelin say that

*Melkonyan v. Sullivan*, 501 U.S. 89 (1991)—a case decided two years before *Schaefer*—"indicated that a district court lacks authority to entertain" an EAJA application filed before entry of a "final judgment." Daley/Michelin Br. 3. It did nothing of the sort. The Court in *Melkonyan* pointedly declined to resolve "the timeliness of petitioner's fee application" in that case, including the argument that he could file "even before judgment is entered." 501 U.S. at 103. Rather, it stated that, upon remand, "the District Court may determine that the application he has already filed is sufficient"—even though it was filed before final judgment. *Id.* The same is true of the other case Daley and Michelin cite, *United States v. 27.09 Acres of Land*, 1 F.3d 107 (2d Cir. 1993), an unusual case in which the district court never terminated the action at all. The Second Circuit likewise instructed that, on remand, "[t]he District Court may determine that the application petitioner has already filed is sufficient." *Id.* at 111 (brackets and citation omitted).[3]

[3] The problem in *27.09 Acres* was that "no 'final judgment' for EAJA purposes was *ever* entered in this action," 1 F.3d at 111 (emphasis added), so there was no way for the fee application to relate forward. That is not the case here: Daley and Michelin admit (at 2) the judgment became final for EAJA purposes on March 23, 2026, which was before the Fourth Circuit ruled. Pet. App. 1a. In any event, the Second Circuit's decision in *27.09 Acres* is predicated on the assumption that a timeliness problem constitutes "a defect in a federal court's subject matter jurisdiction." 1 F.3d at 111. As discussed above, this Court later held the opposite in *Scarborough*, 541 U.S. at 413-414. And as explained in the text, this Court expressly reserved in *Melkonyan* the question whether an application could be filed before final judgment; it did not create a "prematurity" bar. *Contra* Daley/Michelin Br. 3 (citing 1 F.3d at 110-111).

It is far from clear why Daley and Michelin—EAJA claimants—want the Court to reconsider its holding in *Schaefer* and create a new pitfall for EAJA claimants that the government—which pays EAJA fees—is not endorsing. The unbroken authority discussed above and this Court's Rule 15.2 make clear that the Court need not entertain any such argument here.

2. Daley and Michelin also contend that "[t]he lack of adversarial testing at every stage makes this an unsuitable vehicle." Daley/Michelin Br. 3. They are wrong again.

Since Fourth Circuit precedent squarely foreclosed the only argument Mr. Montoya Palacios intended to raise on appeal, as the parties expressly acknowledged (Pet. 12-13), it is hardly unusual that there was not extensive briefing in the Fourth Circuit or that the court of appeals summarily affirmed. This Court has regularly granted certiorari in similar postures, where the court of appeals summarily decided a cert-worthy issue based on existing circuit precedent that everyone acknowledged was controlling.[4] This case is no different.

[4] In *Johnson v. Arteaga-Martinez*, 596 U.S. 573 (2022), for example, the Court granted certiorari after the Third Circuit granted an "unopposed motion by appellee to summarily affirm" because "the parties do not dispute that *Guerrero-Sanchez v[.] Warden York County Prison*, 905 F.3d 219, 226 (3d Cir. 2018) controls." App. to Pet. for Cert. in No. 19-896, at 1a. Another recent example is *Lora v. United States*, 599 U.S. 453 (2023), in which the Court granted certiorari on an issue addressed (in a footnote) in a summary order of the Second Circuit where the petitioner "acknowledge[d] that argument is foreclosed by [the Second Circuit's] case law." App. to Pet. for Cert. in No. 22-49, at 11a n.3.

Finally, Daley and Michelin's strange attempt to chastise Mr. Montoya Palacios for "skipp[ing] rehearing" in the court of appeals rings hollow. Daley/Michelin Br. 2. They know that would have been pointless. Indeed, the Fourth Circuit has previously denied rehearing en banc on this issue despite recognizing a split—and so did the Fifth, Third, and Tenth Circuits. Pet. 19-20. Daley and Michelin also know the reason why. As Daley told the Tenth Circuit in successfully opposing en banc rehearing in that court, "[t]he split of authority [among the circuits] is defined, and there is 'no need for further amplification here, only resolution somewhere.'" Response to Pet. for Rehearing En Banc at 10, *Daley v. Ceja*, No. 24-1191 (10th Cir. filed Mar. 16, 2026), Dkt. No. 108 (quoting *United States v. Nichols*, 784 F.3d 666, 668 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc)). That somewhere is this Court.

### B. The Court should not wait for other cases.

Daley and Michelin's final plea is that the Court should wait for the government to file petitions for certiorari in *their* cases. That would cause unnecessary delay when the issue demands speedy resolution. This case is the only one that will be conferenced before the summer recess. The government's diligent response to this petition presumably reflects its belief that the question presented is pressing and should not be pushed over the summer. Mr. Montoya Palacios agrees.

As the petition observes, as of April 6, 2026, 34,543 habeas petitions had been filed by noncitizens challenging their immigration detention since January 2025. Pet. 21-22. That number has now jumped to

*52,528* as of June 9, 2026. ProPublica, *Tracking Habeas Cases*, https://projects.propublica.org/habeas-tracker (last accessed June 12, 2026). Likewise, the petition collected 124 district court decisions falling on one side or the other of the circuit conflict in the four-month period between December 2025 and March 2026. Pet. 20-21; Pet. App. 19a-28a. In not even two and a half months since April 2026, there have been approximately 115 additional such district court decisions.

In short, the question presented is exceptionally important and arises with extraordinary frequency. The courts, habeas petitioners, and the government all need an answer as soon as practicable. As the Solicitor General agrees, this case presents the right vehicle to give that answer.

## CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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