

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 Writ of Certiorari to the
U.S. Court of Appeals for the Fourth Circuit**

**BRIEF OF *AMICUS CURIAE*
MAHESHA P. SUBBARAMAN, ESQ. (MPS)
IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of the <i>Amicus Curiae</i>	1
Summary of the Argument.....	2
Argument	3
I. The Equal Access to Justice Act (“EAJA”) displaces the presumption against waiver of sovereign immunity through 28 U.S.C. §2412(d)(1)(A)’s excepting clause	5
II. Common law tradition affirms that habeas proceedings are civil actions and thus fall under EAJA’s “any civil action” text	11
A. Five U.S. chief justices lead the way	13
B. State courts follow this Court’s lead.....	18
Conclusion	20

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Ardestani v. INS</i> , 502 U.S. 129 (1991)	6
<i>Barco v. Witte</i> , 65 F.4th 782 (5th Cir. 2023)	5
<i>Bermudez v. DOJ EOIR</i> , No. 24-30617, 2025 U.S. App. LEXIS 30746 (5th Cir. Nov. 24, 2025)	1
<i>Biden v. Nebraska</i> , 600 U.S. 477 (2023)	6
<i>Boumediene v. Bush</i> , 553 U.S. 723 (2008)	13
<i>Cohens v. Virginia</i> , 19 U.S. 264 (1821)	13–14
<i>Cross v. Burke</i> , 146 U.S. 82 (1892)	17
<i>Daley v. Ceja</i> , 158 F.4th 1152 (10th Cir. 2025)	5–6
<i>Ex parte Bollman</i> , 8 U.S. 75 (1807)	11, 13, 16
<i>Ex parte Milligan</i> , 71 U.S. 2 (1866)	15, 17
<i>Ex parte Quirin</i> , 317 U.S. 1 (1942)	17
<i>Ex parte Tom Tong</i> , 108 U.S. 556 (1883)	16–18
<i>Ex parte Watkins</i> , 28 U.S. 193 (1830)	1
<i>Farnsworth v. Montana</i> , 129 U.S. 104 (1889)	16
<i>FHA v. Burr</i> , 309 U.S. 242 (1940)	10
<i>Fisher v. Baker</i> , 203 U.S. 174 (1906)	17
<i>Freeport-McMoRan Oil & Gas Co. v. FERC</i> , 962 F.2d 45 (D.C. Cir. 1992)	3
<i>Gahagan v. USCIS</i> , 911 F.3d 298 (5th Cir. 2018)	1
<i>Greenlaw v. United States</i> , 554 U.S. 237 (2008)	3

TABLE OF AUTHORITIES—cont’d

	Page(s)
CASES—CONT’D	
<i>Harrington v. Berryhill</i> , 906 F.3d 561 (7th Cir. 2018)	1
<i>Heartland Plymouth Ct. MI, LLC v. NLRB</i> , 838 F.3d 16 (D.C. Cir. 2016)	3
<i>Holmes v. Jennison</i> , 39 U.S. 540 (1840).....	14–15
<i>In re Collier</i> , 6 Ohio St. 55 (1856)	11
<i>Indian Towing Co. v. United States</i> , 350 U.S. 61 (1955)	4
<i>Jennings v. Rodriguez</i> , 583 U.S. 281 (2018)	10
<i>Kucana v. Holder</i> , 558 U.S. 233 (2010).....	7
<i>Kurtz v. Moffitt</i> , 115 U.S. 487 (1885)	16
<i>Loper Bright Enters. v. Raimondo</i> , 603 U.S. 369 (2024)	4
<i>Niz-Chavez v. Garland</i> , 593 U.S. 155 (2021)	4
<i>Obando-Segura v. Garland</i> , 999 F.3d 190 (4th Cir. 2021)	5
<i>People ex rel. Curtis v. Kidney</i> , 122 N.E. 241 (N.Y. 1918).....	18
<i>Phelps v. Halsell</i> , 65 P. 340 (Okla. 1901).....	20
<i>Richlin Sec. Serv. Co. v. Chertoff</i> , 553 U.S. 571 (2008)	6
<i>Rotkiske v. Klemm</i> , 589 U.S. 8 (2019)	10
<i>State ex rel. Beekley v. McDonald</i> , 142 N.W. 1051 (Minn. 1913)	19

TABLE OF AUTHORITIES—cont’d

	Page(s)
CASES—CONT’D	
<i>State ex rel. Hellige v. Milwaukee Liedertafel</i> , 164 N.W. 1004 (Wis. 1917)	19
<i>State ex rel. Roberts v. Super. Ct.</i> , 72 P. 1040 (Wash. 1903)	18
<i>State v. Fenton</i> , 70 P. 741 (Wash. 1902)	19
<i>Thacker v. TVA</i> , 587 U.S. 218 (2019)	10
<i>United States v. \$28,000.00</i> , 802 F.3d 1100 (9th Cir. 2015)	1
<i>United States v. Douglas</i> , 55 F.3d 584 (11th Cir. 1995)	3
<i>United States v. Easement & Right-of-Way</i> , 452 F.2d 729 (6th Cir. 1971)	9
<i>United States v. Rabinowitz</i> , 339 U.S. 56 (1950)	5
<i>Weston v. City Council of Charleston</i> , 27 U.S. 449 (1829)	14–15
<i>Winnovich v. Emery</i> , 93 P. 988 (Utah 1908)	11, 18
CONSTITUTIONAL PROVISIONS	
U.S. CONST. art. I, §9, cl. 2	13
STATUTORY PROVISIONS	
5 U.S.C. §552(b)(3)	8
5 U.S.C. §702	8–9
15 U.S.C. §2060(a), (c)	9

TABLE OF AUTHORITIES—cont’d

	Page(s)
STATUTORY PROVISIONS—CONT’D	
16 U.S.C. §539m-11(d)(2).....	9
28 U.S.C. §1391(e).....	8
28 U.S.C. §2412 (1964)	9
28 U.S.C. §2412, Historical and Revision Notes	9
28 U.S.C. §2412(d)(1)(A).....	1–20
28 U.S.C. §2412(d)(1)(C)	7
28 U.S.C. §2412(e).....	8
28 U.S.C. §2516(a)	9–10
Act of June 25, 1948, ch. 646, 62 Stat. 869	9
Pub. L. No. 89-507, 80 Stat. 308 (1966)	9
Pub. L. No. 94-574, 90 Stat. 2721 (1976)	8
Pub. L. No. 96-481, 94 Stat. 2321 (1980)	8
Pub. L. No. 97-248, 96 Stat. 324 (1982)	8
OTHER AUTHORITIES	
1 WM. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765)	11
An Act for the Better Secureing the Liberty of the Subject, 31 Car. 2, ch. 2 (1679)	2, 11–12
CRS REPORT FOR CONGRESS (No. 94-970) (2009)	3
Hon. Felix Frankfurter, <i>Some Reflections on the Reading of Statutes</i> , 47 COLUM. L. REV. 527 (1947)	5

INTEREST OF THE *AMICUS CURIAE*¹

Mahesha P. Subbaraman (“*amicus curiae*”) is a solo appellate attorney. He often litigates appeals related to fee awards on behalf of other attorneys and their clients. *E.g.*, *Gahagan v. USCIS*, 911 F.3d 298 (5th Cir. 2018); *Harrington v. Berryhill*, 906 F.3d 561 (7th Cir. 2018). He also represents grassroots groups seeking to ensure proper fee-shifting against the government. *E.g.*, Brief of *Amicus Curiae* Am. for Forfeiture Reform in Support of Petitioner, *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 479 (2016) (No. 14-1375); Brief of *Amicus Curiae* Pub. Record Media, *Energy & Policy Inst. v. TVA*, 176 F.4th 432 (6th Cir. 2026) (No. 24-6134) (ECF No. 27).

Too many times, *amicus curiae* has seen federal courts impose unjustified limits on fee awards that Congress authorized to help level the playing field. *See Bermudez v. DOJ EOIR*, No. 24-30617, 2025 U.S. App. LEXIS 30746, at *5–9 (5th Cir. Nov. 24, 2025) (reaffirming atextual judicial limits on FOIA fee awards to an aggrieved FOIA requester’s detriment); *United States v. \$28,000.00*, 802 F.3d 1100, 1108 n.2 (9th Cir. 2015) (reversing erroneous reduction of fee award premised on district court’s belief that counsel for a civil forfeiture claimant gave “the government’s litigation work more respect than it deserved”). *Amicus curiae* believes that Petitioner’s case affords the Court a key chance to reverse this trend.

¹ No counsel for a party wrote this amicus brief in whole or in part; nor has any person or any entity, other than *amicus curiae* and his counsel, contributed money intended to fund the preparation or submission of this amicus brief.

SUMMARY OF THE ARGUMENT

Construing fee-award provisions should not be a search for reasons to deny fees. Yet, all too often, courts approach fee-award provisions with precisely this mindset, disregarding the plain, broad statutory terms that Congress enacted to level the playing field against the nation's most powerful civil litigant. The question of whether the Equal Access to Justice Act covers immigrant habeas petitions exemplifies this problem. Courts excluding these petitions start with an answer (the sovereign-immunity canon) rather than a problem (what EAJA's text means).

EAJA's text forecloses this approach in saying that: "[e]xcept as otherwise specifically provided by statute." This text makes EAJA the default, leaving no room for a judicial presumption against sovereign-immunity waivers. Indeed, Congress wrote EAJA's excepting clause to invert a prior codification of this presumption. Congress has since adjusted EAJA's reach through specific statutory text, but none of this text bars habeas cases. The only remaining question, then, is whether habeas cases are civil actions.

The common law answers yes. The Habeas Corpus Act of 1679 gave prisoners civil financial remedies against officials who defied the writ—an early analog to EAJA fee awards. Five U.S. chief justices (Marshall, Taney, Waite, Fuller, and Stone) next confirmed across 150 years that habeas cases are civil suits. State courts followed this Court's lead in resolving a host of procedural questions. So while habeas cases may have their own rules, they are still civil actions. EAJA then covers them.

ARGUMENT

The federal government constitutes “the richest, most powerful, and best represented litigant” in the American legal system. *Greenlaw v. United States*, 554 U.S. 237, 244 (2008). The government thus holds the ability in virtually every case that it litigates to “pound an opponent into submission”—an advantage that the government has exploited time and again to the detriment of countless individuals. See *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 48 (D.C. Cir. 1992). Requiring the government to pay an opponent’s legal fees when the government loses in court helps “level the playing field,” especially when the cost of opposing the government is routinely too high to bear (e.g., civil forfeiture cases) or when the government takes meritless positions. *United States v. Douglas*, 55 F.3d 584, 587 (11th Cir. 1995).

So Congress has enacted a broad array of fee-award provisions² to ensure “administrative hubris does not get the last word under our Constitution.” *Heartland Plymouth Ct. MI, LLC v. NLRB*, 838 F.3d 16, 29 (D.C. Cir. 2016). One of these provisions is the Equal Access to Justice Act (or EAJA), which states in relevant part: “[e]xcept as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees ... incurred by that party in any civil action (other than cases sounding in tort)” 28 U.S.C. §2412(d)(1)(A). Petitioner’s case presents the important question of whether the words ‘any civil action’ in the preceding

² See CRS REPORT FOR CONGRESS (No. 94-970), AWARDS OF ATTORNEYS’ FEES BY FEDERAL COURTS AND FEDERAL AGENCIES 57–117 (2009), <https://tinyurl.com/ea27fc2z>.

text allow EAJA fee awards in successful actions to obtain “a writ of habeas corpus” challenging federal “civil immigration detention.” *See* Pet’r Br. i.

Petitioner’s opening brief demonstrates EAJA’s “clear” applicability to immigrant habeas petitions given the “doubly civil” nature of this litigation as “civil action[s] seeking review of civil detention.” Pet’r Br. 1–2. At the same time, statutory text, the common law of habeas corpus, and EAJA’s drafting history furnish valuable clues beyond those discussed in Petitioner’s brief that support Petitioner’s reading. This amicus brief sets forth these additional clues consistent with the Court’s obligation to “exhaust all ... textual and structural clues” whenever the Court reads statutes. *Niz-Chavez v. Garland*, 593 U.S. 155, 160 (2021); *cf. Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 403 (2024) (“Courts interpret statutes, *no matter the context*, based on the traditional tools of statutory construction” (*italics added*)).

In doing so, *amicus curiae* seeks to underscore the broader importance of Petitioner’s case beyond EAJA’s applicability to immigrant habeas petitions. Statutory fee-award provisions may “subject[] the [g]overnment to liability for potentially great sums of money,” but this reality does not authorize courts to act as “self-constituted guardian[s] of the Treasury, import[ing] immunity back into a statute designed to limit it.” *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955). And in EAJA’s case, this is doubly true because EAJA’s text does more than just waive sovereign immunity against fee awards for “any civil action” (minus tort cases)—it also requires deviations from that waiver to be statutory and specific.

I. The Equal Access to Justice Act (“EAJA”) displaces the presumption against waiver of sovereign immunity through 28 U.S.C. §2412(d)(1)(A)’s excepting clause.

“In matters of statutory interpretation ... it makes a great deal of difference whether you start with an answer or with a problem.” *See* Hon. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947); *see also* *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) (“[W]here one comes out on a case depends on where one goes in.”). The question of EAJA’s applicability to immigrant habeas petitions bears out this insight, with the circuits reaching polar opposite conclusions on this question as a result of very different starting points.

Courts finding that EAJA *includes* immigrant habeas petitions start with a problem: what do the words “any civil action” in §2412(d)(1)(A) mean? *See Daley v. Ceja*, 158 F.4th 1152, 1157 (10th Cir. 2025). Courts finding that EAJA *excludes* immigrant habeas petitions start with an answer—namely, the presumption against waiver of sovereign immunity. *See Obando-Segura v. Garland*, 999 F.3d 190, 193 (4th Cir. 2021). The presumption leads these courts to “frame[]” the issue at hand in the following loaded terms: whether EAJA’s sovereign-immunity waiver “unambiguously covers habeas corpus proceedings.” *Id.*; *see Barco v. Witte*, 65 F.4th 782, 784–85 (5th Cir. 2023) (“The threshold issue ... is whether ... EAJA expressly and unequivocally waives the United States’ sovereign immunity regarding attorney’s fees in immigration habeas corpus actions.”).

Needless to say, interpretation of EAJA's terms that begins with the presumption against waivers of sovereign immunity "loads the dice" against a finding of EAJA coverage regardless of "the statute's most natural meaning." *Biden v. Nebraska*, 600 U.S. 477, 509 (2023) (Barrett, J., concurring). Does EAJA merit such treatment? The Court has previously observed "[EAJA] amounts to a partial waiver of sovereign immunity" and "[a]ny such waiver must be strictly construed in favor of the United States." *Ardestani v. INS*, 502 U.S. 129, 137 (1991). The Court's more recent EAJA jurisprudence, however, emphasizes that "[t]he sovereign immunity canon is just ... a tool for interpreting the law, and we have never held that it displaces the other traditional tools." *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008).

Petitioner relies heavily on the logic of *Richlin* to overcome the canon, as do the courts that conclude EAJA covers immigrant habeas petitions. Pet'r Br. 44–50; *see also, e.g., Daley*, 158 F.4th at 1157 ("[W]e may not resort to the sovereign immunity canon at the first sign of any potential ambiguity in [EAJA's] text as this would abdicate our responsibility to interpret the statutes in front of us."). *Amicus curiae* respectfully submits that EAJA's text independently resolves the canon's applicability in a manner yet to be considered by Petitioner, the Court, or any of the circuit decisions to date addressing whether EAJA covers immigrant habeas petitions. This resolution lies in the first seven words of §2412(d)(1)(A).

Section 2412(d)(1)(A) opens by saying: "**[e]xcept as otherwise specifically provided by statute**, a court shall award to a prevailing party ... fees and

other expenses ... incurred by that party in any civil action” 28 U.S.C. §2412(d)(1)(A). This ‘excepting clause’ displaces the presumption against waiver of sovereign immunity. The clause makes EAJA awards the rule and exclusion the exception—an exception that must be “specifically provided,” and provided “by statute.” Put another way, Congress has already told courts how to resolve any doubt about EAJA’s reach: EAJA applies unless another statute specifically says otherwise. So the proper starting point for resolving Petitioner’s case is not any judge-made presumption but rather the U.S. Code and whether any provision of the Code specifically modifies or precludes EAJA from covering immigrant habeas petitions.

Each part of §2412(d)(1)(A)’s excepting clause advances this conclusion. Start with “specifically,” which negates the idea of “assumed or contemplated” exceptions to EAJA. *Kucana v. Holder*, 558 U.S. 233, 243 n.10 (2010) (“‘Specified’ is not synonymous with ‘implied’ or ‘anticipated.’”). Now consider “by statute”—text that makes the U.S. Code the only source of exceptions to EAJA, leaving no room for judge-made presumptions. Other EAJA provisions, by contrast, preserve judicial latitude. For example, after the text of §2412(d)(1)(A), EAJA provides: “[t]he court, in its **discretion**, may reduce the amount to be awarded pursuant to [§2412(d)], or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter” 28 U.S.C. §2412(d)(1)(C).

Congress knows how to write more permissive excepting clauses that leave intact the presumption

against waivers of sovereign immunity. The venue statute for lawsuits against federal officers (which predates EAJA), for instance, uses the phrase “except as otherwise **provided by law**” (rather than saying “except as otherwise **specifically provided by statute**”). Pub. L. No. 94-574, §3, 90 Stat. 2721, 2722 (Oct. 21, 1976) (codified at 28 U.S.C. §1391(e)). The Administrative Procedure Act (“APA”) offers another example. Four years before passing EAJA, Congress dictated that the APA’s sovereign-immunity waiver conferred “[no] authority to grant relief” that another statute “expressly or impliedly forbids.” *Id.* §1, 90 Stat. at 2721 (amending 5 U.S.C. §702). EAJA’s excepting clause makes no allowance for implication. *Cf., e.g.*, 5 U.S.C. §552(b)(3) (establishing that FOIA’s disclosure rules yield only to matters “specifically exempted from [FOIA] disclosure by statute”).

EAJA adheres to the rule of EAJA coverage that §2412(d)(1)(A)’s excepting clause provides. Congress wrote just one exclusion into §2412(d)(1)(A)’s original text, expressly exempting “cases sounding in tort.” *See* Pub. L. No. 96-481, tit. II, §204(a), 94 Stat. 2327, 2327–28 (Oct. 21, 1980). Two years later, Congress added a second exclusion, providing that EAJA “shall not apply” to tax proceedings governed by “[§]7430 of the Internal Revenue Code of 1986.” *See* Pub. L. No. 97-248, §292(c), 96 Stat. 324, 574 (Sept. 3, 1982) (codified at 28 U.S.C. §2412(e)). Both times, Congress acted just as EAJA’s excepting clause contemplates: specifically, and by statute. Other statutes follow this framework, specifically addressing EAJA’s coverage whenever Congress wishes to adjust EAJA’s reach. *E.g.*, 15 U.S.C. §2060(a), (c) (in petitions for judicial review of consumer product safety rules, “[a]ttorneys’

fees may be awarded against the United States ... without regard to section 2412”); 16 U.S.C. §539m-11(d)(2) (reimbursement of certain legal fees “shall be in lieu of that which might otherwise be available pursuant to the Equal Access to Justice Act”).

Drafting history confirms that §2412(d)(1)(A)’s excepting clause displaces the presumption against sovereign-immunity waivers. Before Congress passed EAJA in 1980, §2412 codified the presumption: “[t]he United States shall be liable for fees and costs only when such liability is expressly provided for by Act of Congress.” *See* 28 U.S.C. §2412 (1964); 62 Stat. 973 (1948); *United States v. Easement & Right-of-Way*, 452 F.2d 729, 729–30 (6th Cir. 1971). The historical notes accompanying §2412’s original form explain this provision followed “the well-known common-law rule that a sovereign is not liable for costs unless specific provision for such liability is made by law”— “a corollary to the rule that a sovereign cannot be sued without its consent.” 28 U.S.C. §2412, Historical and Revision Notes. In 1966, Congress inverted this rule: “[e]xcept as otherwise specifically provided by statute, a judgment for costs ... may be awarded to the prevailing party in any civil action brought by or against the United States.” Pub. L. No. 89-507, §1, 80 Stat. 308, 308 (July 18, 1966). EAJA carried the same excepting clause into 28 U.S.C. §2412(d)(1)(A), now pairing it with a full allowance of fee awards (as well as costs) against the government.

By contrast, when Congress wishes to preserve the judicial presumption against waivers of sovereign immunity in a waiver-affording provision, Congress says so. Consider 28 U.S.C. §2516(a): “[i]nterest on a

claim against the United States shall be allowed in a judgment of the United States Court of Federal Claims only under a contract or Act of Congress expressly providing for payment thereof.” “Atextual judicial supplementation is ... inappropriate when ... Congress has shown that it knows how to adopt the omitted language” *Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019). And courts “may not transmute existing statutory language into its polar opposite.” *Jennings v. Rodriguez*, 583 U.S. 281, 303–04 (2018).

The Court’s precedents, in turn, confirm the extent to which even the simplest set of words may upset the presumption against sovereign-immunity waivers. Take the “sue and be sued” clauses that many statutes attach to federal instrumentalities. Such clauses are “liberally construed,” and “it cannot be lightly assumed that restrictions on that authority are to be implied.” *FHA v. Burr*, 309 U.S. 242, 245 (1940). Any implied limit “must be clearly shown”—and absent such a showing, “it must be presumed” that an instrumentality is amenable to suit. *Id.*; see *Thacker v. TVA*, 587 U.S. 218, 223–26 (2019).

In sum: courts start in the wrong place when they approach interpretation of §2412(d)(1)(A) as an exercise in applying the presumption against waivers of sovereign immunity. The excepting clause enacted by this provision requires courts to ask whether any statute specifically bars EAJA’s applicability—not whether EAJA unambiguously applies. So the only question that remains is whether §2412(d)(1)(A)’s use of the phrase “any civil action” covers habeas proceedings. The common law of habeas corpus writs answers that question with a resounding “yes.”

II. Common law tradition affirms that habeas proceedings are civil actions and thus fall within EAJA's "any civil action" text.

"For the meaning of the term habeas corpus, resort may unquestionably be had to the common law." *Ex parte Bollman*, 8 U.S. 75, 93–94 (1807). Habeas corpus was "a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause." *Ex parte Watkins*, 28 U.S. 193, 202 (1830). In this regard, habeas proceedings were as much an affirmation of the separation of powers as they were an affirmation of due process. Vigorous judicial enforcement of the writ made clear that "[n]o matter where or how the chains of captivity were forged, the power of the judiciary ... is adequate to crumble them to the dust, if an individual is deprived of his liberty, contrary to the law of the land." *In re Collier*, 6 Ohio St. 55, 59 (1856) (cleaned up).

"[H]abeas corpus ... did not [initially] receive the respect from [English] common-law courts [that] its importance merited" *Winnovich v. Emery*, 93 P. 988, 990 (Utah 1908). "[F]or that reason [the writ] was made more effective in the reign of Charles II by what is known as the 'Habeas Corpus Act [of 1679].'" *Id.* The Act "so plainly pointed out" the "methods of obtaining this writ" that the Act inspired jurist Sir William Blackstone to proclaim: "so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law [of England] requires and justifies such detainer." 1 WM. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, *131 (1765).

The Act not only authorized prisoners to “move and obtain” habeas writs but also enabled prisoners to “recover[]” financial “[p]enalties” against officials who violated the Act’s mandates.³ A jailer who failed to produce a prisoner in accord with a granted writ owed the prisoner 100 pounds for a first offense and 200 pounds for a second offense.⁴ Judges who denied a writ in vacation time that the Act required them to grant owed the prisoner 500 pounds apiece.⁵ And anyone who shipped a prisoner to Scotland, Ireland, or other places “beyond the seas” faced an action for false imprisonment in which the prisoner could seek “treble costs besides damages”—damages that could “not be less than five hundred pounds.”⁶

Prisoners recovered these penalties the same way that any other civil litigant recovered money: an “action of debt, suit, bill, [com]plaint or information” in the King’s courts.⁷ The Habeas Corpus Act further afforded prisoners the ability to “sue[]” offending officials within two years of an offense (or, if the prisoner remained in custody, within two years of his release).⁸ The Act thus reflected an early recognition of the need for civil financial remedies to ensure that habeas maintained its vitality in the real world—a function not all that different from the function that EAJA fee awards in habeas cases serve today.

³ An Act for the Better Secureing the Liberty of the Subject and for Prevention of Imprisonments Beyond the Seas, 31 Car. 2, ch. 2 (1679), as reproduced online at: <https://www.british-history.ac.uk/statutes-realm/vol5/pp935-938>.

⁴ *See id.* §IV.

⁵ *See id.* §IX.

⁶ *Id.* §XI (cleaned up).

⁷ *Id.* §IV (cleaned up).

⁸ *Id.* §XVI.

In America, “[t]he Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.” *Boumediene v. Bush*, 553 U.S. 723, 739 (2008). So, in 1787, the Framers devised express constitutional text protecting the writ: “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. art. I, §9, cl. 2; *see also Boumediene*, 553 U.S. at 743–45. Over the course of the next 150 years, five U.S. chief justices (Marshall, Taney, Waite, Fuller, and Stone) wrote decisions that would confirm—in a wide variety of legal contexts—that habeas proceedings are civil actions.

A. Five U.S. chief justices lead the way.

Chief Justice Marshall laid the groundwork for understanding that habeas is a civil action. Marshall explains in *Ex parte Bollman*: “the question brought forward on a habeas corpus is always distinct from that which is involved in the cause itself.” 8 U.S. at 101. Marshall thereby refused to treat habeas as a criminal matter, much less some kind of hybrid. To the contrary, Marshall declared that: “[t]he question whether the individual shall be imprisoned is always distinct from the question [of] whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separated, and may be decided in different courts.” *Id.*

In *Cohens v. Virginia*, Chief Justice Marshall took up the question of “[w]hat is a suit?” 19 U.S. 264, 407–08 (1821). His answer was straightforward: “the

prosecution, or pursuit, of some claim, demand, or request. In law language, it is the prosecution of some demand in a court of justice.” *Id.* (cleaned up). Marshall further elaborated: “[t]o commence a suit, is to demand something by the institution of process in a court of justice, and to prosecute the suit, is, according to the common acceptance of language, to continue that demand [in court].” *See id.*

Finally, in *Weston v. City Council of Charleston*, Chief Justice Marshall addressed whether “a writ of prohibition [is] a suit?” 27 U.S. 449, 464 (1829). Like habeas writs, prohibition writs were a long-settled common law injunctive remedy that parties obtained through an application to a court. Marshall observed: “[t]he term [‘suit’] is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice, which the law affords him.” *Id.* On this basis, Marshall determined that a judgment on an application for a writ of prohibition was a judgment in a suit: “[t]he modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit.” *Id.*

Chief Justice Taney continued Marshall’s logic. In *Holmes v. Jennison*, Vermont’s governor ordered the arrest of George Holmes for extradition to a foreign power. *See* 39 U.S. 540, 561–62 (1840). After the Vermont Supreme Court denied habeas relief, Holmes sought U.S. Supreme Court review under the Judiciary Act of 1789. *Id.* But the Act allowed such review only “in a suit,” raising the issue of whether Holmes’s habeas proceeding was a suit. *Id.*

Speaking for a plurality of the Court,⁹ Chief Justice Taney said yes: “[i]f a party is unlawfully imprisoned,” then “the writ of habeas corpus ... is his suit in [c]ourt, to recover his liberty.” *Id.* at 564. Drawing on Chief Justice Marshall’s *Weston* opinion, Taney declared that Marshall’s understanding of the word “suit” read the Judiciary Act “according to [its] natural meaning,” leaving it “too plain for argument” that Holmes’s “proceedings upon the habeas corpus was a suit.” *Id.* at 566–67. Taney further highlighted all the ways that Holmes’s habeas petition qualified as a suit: “[a] right claimed by the prisoner Holmes, under the Constitution ... was litigated between him and the Governor of the [S]tate [of Vermont], and the sheriff of the county, in a court of justice.” *Id.*

A quarter-century later, the Court ratified Chief Justice Taney’s analysis in *Ex parte Milligan*, 71 U.S. 2 (1866). Lambdin Milligan petitioned a federal court for habeas relief from a death sentence issued by a military commission. *See id.* at 107–09. Federal judges certified the dispute to the U.S. Supreme Court, prompting the government to raise a jurisdictional challenge based on the case’s *ex parte* nature and resulting lack of “two parties to it.” *Id.* at 112. The Court disagreed. Noting that “[i]n any legal sense, action, suit, and cause, are convertible terms,” the Court held: “[w]hen Milligan demanded his release by the proceeding relating to habeas corpus, he commenced a suit.” *Id.* at 112–13. The Court then cited *Holmes* for the same point. *Id.* at 113.

⁹ Justice Catron, who otherwise voted to dismiss the case for want of jurisdiction, likewise “concur[red], that a proceeding by habeas corpus is a suit, within the meaning of the Judiciary Act.” *Holmes*, 39 U.S. at 597 (opinion of Catron, J.).

Chief Justice Waite reaffirmed Chief Justice Marshall's thinking in *Ex parte Tom Tong*, 108 U.S. 556 (1883). Held under criminal process, Tom Tong claimed "the Constitution and a treaty of the United States" gave him "the right to his liberty." *Id.* at 559–60. To address Tong's immigrant habeas claim, the Court first had to determine its own jurisdiction, which "depend[ed] on whether [Tong's] proceeding is to be treated as civil or criminal." *Id.* at 559. If Tong's case was "a civil suit or proceeding," then the Court had "no jurisdiction" over Tong's case, for lack of any "final judgment in the circuit court." *Id.*

Drawing on Chief Justice Marshall's analysis in *Bollman*, Chief Justice Waite (writing for the Court) held Tong's case was a civil action, which meant the Court could "[n]ot take jurisdiction of the case in its present form." *Id.* at 560. Waite explained that while Tong faced "a criminal prosecution," Tong's pursuit of a "writ of habeas corpus" was "not a proceeding in that prosecution." *Id.* at 559. Tong's habeas petition instead was "a new suit brought by him to enforce a civil right" against those "holding him in custody." *Id.* at 559–60. Waite underscored "[t]he proceeding is one instituted by ... [Tong] for his liberty, not by the government to punish him for his crime." *Id.*; see also *Kurtz v. Moffitt*, 115 U.S. 487, 494 (1885) (citing *Tom Tong*) ("[H]abeas corpus, sued out by one arrested for crime, is a civil suit ... assert[ing] the civil right of personal liberty, against those who are holding him in custody"); *Farnsworth v. Montana*, 129 U.S. 104, 113 (1889) (citing *Tom Tong*) ("[H]abeas corpus ... [is] a civil ... not a criminal proceeding, even when instituted to arrest a criminal prosecution.").

Chief Justice Fuller subsequently doubled down on *Tom Tong* in *Cross v. Burke*, 146 U.S. 82 (1892). Prisoner William Cross sought U.S. Supreme Court review of a habeas denial following his criminal conviction and his being sentenced to death in the District of Columbia. *Id.* at 83. The Court’s ability to review Cross’s appeal turned on statutes limiting the Court’s ability to review decisions of the District of Columbia’s highest court unless “a pecuniary matter [was] in dispute.” *Id.* at 87. Writing for the Court, Fuller held that the Court lacked jurisdiction to hear Cross’s appeal because Cross’s habeas claim had “no money value,” concerning only “the civil right of personal liberty.” *Id.* at 87–88. Along the way, Fuller cited *Tom Tong* as proof that “it is **well settled** that a proceeding in habeas corpus is a civil and not a criminal proceeding.” *Id.* at 88 (bold added); *see also*, e.g., *Fisher v. Baker*, 203 U.S. 174, 181 (1906) (citing *Cross*) (“The proceeding is in habeas corpus, and [it] is a civil and not a criminal proceeding.”).

Chief Justice Stone finally cemented the point in *Ex parte Quirin*, 317 U.S. 1 (1942). Affirming the Court’s jurisdiction to review lower court decisions denying eight military prisoners leave to file habeas petitions, Stone explained that *Milligan* remained good law: “[p]resentation of [a habeas] petition for judicial action is the institution of a suit.” *Id.* at 24. Procedural deviations from “the usual procedure on an application for a writ of habeas corpus” did not alter this reality. *Id.* The “denial by the district court of leave to file the [habeas] petitions” was thus a “judicial determination of a case”—one “reviewable” by “appeal to the Court of Appeals” and by grant of “certiorari” in the U.S. Supreme Court. *Id.*

B. State courts follow this Court's lead.

This Court's decisions establishing the definitive civil nature of habeas proceedings exerted a profound influence on state courts. New York's highest court proclaimed *Tom Tong* "unquestionably the leading decision" on whether "the writ of habeas corpus ... [is] either civil or criminal in its nature." *People ex rel. Curtis v. Kidney*, 122 N.E. 241, 242 (N.Y. 1918). Further proclaiming that *Tom Tong*'s "reasoning and conclusion have been adopted by the greater number of the states in which codes regulate procedure," the court went on to conclude: "the proceeding by the writ of habeas corpus to inquire into the cause of the detention of a person is a civil special proceeding to enforce a civil right, although its purpose is to effect the release of the person from imprisonment ... under a criminal prosecution." *Id.* at 242–43.

State courts followed *Tom Tong* to answer many different procedural questions turning on the proper classification of habeas proceedings. For example, in *Winnovich v. Emery*, the Utah Supreme Court faced the question of whether a sheriff could appeal a grant of habeas relief. 93 P. at 989. The State lacked a right to appeal in criminal cases, but did this prohibition extend to a sheriff's appeal in a habeas proceeding? The court said 'no' because "habeas corpus proceedings are civil, and the reasons why ... are well stated by Mr. Chief Justice Waite." *Id.*; see also *State ex rel. Roberts v. Super. Ct.*, 72 P. 1040, 1041 (Wash. 1903) ("[*Tom Tong*] clearly defines the office of the writ of habeas corpus In the light of such eminent authority ... it must be held here that ... habeas corpus ... is a civil proceeding").

State courts further had a front-row seat to the kind of problems that would arise if they allowed the conflation of habeas proceedings with criminal trials. In *State v. Fenton*, a defendant awaiting trial on an assault charge appealed the denial of his habeas petition and then argued his habeas appeal stayed his criminal trial. 70 P. 741, 742 (Wash. 1902). The Washington Supreme Court disagreed: “[a] habeas corpus proceeding cannot be said to be a criminal action, for, while it is frequently invoked by criminals or persons charged with crime, it is not a criminal action, so far as the parties ... are concerned.” *Id.* The Minnesota Supreme Court reached the same conclusion: “[h]abeas corpus is essentially civil in its nature. ... [T]he habeas corpus proceedings [here] were no part of the criminal action, but in fact were in opposition [to it] An appeal in one ... does not stay proceedings in another” *State ex rel. Beekley v. McDonald*, 142 N.W. 1051, 1051 (Minn. 1913).

The Wisconsin Supreme Court encountered a noteworthy version of this issue in reviewing a grant of habeas relief arising from detention in a civil case. See *State ex rel. Hellige v. Milwaukee Liedertafel*, 164 N.W. 1004, 1004 (Wis. 1917). Both sides treated the habeas proceeding as merely an offshoot of the civil case. *Id.* The court admonished the parties for their “failure to understand the nature of a habeas corpus proceeding”: “[i]t is not a motion in another action; on the contrary it is a civil action of itself, in which the state on the relation of the petitioner is plaintiff and the person charged with unlawfully imprisoning the petitioner is at least one of the defendants.” *Id.* The court hoped this lesson would help the parties rectify “the unsatisfactory state of the record.” *Id.*

In sum: common law tradition teaches that “[a]ll actions which are not criminal, we call civil.” *Phelps v. Halsell*, 65 P. 340, 342 (Okla. 1901). “[T]his does not mean that there is only one kind of civil action.” *Id.* “We have the same kind of actions ... as existed at common law,” including “actions in attachment, replevin, injunction, mandamus, ejectment, etc.”—each one with “its own rules of law” and subject to its own common law principles. *Id.* Habeas proceedings are no exception: they are civil actions with their own rules and principles, but civil actions nonetheless. EAJA’s coverage of “any civil action” then reaches Petitioner’s habeas action, consistent with 150 years of common law. *See* 28 U.S.C. §2412(d)(1)(A).

CONCLUSION

As a matter of plain text and generations of common law tradition, the Court should hold that EAJA applies to habeas corpus proceedings.

Respectfully submitted,

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