UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

N.N., *Petitioner*, v. Brian McShane et al., *Respondents*.	Civil No. 25-5494

PETITIONER'S VERIFIED REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

As the government sees it, on the one hand, the issues in this case were so novel and unresolved that its position was substantially justified. On the other, this case was so open-and-shut that petitioner should have sued with one lawyer alone. Both positions cannot be true. As it turns out, neither is.

The government's position was not substantially justified at either the administrative level or in federal court. At the administrative bond hearing, ICE failed to present argument or evidence that supervisory conditions were warranted and then unilaterally imposed them when the immigration judge ordered petitioner released without them. This Court then described the government's defense of that agency position as "not persuasive in the slightest." *N- N- v. McShane*, No. CV 25-5494, 2025 WL 3143594, at *3 (E.D. Pa. Nov. 10, 2025) (*N-N-*). The government thus twice fails to meet its burden to show substantial justification.

Petitioner's attorneys also expended a reasonable amount of time to defend against this unjustified conduct. Petitioner's pleadings did not simply parrot existing federal caselaw. In addition to seeking a writ of habeas corpus, petitioner's suit also struck at the root cause of the

unlawful restraints on his liberty, raising legal issues yet to be addressed by any federal court: whether an administrative policy to indiscriminately impose electronic surveillance on noncitizens, including in violation of an immigration judge's order, should be vacated as arbitrary and capricious and contrary to law under the Administrative Procedure Act (APA). This Court resolved the case on narrower grounds. But it did not reject petitioner's APA claims. And a narrower resolution does not mean that the time spent preparing petitioner's arguments on his interrelated claims were unreasonable. So petitioner's motion for fees should be granted.

I. The government's position was not substantially justified so the Court should award petitioner attorney's fees.

Once more given the opportunity, the government is unable to show "a reasonable basis in truth for the facts alleged": that petitioner's individual characteristics merited supervision conditions beyond those ordered by an immigration judge. *Michelin v. Warden Moshannon Valley Corr. Ctr.*, No. 24-2990, 2026 WL 263483, at *11 (3rd Cir. Feb. 2, 2026) (citation modified) (providing standard for substantially justified position). The government must recognize this flaw in its argument because it doesn't even try to meet the standard. Instead, it asks this Court to simply credit that "ICE has long imposed conditions of release following a bond hearing, including conditions not expressly set forth in the immigration judge's order." Opp'n Brief 4, ECF No. 23. But "attorney argument is not evidence." *Rigby v. Jennings*, 630 F. Supp. 3d 602, 614 (D. Del. 2022) (citation modified) (citing *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 24 n.6 (2022)). So this Court has no evidentiary basis to affirm government counsel's unsupported assertion on historical practice that ICE's conduct is reasonable.

What is clear from the record in the verified petition is that ICE counsel attended the bond hearing, presented evidence and argument why petitioner's liberty should be restricted through continued detention, lost, and then expressly waived the right to administrative appeal. Days later,

after petitioner was released, ICE restricted his liberty anyway, affixing an ankle monitor on him. If ICE genuinely believed it had a reasonable factual basis to impose conditions on petitioner, why waive appeal? The waiver is an admission that the case for electronic supervision could not withstand scrutiny.

On the law, this Court did not just reject the agency's and government counsel's position. It found that their proposed interpretation of regulations would render the administrative process "meaningless and superfluous." *N-N-*, at *3. Now, the government asks this Court to hold that its position is per se substantially justified if an issue has not been decided at the circuit level. Opp'n Brief 5–6. But under *Michelin*, the actual test this Court must apply is whether the position had a reasonable basis in law. Here, the regulatory structure was clear enough that every court to address the issue has ruled the same way: the government's position is textually unsound and structurally incoherent, a far cry from reasonable. *See, e.g.*, *Montes Aguillon v. Bondi*, No. EP-26-CV-71-KC, 2026 WL 531899 (W.D. Tex. Feb. 25, 2026); *Gonzalez Mojica v. Lyons*, 25-cv-13783, 2026 WL 266502 (D. Mass. Feb. 2, 2026); *Batz Barreno v. Baltasar.* --- F. Supp. 3d. ---, 2026 WL 120253, at *2 (D. Colo. Jan. 15, 2026); *Khabazha v. United States Immigr. & Customs Enf't,* 25-cv-5279, 2025 WL 3281514 (S.D.N.Y. Nov. 25, 2025)*; Orellana Juarez v. Moniz*, 788 F. Supp. 3d 61 (D. Mass. 2025).

Hernandez v. Udzinski, No. 2:25-CV-373-RWS, 2025 WL 4093557 (N.D. Ga. Dec. 16, 2025), decided after this court ruled on November 10, 2025, cannot retroactively justify the government's pre-litigation conduct or its litigation position here. When *N-N-* was litigated, the only court to have addressed the issue in dispute had ruled against the government. *See Orellana Juarez v. Moniz*, 788 F. Supp. 3d 61. So neither the agency nor the government had contrary authority to rely on. At any rate, *Hernandez* dealt with a different legal question, because the

petitioner there conceded that the immigration judge lacked jurisdiction to set conditions, notwithstanding "the weight of caselaw suggesting that IJs do have this power." *Hernandez v. Udzinski*, 2025 WL 4093557 at *2. Given this concession, the court reasoned that ICE alone had authority to set conditions of release. *Id.* at *2. Here, in contrast, the parties explicitly litigated the immigration judge's authority to set conditions and the Court found squarely in petitioner's favor.

The government fails to meet its burden to justify its factual and legal positions both pre-litigation and before this Court. So the Court should award petitioner his attorneys' fees.

II. The fees requested are reasonable so the Court should award petitioner attorney's fees.

The government does not dispute the reasonableness of counsels' requested hourly rate. Nor does the government challenge the accuracy of counsels' records. *See McDonald v. McCarthy*, 966 F.2d 112, 119 (3d Cir. 1992) (holding that "where a party fails to challenge the accuracy of representations set forth in a fee petition," the district court is not free to reduce the fee amount by disregarding the uncontested affidavits filed by the plaintiff). Because "a district court may not decrease a fee award based on factors not raised at all by an adverse party," the Court should award petitioners' counsel their requested rates and amount of time billed. *United States v. Eleven Vehicles, Their Equip. & Accessories*, 200 F.3d 203, 212 (3d Cir. 2000).

Besides these concessions, the government's brief advances the contradictory position that the legal question here was so unresolved that a reasonable agency could defy an immigration judge's order and that petitioner's counsel over-resourced what was essentially a simple filing. But the petition here was not a template habeas filing seeking personal release alone that "largely tracked arguments made in the District of Massachusetts case the petitioner relied upon." Opp'n Brief 6–7. Rather, it was the reasonable work of a team of attorneys who brought a first-in-circuit challenge under seven counts, including a claim under the APA for vacatur of an agency policy

requiring indiscriminate application of electronic ankle monitoring, even in violation of an immigration judge's order. This vacatur claim ran against reliance on the policy to justify future restriction on liberty of anyone, not just its individual application in one historical case. It also shared a common core of facts and related legal theories with the individual claims for habeas relief. The habeas claims illustrated why the policy was arbitrary and capricious and contrary to law under the APA: because its application to individuals violated the Due Process Clause and the *Accardi* doctrine.

"In cases in which the plaintiff's successful and unsuccessful claims involve a common core of facts or related legal theories, or where much of counsel's time is dedicated to the litigation as a whole, it is often impossible to divide counsel's time on a precise claim-by-claim basis." *Ne. Women's Ctr. v. McMonagle*, 889 F.2d 466, 476 (3d Cir. 1989). And while the court did not rule on the merits of plaintiff's APA claims, "[w]here a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983). The fact that the case resolved on narrower grounds does not retroactively simplify what counsel was reasonably required to research and prepare for court filings and oral argument.

The government also fails to make "sufficiently specific objection to the amount of fees requested." *United States v. Eleven Vehicles, Their Equip. & Accessories*, 200 F.3d 203, 211. Instead, without support in caselaw, it asks this Court to create a new definition in law for EAJA "itemization" that parses the word so narrowly that it would require counsel to describe which sections of a legal document it drafted or reviewed. *See* Opp'n Brief (arguing that only one attorney "itemizes" her work by specifying that she worked on the "Fact" section of the petition). Nevermind the fact that that an attorney's work might involve reviewing or drafting every section

of a document, so "itemization" of the type the government seeks is impossible to find. The actual EAJA standard only requires a fee petition "to be specific enough to allow the district court to determine if the hours claimed are unreasonable for the work performed." *Rode v. Dellarciprete*, 892 F.2d 1177, 1190 (3d Cir. 1990) (citation modified). Under this permissible standard, a fee petition need only include "some fairly definite information as to the hours devoted to various general activities, e.g., pretrial discovery, settlement negotiations, and the hours spent by various classes of attorneys," and "it is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted." *Id.* (citation modified). Petitioner's submitted evidence meets this standard.

Rather than engaging with the itemized billing entries of plaintiff's counsel, the government largely objects categorically to petitioner's request for fees for "five attorneys' hours to collaborate on a petition" or "for five attorneys participating in a moot court to prepare for an oral argument." Opp'n Brief 6–7. These are not sufficiently specific objections under *Eleven Vehicles*, and "[t]his circuit's precedent . . . binds the district court not to reduce the fee amount requested *sua sponte*, in the absence of a Government objection." *United States v. Eleven Vehicles, Their Equip. & Accessories*, 200 F.3d 203, 212.

Even if the government's categorical objections to attorney activities did meet the *Eleven Vehicles* standard, the amount of time and activities billed were reasonable. Experienced counsel spent time mooting a new attorney for her first federal court appearance in a matter with complex constitutional questions. Of the three attorneys from the organization that originated and developed the legal theories advanced in the case and participated in the moot (Kennedy Human Rights Center, formerly known as RFK Human Rights), only one traveled to attend the hearing: the Director of Litigation, on hand to ensure the argument presented in court aligned with previous

preparation and the overall theory of the case. At that hearing, this Court explicitly complimented counsel's preparedness, evidence that the moot court worked, and that it served the Court's interest in effective advocacy.

The government concedes that petitioner's counsel seeks a reasonable hourly rate on the basis of accurate timekeeping. And it fails to provide sufficiently specific objections to the amount of fees requested. So this Court should grant petitioner his requested fee amount.

III. The Court should award petitioner's counsel fees for preparing this reply brief.

Petitioner's attorney, Anthony Enriquez, of Kennedy Human Rights Center, spent 455 minutes, or 7.5 hours, researching and drafting this reply brief, on the following days:

March 4, 2026: 45 minutes

March 9: 2026: 180 minutes

March 10, 2026: 230 minutes

Multiplied by the hourly rate of $280.99 (calculated in petitioner's brief in support of his motion for attorneys fees, ECF 20), Petitioner's counsel is entitled to an additional $2107.43 for time spent litigating this fee motion. This brings the total amount sought by petitioner to $40,908.89. Petitioner's attorney verifies that the factual statements regarding time spent on this brief are true and correct.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests an award of $40,908.89 in fees and expenses.

DATED: March 11, 2026
New York, New York

Respectfully Submitted,

/s/ Anthony Enriquez
Anthony Enriquez
Vice President, U.S. Advocacy and Litigation
Robert & Ethel Kennedy Human Rights Center
88 Pine St., 8th Fl., Ste. 801
New York, NY 10005
T: 917-941-9141
E: enriquez@kennedyhumanrights.org

/s/ Sarah T. Gillman
Sarah T. Gillman
Director of Strategic U.S. Litigation
Robert & Ethel Kennedy Human Rights Center
88 Pine St., 8th Fl., Ste. 801
New York, NY 10005
T: 646-289-5593
E: gillman@kennedhumanrights.org

/s/ Sarah E. Decker
Sarah E. Decker
Senior Staff Attorney
Robert & Ethel Kennedy Human Rights Center
1300 19th Street NW, Ste. 750
Washington, DC 20036
T: 646-289-5593
E: decker@kennedyhumanrights.org