IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 25-cv-3805-RBJ

HERBERT ORLANDO VELAZQUEZ DE LEON,

Petitioner,

v.

JUAN BALTAZAR, Warden, Denver Contract Detention Facility, Aurora, Colorado, in his official capacity;
GEORGE VALDEZ, Field Office Director, Denver Field Office, U.S. Immigration and Customs Enforcement, in his official capacity;
MARKWAYNE MULLIN, Secretary, U.S. Department of Homeland Security, in his official capacity;
DAVID J. VENTURELLA,[1] Senior Office Performing the Duties of the Director, U.S. Immigration and Customs Enforcement, in his official capacity; and
TODD BLANCHE, Acting Attorney General, U.S. Department of Justice, in his official capacity,

Respondents.

RESPONSE TO MOTION FOR ATTORNEY'S FEES (ECF No. 27)

Respondents submit this response to Petitioner's Motion for Award of Attorney's Fees Pursuant to the Equal Access to Justice Act (ECF No. 27, filed 5/31/26). The Court must decline to award fees under EAJA, because the government's position—which has been adopted by courts throughout the country—was substantially justified.

BACKGROUND

Petitioner's habeas case presented an issue of statutory interpretation that remains

[1] David J. Venturella is substituted for his predecessor pursuant to Fed. R. Civ. P. 25(d).

unresolved under Tenth Circuit precedent. Petitioner is a citizen of Mexico who was not admitted to, or paroled into, the United States. *See* ECF No. 15-1 ¶¶ 1, 5-7. In November 2025, U.S. Immigration and Customs Enforcement ("ICE") detained him when he was released from state custody and charged him with being deportable as a noncitizen present in the United States without being admitted or paroled. *Id.* ¶¶ 10-13. On November 21, 2025, Petitioner appeared before an immigration judge for a custody determination hearing, and Petitioner withdrew his request for custody redetermination. *Id.* ¶ 14. Petitioner's removal proceedings were pending when he initiated this habeas action on November 24, 2025. *Id.* ¶¶ 15-18; ECF No. 1 at 17.

Petitioner argued that the mandatory detention provision of 8 U.S.C. § 1225(b)(2) did not apply to him and that he was entitled to a bond hearing under 8 U.S.C. § 1226. ECF No. 1 ¶ 39. The Court granted the petition on statutory grounds and ordered Respondents to provide Petitioner with a bond hearing under § 1226(a). ECF No. 19 at 9. Respondents did so. *See* ECF No. 21 at 1.

Petitioner now seeks attorney's fees under EAJA, 28 U.S.C. § 2412, in the amount of $4,179, which includes $1,006 for this motion. *See* ECF No. 27 at 2, 11.

ARGUMENT

I. Attorneys' fees should not be awarded under EAJA because Respondents' position was substantially justified.

Respondents' position was "substantially justified," 28 U.S.C. § 2412(d)(1)(A), and thus Petition is not entitled to fees.

A party seeking fees "shall . . . allege that the position of the United States was not substantially justified." 28 U.S.C. § 2412(d)(1)(B). The government bears the burden to establish substantial justification. *See Hackett v. Barnhart*, 475 F.3d 1166, 1172 (10th Cir.

2007). A court must "determine whether the government's position was substantially justified based on the totality of the circumstances, as reflected in the record before the court." *United States v. Charles Gyurman Land & Cattle Co.*, 836 F.2d 480, 485 (10th Cir. 1987).

A position is substantially justified under EAJA if it has "a reasonable basis both in law and fact," and is "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Put another way, the government's position can be substantially justified even if "not correct." *Madron v. Astrue*, 646 F.3d 1255, 1257 (10th Cir. 2011) (quoting *Hackett*, 475 F.3d at 1172); *see also Fletcher v. United States*, 801 F. App'x 640, 646 n.3 (10th Cir. 2020) ("The Government's position, however, can be substantially justified even if it is ultimately wrong.").

A "division among courts, by itself, is strong evidence that the government's position was substantially justified." *Kadidiatou D. v. Easterwood*, No. 26-cv-1218, 2026 WL 969017, at *1 (D. Minn. Apr. 10, 2026) (though disagreeing with the government's position that detention without bond pursuant to 8 U.S.C. § 1225(b)(2)(A) was lawful, finding that the government's position, as evidenced by a split among courts, was substantially justified); *Martinez Amaya v. Bondi*, No. 26-cv-01945-ESK, 2026 WL 1078278, at *2-3 (D.N.J. Apr. 21, 2026) (though the court "unequivocally disagree[d]" with the statutory interpretation that § 1225(b)(2) mandates detention for noncitizens in similar situations as Petitioner "as a matter of law," it nonetheless found that the government's position was substantially justified and EAJA fees could not be awarded).

Here, Respondents' position on the merits of the petition—that Petitioner was properly subject to detention under 8 U.S.C. § 1225(b)(2)(A) and therefore not entitled to a bond

hearing—was substantially justified for the reasons set forth in response to the Petition. *See generally* ECF No. 15 at 3-15. Regarding pre-litigation conduct, it is undisputed that Petitioner "entered the United States without inspection." ECF No. 1 ¶ 1; ECF No. 15-1 ¶¶ 6-7. Because he was not admitted to, or paroled into, the United States, he was both deemed to be an applicant for admission under 8 U.S.C. § 1225(a)(1) and inadmissible under 8 U.S.C. § 1182(a)(6)(A)(i), rendering him subject to removal. His detention was substantially justified because his removal proceedings were ongoing when he filed this case (and because he withdrew his request for custody redetermination). *See* ECF No. 15-1 ¶¶ 14-17. Petitioner's pre-litigation detention was thus substantially justified under the INA and the circumstances of this case. *See Buenrostro-Mendez v. Bondi*, 166 F.4th 494, 500-08 (5th Cir. 2026) (petitioners who were present in the United States without having been admitted or paroled were subject to removal under § 1182(a)(6)(A)(i) and mandatory detention for the duration of those removal proceedings).

Petitioner argues that because his Notice to Appear did not classify him as an "arriving [noncitizen]," his pre-litigation detention was not substantially justified. ECF No. 15 at 8. But a noncitizen need not be an "arriving alien" to be subject to mandatory detention under § 1225(b)(2)(A) because (1) the INA deems a noncitizen present in the United States, who has not been admitted or paroled, to be an "applicant for admission," 8 U.S.C. § 1225(a)(1); and (2) an "applicant for admission" is subject to detention under § 1225(b)(2)(A). *See Buenrostro-Mendez*, 166 F.4th at 502 ("While they remain applicants, they are presently seeking admission."). Petitioner's paperwork is not inconsistent with his pre-litigation detention or Respondents' pre-litigation position.

Respondent's legal position was grounded in the text of the INA and Supreme Court

precedent interpreting that statute and has been adopted by judges throughout the country, although that position was not successful in this case. Specifically, the Fifth and Eighth Circuits have agreed with Respondents' interpretation that detention of similarly situated petitioners is mandatory under § 1225(b)(2)(A). *See Buenrostro-Mendez*, 166 F.4th at 501-08; *Avila v. Bondi*, 170 F.4th 1128, 1132-38 (8th Cir. 2026). The Chief Judge of this District, as well as multiple other district courts in this Circuit, have likewise agreed with Respondents' position. *See Singh v. Baltazar*, No. 26-cv-01076-DDD-TPO, 2026 WL 1282828, at *3-7 (D. Colo. May 11, 2026); Order Denying Writ of Habeas Corpus at 9-16, *Singh v. Blanche*, No. 26-cv-00421-DDD-KAS (D. Colo. Apr. 15, 2026), ECF No. 12; *Montoya v. Holt*, No. 25-cv-01231-JD, 2025 WL 3733302, at *6-15 (W.D. Okla. Dec. 26, 2025).[2] As a court in this Circuit recently summarized: "The Court is unable to say that a position is substantially unjustified, which requires only reasonableness in law and in fact, when two Courts of Appeals, as well as district courts across the country, embrace that same position." *Serrano-Martinez v. De Anda-Ybarra*, No. 26-cv-0529, 2026 WL 1068150, at *29 (D.N.M. Apr. 20, 2026); *see also Garcia-Lopez v. Castro*, No. 25-cv-1144, 2026 WL 524082, at *36 (D.N.M. Feb. 25, 2026) (same).

Recently, a court in the District of Minnesota found that the government's position in a

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[2] Respondent's position also aligns with the considered analysis of many other district courts across the country. *See, e.g.*, *Xiaoquan Chen v. Almodovar*, 815 F. Supp. 3d 314, 318-24 (S.D.N.Y. 2025); *Candido v. Bondi*, No. 25-cv-867, 2025 WL 3484932, at *1-4 (W.D.N.Y. Dec. 4, 2025); *Topal v. Bondi*, No. 25-cv-01612, 2025 WL 3486894, at *1-2 (W.D. La. Dec. 3, 2025); *Altamirano Ramos v. Lyons*, 809 F. Supp. 3d 1015, 1022-27 (C.D. Cal. 2025); *Chavez v. Noem*, 801 F. Supp. 3d 1133, 1140-41 (S.D. Cal. 2025); *Cabanas v. Bondi*, No. 25-cv-04830, 2025 WL 3171331, at *3-6 (S.D. Tex. Nov. 13, 2025); *Mejia Olalde v. Noem*, No. 25-cv-168, 2025 WL 3131942, at *2-5 (E.D. Mo. Nov. 10, 2025); *Sandoval v. Acuna*, No. 25-cv-01467, 2025 WL 3048926, at *2-6 (W.D. La. Oct. 31, 2025); *Rojas v. Olson*, No. 25-cv-1437, 2025 WL 3033967, at *6-14 (E.D. Wis. Oct. 30, 2025); *Vargas Lopez v. Trump*, 802 F. Supp. 3d 1132, 1137-43 (D. Neb. 2025).

materially similar case—that detention was proper pursuant to 8 U.S.C. § 1225(b)(2)(A) as opposed to § 1226(a)—was "substantially justified," even though the Court ruled against the government on the merits of that argument:

> At the time that this Court granted [the] petition, courts across the country—and judges within this District—were divided on the question of whether § 1225(b)(2) applied to aliens such as [Petitioner]. Although this Court (and the vast majority of courts that had addressed the issue) disagreed with the government's position, that position unquestionably had a reasonable basis in law and fact. The division among courts, by itself, is strong evidence that the government's position was substantially justified.

Kadidiatou, 2026 WL 969017, at *1 (footnote omitted).[3]

Other district courts, while disagreeing with the government's position on whether detention is proper under 8 U.S.C. § 1225(b)(2)(A), have similarly found that the position is substantially justified, barring a fee award under EAJA. *See, e.g.*, *Hernandez Herrera v. Olson*, No. 25-cv-1994, 2026 WL 1602258, at *2 (E.D. Wis. June 4, 2026); *Bah v. Warden*, No. 26-cv-752, 2026 WL 1600632, at *2 (W.D. Pa. June 4, 2026); *Martinez Amaya*, 2026 WL 1078278, at *3; *Rodrigo Ante Latacunga v. Dedos*, No. 26-cv-00312, 2026 WL 948865, at *17 (D.N.M. Apr. 8, 2026); *Chang v. Mullin*, No. 26-cv-3019, 2026 WL 915456, at *2 (D. Neb. Apr. 3, 2026); *Bagator v. Warden*, No. 25-cv-486, 2026 WL 1436550, at *2 n.2 (W.D. Pa. Apr. 1, 2026), *recommendation adopted sub nom. Bagator v. Rose*, 2026 WL 1045345 (W.D. Pa. Apr. 17, 2026); *Lopez v. Trump*, 816 F. Supp. 3d 492, 495 (D. Vt. 2026). "Congress, in waiving the United States' sovereign immunity to allow the recovery of fees under the EAJA, limits this waiver" where the unsuccessful party's position was substantially justified, "and the Court must

[3] In *Kadidiatou*, the Court also noted that the Eighth Circuit Court of Appeals had definitively ruled on the issue, thus dispelling any remaining doubt that the government's position is justified for purposes of a motion for EAJA fees.

respect that limitation." *Serrano-Martinez*, 2026 WL 1068150, at *29.

The Tenth Circuit has not yet ruled on the legal issue presented in this case. Respondents' position is "justified to a degree that could satisfy a reasonable person," *Pierce*, 487 U.S. at 565, because it *has* satisfied many reasonable persons: district court judges and circuit court judges. While that position did not prevail before this Court, that fact does not entitle Petitioner to EAJA fees. *See Madron*, 646 F.3d at 1257-58; *Fletcher*, 801 F. App'x at 646 n.3. The Court should decline to award fees in this matter.[4]

CONCLUSION

Because Respondents' position was substantially justified, EAJA fees are not available under 28 U.S.C. § 2412(d)(1)(A).

Dated: June 22, 2026

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[4] In the event that the Court finds that fees are awardable under EAJA, Respondents do not contest the amount of fees sought in the motion.

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2026, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Hans Meyer, Esq.
Daniel Herrera, Esq.
Counsel for Petitioner

s/Thomas A. Isler
Thomas A. Isler