UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:25-cv-03805-RBJ

HERBERT ORLANDO VELAZQUEZ DE LEON,

Plaintiff-Petitioner,

v.

JUAN BALTAZAR, Warden, Denver Contract Detention Facility, Aurora, Colorado, in his official capacity,

GEORGE VALDEZ, Director of the Denver Field Office for U.S. Immigration and Customs Enforcement, in his official capacity;

MARKWAYNE MULLIN, Secretary of the U.S. Department of Homeland Security, in his official capacity;

DAVID VENTURELLA, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity;

TODD BLANCHE, Acting Attorney General of the United States, in his official capacity;

Defendants-Respondents.

REPLY TO RESPONSE TO MOTION FOR ATTORNEY'S FEES (ECF 28)[1]

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[1] On February 7, 2026, Mr. Velazquez de Leon also filed an Unopposed Motion for Extension of Time seeking leave from the Court to file this Reply Brief one day after the presumptive filing deadline due to unforeseen circumstances requiring counsel to provide unexpected care for his young child, who became ill on the day the reply brief was due. Counsel conferred with AUSA Thomas Isler, who does not oppose.

I. Introduction

Petitioner, Herbert Orlando Velazquez De Leon ("Mr. Velazquez De Leon"), submits this reply to Respondents' Response, ECF 28, to his Motion for Attorney's Fees. ECF 27. Respondents' arguments to the contrary fail to address substantial portions of the Motion and the arguments Respondents do advance are unpersuasive.

II. Respondents' Concessions Support Mr. Velazquez De Leon's Motion.

"Where, as here, a party files a response to a motion but does not address all arguments which the motion raises, the party has effectively conceded the arguments which it does not address." *Alfaro Herrera v. Baltazar*, 1:25-cv-04014-CNS, 2026 WL 91470, at *5 (D. Colo. Jan. 13, 2026) (citation omitted); *See United States v. Hunter*, 739 F.3d 482, 495 (10th Cir. 2013) (concluding that cursory argument not meaningfully developed by any analysis or citation is deemed waived). Here, Respondents do not address, and therefore concede, substantial portions of the Motion, including:

- Whether Mr. Velazquez De Leon was the prevailing party;
- Whether Mr. Velazquez De Leon's fee application was timely;
- Whether special circumstances exist to preclude the award of fees;

See generally ECF 28. Respondents therefore concede those portions of the motion.

III. Respondents' Position was Not Substantially Justified.

Reasonable attorney's fees are appropriate when the government's "pre-litigation and . . . litigation position" are not substantially justified. *Al-Maleki v. Holder*, 558 F.3d 1200, 1207 (10th Cir. 2009). Respondents must carry the burden to show substantial justification and the test for substantial justification in the Tenth Circuit is "one of reasonableness in law and fact." *Hackett v. Barnhart*, 475 F.3d 1166, 1172 (10th Cir. 2007). Respondents fail in this endeavor.

a. Respondents Pre-Litigation Position was Not Substantially Justified.

Respondents' application of § 1225(b)(2) and to impose mandatory incarceration was not substantially justified. That is particularly true here because Respondents pre-litigation "treatment of [Mr. Velazquez De Leon] appears to conflict with their assertion that he [was] detained pursuant to § 1225." *Loa Caballero v. Baltazar*, 25-cv-03120-NYW, 2025 WL 2977650, at *8 (D. Colo. Oct. 22, 2025). The "Government's own detention paperwork suggest[ed] that [Mr. Velazquez De Leon] [was] detained under § 1226, not § 1225." *Id.* (citations omitted). ICE served Mr. Velazquez De Leon with the following:

- A Notice to Appear ("NTA"): On December 2, 2025, ICE filed a charging document. This document provides ICE the option to identify Mr. Velazquez De Leon as an "arriving [noncitizen]." ICE did not choose that option and instead specifically charged Mr. Velazquez De Leon as present without admission or parole and inadmissible under U.S.C. § 1182(a)(6)(A)(i), and therefore eligible for bond under § 1226.

ECF 10-2. In other words, ICE served Mr. Velazquez De Leon with a charging document of the agency's factual and legal determination that he was subject to § 1226(a).

Respondents' reliance on district court decisions finding their position substantially justified is unpersuasive because those decisions do not appear to address evidence in the record of the Respondents' *pre-litigation* position in this case. The Tenth Circuit in *Al-Maleki*, requires analysis of both prongs: pre-litigation position *and* litigation position. 558 F.3d at 1207. Here, Respondents held legally inconsistent prelitigation positions including charging decision recognizing bond eligibility under § 1226, only to change positions after three decades to argue an erroneous theory that detention authority sounded in § 1225.

b. Respondents' Litigation Position in Support of § 1225(b)(2) Mandatory Detention was Not Substantially Justified.

As a threshold issue, the Court's analysis regarding substantial justification of the government's *litigation* position must flow from the state of the law at the *time of litigation*,

not the current state of the law. *See Commissioner, I.N.S. v. Jean*, 496 U.S. 154, 160 (1990). In other words, Respondents position must be understood according to the record laid out in this case. *Madrid v. Astrue*, 243 F. App'x 387, 390 (10th Cir. 2007). Respondents do not do so in their response. *See generally*, ECF 28. The litigation in this case started on November 24, 2025, and concluded with this Court's order granting habeas relief on December 22, 2025. ECF 1, ECF 19. *At the time of litigation*, no circuit court of appeals, and no court this district supported Respondents litigation position. Indeed, as this Court recognized in its ruling, "for the first time, there is appellate authority on this issue. The Court of Appeals for the Seventh Circuit recently found, upon analysis of the "text and structure of the two provisions," that § 1226(a) likely governs detention for noncitizens who, like petitioner, are already present in the United States without being admitted or paroled or having applied for the same. *Castañon-Nava v. U.S. Dept. of Homeland Security*, No. 25-3050, ---F.4th----, 2025 WL 3552514, at *8, *8-10 (7th Cir. Dec. 11, 2025)." ECF 19 at * 5.[2] Moreover, at the time of litigation, every judge in this district to decide this issue had ruled definitively against the Respondents' newfound position. Thus, the Respondents' litigation position was not substantially justified at *the time of litigation. Madrid*, 243 F. App'x at 390.

Respondents also neglect to recognize recent decisions in this district granting EAJA fees on the same issue. In *Morales Lopez v. Baltazar*, Judge Martinez granted EAJA fees in a habeas petition on the same issue, finding the government's position not to be substantially justified "because it is based on an abrupt, 'revised' interpretation . . .

[2] The Court's habeas decision further articulated the state of the law *at the time of litigation*, stating that "This Court accords with the Seventh Circuit's reasoning, which has also been echoed and expounded upon in the many, many district court decisions ruling the same way." ECF 19 at * 7.

seemingly in an effort to accomplish the current administration's policy objectives—namely, meeting mass deportation quotas." ---F.Supp.3d ---, WL 1587510 at *5 (D. Colo. May 29, 2026) (Attached as Exhibit 1). Judge Martinez explained that "as of late 2025 an overwhelming majority of district courts had concluded that section 1225(b) does not govern on these facts." *Id at * 7* (*citing Barco Mercado v. Francis*, 2025 WL 3295903, at * 13 (S.D.N.Y. Nov. 26, 2025) (collecting 362 district court opinions nationwide and noting that challengers prevailed in at least 350 of them, in decisions by over 160 judges across fifty courts). Thus, at the *time of litigation* in November and December of 2025, 97% of those 362 court decisions ruled that Respondents' position was unlawful. The Court further explained that "of the roughly 12,000 federal district court cases around the country to have addressed the mandatory detention issue, roughly 10,800 decisions have found in favor of the immigrant, whereas only roughly 1,300 decisions have found in favor of the Government." *Id at *7*. Such overwhelming statistical evidence "confirm the following: The Government's statutory interpretation of section 1225(b) has been rejected by a vast, overwhelming majority of federal district judges across the country." *Id at *8*.

Other orders granting EAJA fees in this District have followed suit.[3] In *Temaj Lopez v. Baltasar*, Judge Martinez again ruled the Government's position was not substantially justified, No. 1:26-cv-0688-WJM, 2026 WL 1747867 at * 1 (D. Colo. Jun. 16, 2026) (Attached as Exhibit 2). In *Abanil v. Baltazar*, Judge Martinez again awarded EAJA fees, finding the Government's position was "not substantially justified principally because it is based on an abrupt, 'revised' interpretation" of the INA that departed from the

[3] In February of 2026, Judge Brimmer noted that "more than 1,500 district court decisions" had ruled that Respondents' position was unlawful. *Chavez Amrenta v. Noem*, No. 26-cv-00236-PAB, 2026 WL 274634, at *2 (D. Colo. Feb. 3, 2026). The Second Circuit also recently found that a remarkable "*90 percent of the hundreds of district judges* across the land[,]" have rejected Respondents' new detention regime. *Barbosa da Cunha v. Freden*, 175 F.4th 61, 99, (2d Cir. 2026) (emphasis added).

Government's "historical" treatment of similarly situated noncitizens. 1:25-cv-04029-WJM-STV, 2026 WL 1758226 at *4 (D. Colo. Jun. 18, 2026) (Attached as Exhibit 3). The Court held the Government's "overall position in this case—including its position *prior to the commencement* of litigation—lacks substantial justification." *Id.* at *7.[4]

Respondents' litigation position related to § 1225(b)(2) was not substantially justified because the government is required to "defend its actions based on the reasons it gave *when it acted . . . .*" *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 24 (2020) (emphasis added). Respondent change conflicted with thirty years of agency practice, contradicted the agency's own regulations, and ignored its own documentation of detention authority. *See Marrero Yera v. Baltazar, et al.*, 1:26-cv-00476-SCK, SBP, 2026 WL 472014, at *2 (D. Colo. Feb. 19, 2026) (finding that because ICE "affirmatively decided to treat [the noncitizen] as being detained under Section § 1226(a)[,] it cannot now be heard to change its position to claim that he is detained under section 1225(b)"). Respondent's litigation position continues to be "contrary to the agency's own implementing regulations; it's published guidance; the decisions of immigration judges (until very recently); decades of practice; the Supreme Court's gloss on the statutory scheme; and the overall logic of our immigration system." *Loa Caballero*, 2025 WL 2977650, at *8 (quotation omitted).

The Tenth Circuit also recently issued its decision in *Santillan Quiroz v. Bondi*, 26-6019, 2026 WL 1876709 (10th Cir. June 30, 2026), holding in a unanimous decision that the Government's interpretation of 8 U.S.C. § 1225(b)(2)(A) is unlawful. The court

[4] Petitioner recognizes that Judge Gallagher recently denied a similar EAJA motion in a two-and-a-half-page written decision. *See Moya Pineda v. Baltazar*, 25-cv-02955-GPG-TPO (D. Colo. June 29, 2026). However, that decision predates the Tenth Circuit's recent unanimous decision on this issue that soundly rejected the Respondents' litigation position.

explained that the Government's position is a "new and novel reading of old statutes" resulting in a "flood of habeas petitions challenging those detentions." *Id.* at *4. The court concluded that the Government's arguments "don't move the needle" and held that § 1225(b)(2)(A) is limited to individuals at the border, while noncitizens like Mr. Velazquez de Leon are "applicant[s] for admission" but not "seeking admission." *Id.* at * 36–37. The court cited the Respondents' longstanding and "(until recently) unbroken interpretation and practice" regarding immigration detention, and the Supreme Court's decision in *Jennings v. Rodriguez*, 583 U.S. 281, 287-88 (2018), which clearly stated that "§ 1226 'authorizes the Government to detain certain aliens *already in the country*.'" *Id.* at *4-5 (emphasis in original). As is the case here, where the Respondents' litigation position violates the Constitution, a statute, or an agency's own regulations, it is not substantially justified. *See Caring Hearts Pers. Home Servs., Inc. v. Burwell*, 824 F.3d 968, 977 (10th Cir. 2016) ("[A]n agency decision that loses track of its own controlling regulations and applies the wrong rules" is not substantially justified.)

Three other federal circuit courts have also resoundingly rejected the Respondents' litigation position. *Lopez Campos et al., v. Raycraft*, 175 F.4th 713, 725 (6th Cir. 2026) (noting that the "text, canons, and past practice all support" [Mr. Velazquez De Leon's] reading while also finding Respondents' position violates due process); *Alvarez Hernandez v. Warden, Federal Detention Center Miami*, 175 F.4th 1258, 1285 (11th Cir. 2026) (holding that "[n]owhere in the text, structure, or history of the INA does" Respondents' position "find steady footing"); *Barbosa da Cunha*, 175 F.4th at *84 (finding based on the "unambiguous meaning of the text" that people like [Mr. Velazquez De Leon] are "not subject to mandatory detention, because he is not 'seeking admission' under Section 1225(b)(2)(A)"). Moreover, prior to the Tenth Circuit's ruling, nearly every judge

and magistrate in this District repeatedly rejected the litigation position of the Respondents. The rulings by this Court and the near unanimity of judges in this District have now been reaffirmed by four circuit courts and align with "90 percent of the hundreds of district judges" to rule on this issue. *Cunha*, 175 F.4th at 87.

Moreover, the list of EAJA fee awards on this issue continues to grow outside of this District. *See e.g., Orrego Orrego v. Hyde*, 26-cv-10260-BEM, 2026 WL 1480362 (D. Mass. May 27, 2026) at * 3 (finding that the Government's "opposition was [not] substantially justified," given "multiple opinions from this Court to the contrary. Indeed, Respondents had repeatedly taken the same position before this Court ... and repeatedly failed to prevail."); *L.R.C. v. Maldonado*, 25-CV-6825 (AMD), 2026 WL 946787 at *2 (E.D.N.Y. Apr. 7, 2026) (awarding fees after determining that the respondents' position at the time of litigation was not substantially justified). *Kumar v. Soto*, No. 26-cv-00203, 2026 WL 1458522, at *2 (D.N.J. Apr. 22, 2026) (stating "lack of substantial justification for Respondents' prelitigation conduct compels the same conclusion as to their continued position asserted in this litigation."); *Gregorio Sandoval Ortiz v. Arnott*, et.al., No. 6:26-CV-3159-MDH, 2026 WL 787589, at *6 (W.D. Mo. Mar. 20, 2026) ("As explained throughout, the Court finds the position of the United States is not substantially justified."); *C.M. v. Knight*, No. 25-01915, 2026 WL 743350, at *2 (E.D. Cal. Mar. 17, 2026) ("to the extent Respondents disagree with Petitioner's argument, the Court finds Respondents fail to meet their burden that their position was substantially justified."); *Salazar v. Noem*, 8:26-CV-44, 2026 WL 594606 at *2 (D. Neb. Mar. 3, 2026) (finding that "the government was not substantially justified in enforcing its novel interpretation of section 1225(b)").; *Rivera Esperanza v. Francis*, ---F.Supp.3d---, 2025 WL 3513983, at *9 (S.D.N.Y. Dec. 9, 2025); *Hurtado v. Bondi*, No. 26-546, 2026 WL 752441, at *2 (D. Minn. Mar. 17, 2026);

Sandoval Abzun v. Genalo, 25-CV-9489, 2026 WL 100028, at *1 (S.D.N.Y. Jan. 14, 2026) (awarding EAJA fees finding the Government's position was not substantially justified because it has "never had a reasonable basis in statutory text, structure, or history"); *Cornejo Guanuquiza v. Francis*, 25-CV-10267, 2025 WL 3678121, at *2 (S.D.N.Y. Dec 18, 2025) (same); *Yao v. Almodovar*, --- F. Supp. 3d ---, 2025 WL 3653433, at *12 (S.D.N.Y. Dec. 17, 2025) ("ICE's position, rejected this year in some 97% of the cases in which it was litigated, was not substantially justified.").

Here, the Court also found that Respondents violated due process, specifically holding that "Mr. Vazquez de Leon's mandatory detention under the wrong statute constitutes an ongoing due process violation, infringing his core liberty interest." ECF 19, at *8. Respondents present no argument to the contrary as to the due process violation found by the Court in this case. *See* ECF 28 *generally*. Thus, Respondents' have "effectively conceded the arguments which it does not address." *Alfaro Herrera*, 2026 WL 91470 at *5.

For these reasons, Respondents' position is not substantially justified.

IV. Mr. Velazquez de Leon is Entitled to EAJA Fees for Litigation of This Reply Brief

Mr. Velazquez De Leon EAJA attorney fees of attorney fees under EAJA for the habeas corpus litigation for a total fee amount of $4,179, including $3,173 for the litigation of the habeas corpus case, and $1,006 for the litigation of the initial motion for EAJA fees. Mr. Espinoza Ruiz now requests an additional $1,290 in fees for the litigation of this Reply Brief. Exhibit 4. Therefore, Mr. Velazquez de Leon requests a total EAJA fee award of $5,469 in this matter. Given he "obtained excellent results his attorney should recover a fully compensatory fee." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983).

V. Conclusion

Mr. Velazquez De Leon respectfully requests the Court grant EAJA fees in this case.

Dated: July 7, 2026

Respectfully submitted,

s/ Hans Meyer
Hans Meyer

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2026, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notifications of such filing to all counsel of record.

/s/ Hans Meyer
Hans Meyer