

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

NELSON HERNANDEZ HERRERA,

Petitioner,

v.

SAM OLSON, *et al.*,

Respondents.

Case No. 25-CV-1994

**REPLY TO RESPONDENTS' OPPOSITION TO MOTION FOR ATTORNEY'S FEES
AND EXPENSES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT**

The petitioner, Mr. Hernandez Herrera, by and through undersigned counsel, hereby submits this Reply to Respondents' Opposition to Mr. Hernandez Herrera's Motion for Attorney's Fees and Expenses Pursuant to the Equal Access to Justice Act ("EAJA").

Respondents agree that Mr. Hernandez Herrera was the prevailing party and timely filed the motion. They dispute only that their position was not substantially justified. They argue justification based on the Board of Immigration Appeals Decision in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (B.I.A. 2025), and because other courts in other jurisdictions have agreed with Respondents' legal position.

To their first point, Respondents attempt to justify their position by pointing to an administrative decision from the Board of Immigration Appeals, one of Respondents' agencies. The Board of Immigration Appeals is a part of the Department of Justice under the complete control and direction of the Attorney General. An agency following its own decision cannot be

used to justify its position and does not make the position reasonable.

Respondents in their opposition brief cite to *Amezola-Garcia v. Lynch*, 835 F.3d 553, 555 (6th Cir. 2016) to argue that “the position that the Government took when arguing before the BIA is fair game”. This case does not support Respondent’s position despite this cherry-picked quote. In *Amezola-Garcia*, the 6th Circuit found that when only a small part of the government’s position was not justified, EAJA fees are unavailable because “as a whole” the government’s position was justified. *Id.* In the explanation, that Court held that the position held by the government in the lower BIA decision on the same matter is fair game.

Here, there is no BIA case “Matter of Hernandez Herrera” from which we are appealing. They are attempting to point to a decision in another matter to justify their arguments in the current matter. Allowing this would permit the government to always avoid EAJA fees by bootstrapping its future arguments on its own previous decisions.

To their second point, the courts, in the various cases cited by Respondents in their opposition brief, noted in denying EAJA fees that at the time the legal issue was novel or not yet decided. On the legal issue at hand, however, Respondents have lost again and again and again. Respondents continued to litigate this matter and unlawfully detain Mr. Hernandez Herrera even after hundreds of courts across the country have ruled against Respondents thousands of times. *See* Nate Raymond, Kristina Cooke & Brad Heath, “Courts Have Ruled 4,400 Times That ICE Jailed People Illegally. It Hasn’t Stopped”, Reuters (Feb. 14, 2026), <https://www.reuters.com/legal/government/courts-have-ruled-4400-times-that-ice-jailed-people-illegally-it-hasnt-stopped-2026-02-14/> (Last visited March 21, 2026). Undeterred from all their losses, they continued to litigate against Mr. Hernandez Herrera after the Seventh Circuit panel decision was issued in *Castanon-Nava v. U.S. Dep’t of Homeland Security*, No. 25-3050, ---

F.4th---, 2025 WL 3552514 (7th Cir. 2025).

At a certain point, the legal issue we're arguing over is not novel, and we are long past that point. Even after all the aforementioned legal losses, including in this case, Respondents continue to unlawfully detain thousands of immigrants. Holding Respondents responsible for all these immigrants' legal fees is the purpose of having EAJA in the first place. Otherwise an overbearing government would continue to be able to deny the basic rights of anyone subject to its jurisdiction. Therefore, Mr. Hernandez Herrera urges this Court to approve the motion and grant EAJA fees in this case.

As a final matter, undersigned counsel notes that in reviewing Respondents' opposition, researching cases cited by Respondents, and drafting this response, an additional 1.2 hours were spent. Mr. Hernandez Herrera therefore requests that number be added to the total time billed for attorney's fees for his request.

DATED this 20th of April, 2026

Respectfully submitted,
Theodore Chadwick
Attorney for Petitioner