UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NOUAMANE SIDQUI,

Petitioner,

v.

JUDITH ALMODOVAR, et al.

Respondents.

Case No. 25 CV 9349 (VSB)

Reply to Opposition to Motion for EAJA Fees

This Reply is submitted in response to Respondents' Memorandum of Law in Opposition to Petitioner's Motion for Attorney's Fees and Expenses, ECF No. 45 ("Opposition").

Under the EAJA, the Government's position is "substantially justified" only if its conduct was "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 485 U.S. 552, 595 (1988). The Government bears the burden of proving its position was justified. *Scarborough v. Principi*, 541 U.S. 401, 414 (2004). Significantly, the government must meet this threshold *twice*—it must independently establish that the agency conduct that gave rise to the litigation was substantially justified, *and* that its litigation position also was substantially justified. 8 U.S.C. § 2412(d)(2)(D); *Smith by Smith v. Bowen*, 867 F.2d 731, 734 (2d Cir. 1989) ("Congress made clear that for EAJA purposes, a court should inquire into both the underlying agency determination affecting the party, as well as the Government's litigation strategy in

defense of that determination."). *See also Michelin v. Warden Moshannon Valley Corr. Ctr.*, 169 F.4th 418, 433 (3d Cir. 2026) ("'In immigration cases, the Government must meet the substantially justified test twice': once for its underlying conduct and once for its decisions in the ensuing litigation about that conduct.") (*quoting Johnson v. Gonzales*, 416 F.3d 205, 210 (3d Cir. 2005)).

Here, Respondents fail to meet their burden to show either that ICE's conduct, or the litigation position taken by the U.S. Attorney's Office in this matter, were substantially justified. Respondents detained Petitioner on December 9, 2025, without any notice or an opportunity for an individualized bond hearing, and thereafter represented to the Court that such action was legal. At the time, Respondents were engaged in the newfound practice of detaining non-citizens without notice, and without an opportunity for bond, a campaign that continues without abatement today. There is no debate that this new practice was not the result of a change in the law, but because of politics.[1]

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[1] *See Cunha v. Freden*, --- F.4th ---, 2026 WL 1146044, at *23 (2d Cir. April 28, 2026) (Cabranes, J., *concurring*) ("On appeal, Respondent argues that Congress clearly required the Executive to detain millions of people like Petitioner—parents of American children, owners of American businesses, members of American communities—but that some thirty years passed before anyone noticed. In the meantime, fifteen Congresses stood silently by as five presidents ignored the plain text of the statute. Immigration officials also failed to grasp that Congress had told them to round up people by the millions. The capacity to carry out the largest detention in American history went unbuilt. Today this Court, in the majority's exhaustive opinion, refuses to credit Respondent's tale. This is good news."). *See also Castanon-Nava v. U.S. D.H.S.*, 161 F.4th 1048, 1062 n. 13 (7th Cir. 2025) (internal quotations and citations omitted) ("It also does not escape our notice that Defendants' recent reliance on § 1225(b)(2)(A) to detain noncitizens discovered within the United States upends decades of practice. Before July 8, 2025, DHS's long-standing interpretation had been that § 1226(a) applied to those who have crossed the border between ports of entry and are shortly thereafter apprehended. Mandatory detention of all persons illegally in the United States only became official DHS policy when Acting Director of ICE Todd M. Lyons issued an internal memorandum on July 8, 2025 explaining that the agency 'revisited its legal position' on the applicability of §§ 1225(b) and 1226(a)."); *Matter of Hurtado*, 29 I.&N. Dec. 216, 225 & n.6 (BIA 2025) ("We acknowledge that for years Immigration Judges have conducted bond hearings for aliens who entered the United States without inspection.").

1. *The Agency's Prelitigation Position was Not Substantially Justified*

In their Opposition, Respondents argue their behavior is "substantially justified" because a minority of judges have ruled in their favor. But even if this argument justified their litigation position (it doesn't, *see infra*, Part #2), this argument fails to carry their burden of showing that *ICE's* practice of no-bond detention without notice was substantially justified, and this dooms their Opposition altogether. *See United States v. 515 Granby, LLC*, 736 F.3d 309, 316 (4th Cir. 2013) ("[W]hen the government's unjustified prelitigation position forces a lawsuit, the petitioner may recover fees under the EAJA for the entire suit, even if the government's litigation position was reasonable.").

Indeed, "the Government's response . . . makes no reference to its position during the underlying proceedings (focusing instead on the proceedings in our Court), and it has thus waived any argument on this ground." *See Johnson*, 416 F.3d at 211. *See also Kumar v. Soto*, No. 26-cv-00203-CPO, ECF No. 21, at 3-4 (D.N.J. April 17, 2026) (attached hereto as Exhibit A) ("Respondents' Opposition does not even attempt to address the reasonableness of the source conduct giving rise to this case; that is, the Department of Homeland Security's abrupt re-interpretation of the meaning of 'applicants for admission' under § 1225. . . . Respondents have therefore failed to meet their burden to establish substantial justification of their prelitigation position.").

But *even if* Respondents had not waived any argument concerning ICE's underlying conduct, the vast majority of judges within this District, including Your Honor in this very case, have ruled that ICE's practice of detention without notice is illegal and in violation of the Constitution. *See Sidqui v. Almodovar*, --- F.Supp.3d ----, 2026 WL 251929, at *1 (S.D.N.Y. Jan. 30, 2026) ("I find that the Government detained Petitioner pursuant to 8 U.S.C. § 1226 and

that his detention violated his due process rights."). *See also, e.g., Sumit v. Maldonado*, 26-cv-650-AMD, 2026 WL 371132, at *2 (E.D.N.Y. Feb. 10, 2026) ("[T]he petitioner, who was previously released on his own recognizance on November 30, 2023, is currently being detained pursuant to 8 U.S.C. § 1226 and in violation of his rights to due process under the Fifth Amendment of the Constitution. Furthermore, the Court finds that even if Section 1225 applied to the petitioner's detention, the petitioner was still entitled to due process before the government arrested him and detained him on November 14, 2025. Under either section of the INA, the government has unlawfully detained the petitioner since November 14, 2025 because it denied him due process."). Indeed, the government was on notice that their practices violated the Constitution long before Petitioner's detention. *See, e.g., Hyppolite v. Noem*, 808 F. Supp. 3d 474, 478, 494 (E.D.N.Y. 2025) ("What happened next was anything but routine. Without any prior notice or explanation, as Hyppolite and his father (who had accompanied him to the hearing) left the courtroom, they found themselves surrounded and detained by agents with U.S. Immigration and Customs Enforcement ('ICE'). Although his father was released after establishing that he was a U.S. citizen, Hyppolite was not. Instead, he was placed into handcuffs and leg shackles and forcibly removed to a 'holding area' at a nearby federal office building. . . . [T]his Court concludes that his detention violates his procedural due process rights under the Fifth Amendment, warranting a grant of his habeas petition and his immediate release.").

A violation of the Constitution cannot be substantially justified. *See Meinhold v. U.S. Dep't of Defense*, 123 F.3d 1275, 1278 (9th Cir. 1997) ("If the government's position violates the

Constitution . . . a finding that the government was substantially justified would be an abuse of discretion.").[2]

2. *The Agency's Litigation Position was Not Substantially Justified*

As recounted above, Respondents presented to this Court a legal theory that had been rejected by the vast majority of judges to consider the issue. Yet despite being pushed back repeatedly by the Courts, Respondents press on. Indeed, as found just recently by Judge Quraishi of the Federal District of New Jersey:

> The Government's handling of Petitioner's detention is emblematic of its approach to immigration enforcement in this state. On the merits, its detentions are illegal. *The Government knows this*. Its reliance on § 1225 has been roundly rejected: federal courts have in near unanimity similarly rejected respondents' position in approximately 300 cases to date, a number which climbs with each passing day.

Cartagena Hueso v. Soto, No. 26-1455 (ZNQ), 2026 WL 539271, at *3 (D.N.J. Feb. 26, 2026) (emphasis added).

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[2] And there is more to address in this particular case supporting why ICE's pre-litigation conduct cannot be "substantially justified." Here, not only did this Court find that Respondents' actions violated the Constitution, but also that the circumstances surrounding Petitioner's re-detention after being released on bond by an Immigration Judge were suspicious, dubious, and not based on any reasoned decision-making. *See Sidqui*, --- F.Supp.3d ---, 2026 WL 251929, at *13 ("Moreover, ICE appears to not have checked the status of the criminal charges against Petitioner, which are allegedly one of the two reasons for his arrest, (*see* Doc. 28 at 2), because it is now undisputed that those charges were dismissed prior to ICE re-detaining Petitioner. (Tr. 9:3-9 (noting that ICE officers 'weren't aware of' Petitioner's criminal charges being dropped prior to re-detaining Petitioner).)". *See also id.* at --- F.Supp.3d ----, 2026 WL 251929, *15 ("The fact that Petitioner was arrested over eight months after allegedly failing to comply with the terms of his ATD Program, over seven months after he was initially arrested by the New York Police Department, and four months after the criminal charges from that arrest were dismissed—despite the Government's conceded knowledge of both the alleged failure to comply with the ATD Program and the criminal charges—highlights the risk of erroneous deprivation. ICE detained Petitioner when he voluntarily appeared at the Queens office of BI Inc.—which he had done to get his electronic application fixed so that he could attempt to comply with the terms of his ATD Program, (Doc. 25)—simply because a BI Inc. employee notified ICE that Petitioner was at their office. (*See* Doc. 28 at 2.) This all strongly suggests to me that Petitioner was arrested without a change of circumstances.").

Respondents' Opposition instead focuses on the limited caselaw supporting its legal position. But as noted by Judge Donnelly just recently in awarding EAJA fees in a factually similar matter, the existence of this caselaw is irrelevant:

> 'The issue for EAJA purposes is not what the law is when the EAJA application is made, but rather whether the government was substantially justified in believing the law not to have foreclosed its position during the underlying litigation.' At the time the parties litigated the petition, the Fifth Circuit had not decided *Buenrostro Mendez* — which, in any event, is not binding on the Court. Nor had any court in this District agreed with the government's position.

L.R.C. v. Maldonado, 25-CV-6825 (AMD), 2026 WL 946787, at *2 (E.D.N.Y. April 7, 2026) ("*L.R.C.*") (*quoting Commodity Futures Trading Com'n v. Dunn*, 169 F.3d 785, 787 (2d Cir. 1999)). "Then — as now — the respondent's position 'd[id] not and ha[d] never had a reasonable basis in statutory text, structure, or history, and ha[d] been rejected with near unanimity in the overwhelming majority of cases across the country.'" *Id.* (*quoting Barco Mercado v. Francis*, 811 F. Supp. 3d 487, 506 (S.D.N.Y. 2025)). Similarly, herein: (1) no "court in this District [had] agreed with the government's position" at the time this matter was litigated; and (2) "[t]hen — as now — the respondent's position . . . 'ha[d] been rejected with near unanimity in the overwhelming majority of cases across the country.'" *See id.* (*quoting Barco Mercado*, 811 F. Supp. 3d at 506).[3]

And there is more to add with respect to Respondents' litigation position in this specific matter that further supports a finding that their behavior was not "substantially justified." As found by the Court, Respondents' representations in this matter were shifting, at times uninformed, and lacking "transparency:"

At the OTSC Hearing, counsel for the Government was unaware of the circumstances

[3] Judge Cogan's opinion in *Saamishvili v. Flanagan*, No. 25 Civ. 6178 (BMC), 2026 WL 377574 (E.D.N.Y. Feb. 11, 2026) was not published until mid-February 2026. Judge Cogan is the only justice from this District to date to have sided with Respondents.

concerning the issuance of the Arrest Warrant, including the timing of the arrest and the issuance of the Arrest Warrant, who made the decision to arrest Petitioner, and what triggered the decision to arrest Petitioner. (Tr. 11:15-13:11, 14:1-10). Instead, as explained *supra* III.A.3, the Government asserts that 'individualized assessments provided in section 1226(a)[ ] are unavailable to Petitioner because his detention is statutorily mandated by section 1225(b)(1)(B)(ii).' (Opp'n 15.) Indeed, the Government's first explanation for the arrest was proffered in the second supplemental declaration, which explained that it was staff at the BI Inc. office who alerted ICE that Petitioner was at BI Inc.'s Queens office, which prompted ICE to prepare an arrest warrant at 26 Federal Plaza and dispatch officers to the BI Inc. office to arrest Petitioner. (Doc. 28 at 1–2.) It was not until the Government's second supplemental declaration that the Government explained, for the first time, that Petitioner was arrested 'for violating a condition of his release from custody, *i.e.*, non-compliance with the ISAP program; and for his criminal history.' (*Id.* at 2.) However, 'ICE does not know when BI Inc. provided the notice as to Petitioner's noncompliance nor why approximately seven months elapsed after the last time Petitioner checked in (February 28) before ICE acted on this information on October 17, 2025, by terminating Petitioner from the ISAP program.' (*Id.* at 1.) The Government also does not explain why it did not act earlier when it concedes that 'ICE became aware of [Petitioner's] arrest on March 31, 2025.' (Doc. 21 at 1.) Moreover, ICE appears to not have checked the status of the criminal charges against Petitioner, which are allegedly one of the two reasons for his arrest, (*see* Doc. 28 at 2), because it is now undisputed that those charges were dismissed prior to ICE re-detaining Petitioner. (Tr. 9:3-9 (noting that ICE officers 'weren't aware of' Petitioner's criminal charges being dropped prior to re-detaining Petitioner).) It is also worth noting that, during the OTSC Hearing, I asked counsel for the Government what triggered Petitioner's arrest, and counsel for the Government 'speculat[ed]' that 'the fact that [Petitioner was] no longer in the [ATD] program means he would be back in detention,' but did not mention Petitioner's prior arrest as a basis for Petitioner's re-detention. (*Id.* at 11:15-13:11.) '[T]he assertion that [Petitioner's] detention stems from [his March] arrest is entirely *post hoc*. Nowhere in the record did Respondents assert that Petitioner was detained under Section 1226(c), nor do any documents indicate that [his November] arrest and detention by ICE were linked to [his] dropped charges from [March], nearly eight months prior. 'The Court cannot credit Respondents' new position as to the basis for [Petitioner'] detention, which was adopted *post hoc* and raised for the first time in this litigation.'" *Rueda Torres*, 2025 WL 3168759, at *5 (quoting *Lopez Benitez*, 795 F. Supp. 3d at 486). 'The utter lack of transparency here is problematic, to say the least, as it makes it impossible to determine why [Petitioner] was detained in the first place.' *Lopez Benitez*, 795 F. Supp. 3d at 494.

Sidqui, --- F.Supp.3d ----, 2026 WL 251929, at *13.[4]

Because Respondents' legal position in this matter was not "substantially justified,"

[4] Respondents' Opposition's "Petitioner's Immigration and Detention History" and "Habeas Petition and Procedural Background" sidesteps this entirely.

EAJA fees are appropriate. *See Sumit v. Maldonado*, 26-CV-650 (AMD), ECF No. 17 (E.D.N.Y. April 28, 2026) (attached hereto as Exhibit B) (awarding EAJA fees in factually similar habeas proceeding); *Kumar*, No. 26-cv-00203-CPO, ECF No. 21, at 6 (Ex. A) (awarding EAJA fees in factually similar habeas proceeding; "this Court joins the growing number of district courts nationwide who have awarded fees pursuant to the EAJA for Respondents' unlawful immigration detention practices") (collecting authority); *L.R.C.*, 2026 WL 946787, at *5 (awarding EAJA fees in factually similar habeas proceeding in the amount of $15,497); *Cornejo Guanuquiza v. Francis*, 25-CV-10267 (RA), 2025 WL 3678121, at *2 (S.D.N.Y. Dec 18, 2025) (awarding EAJA fees in factually similar habeas proceeding; "[t]he Court finds that the Government's position 'was not substantially justified,' since it does not 'and has never had a reasonable basis in statutory text, structure, or history.'"); *Yao v. Almodovar*, 813 F. Supp. 3d 461, 478 (S.D.N.Y. 2025) ("Here, Yao is the prevailing party, and ICE's position, rejected this year in some 97% of the cases in which it was litigated, was not substantially justified. Yao is thus entitled to reasonable fees and costs."); *Rivera Esperanza v. Francis*, No. 25-CV-8727 (RA), 2025 WL 3513983, at *9 (S.D.N.Y. Dec. 9, 2025) (awarding EAJA fees in factually similar habeas action); *Barco Mercado v. Francis*, 811 F. Supp. 3d at 506 ("[Respondents'] position has been rejected with near unanimity in the overwhelming majority of cases across the country. Mr. Barco is entitled to reasonable fees and costs.").

3. *Any EAJA Award Should be Adjusted*

Should the Court find an EAJA award appropriate, the award should be increased for the 8.5 hours spent researching and drafting this Reply, for a total of $7,991.38 (previous award submission of $5,757.83 + ($262.77 x 8.5)). *See* Exhibit C. *See also Commissioner, I.N.S. v. Jean,* 496 U.S. 154, 162 (1990) ("We find no textual or logical argument for treating so

differently a party's preparation of a fee application and its ensuing efforts to support that same application.").

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Respectfully submitted,

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