UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

E.M.M.,

Petitioner,

v.

JUDITH ALMODOVAR, Acting Director, New York City Field Office, U.S. Immigration and Customs Enforcement, *et al.*,

Respondents.

25 Civ. 9592 (DEH)

RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S MOTION FOR ATTORNEY'S FEES

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Respondents (the "government"), by their attorney Jay Clayton, United States Attorney for the Southern District of New York, respectfully submit this memorandum of law in opposition to Petitioner's motion for attorneys' fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). ECF No. 22 (hereinafter "Fee Motion" or "Mot.").

PRELIMINARY STATEMENT

Petitioner E.M.M. ("Petitioner") seeks an award of attorneys' fees and costs under the EAJA. Because the government's position was substantially justified and special circumstances render a fee award improper, the motion should be denied. If the Fee Motion is not denied in its entirety, the fee request should be reduced because it does not reflect a reasonable expenditure of hours.

FACTUAL BACKGROUND

A. Underlying Litigation

Petitioner unlawfully entered the United States at some point prior to May 19, 2025. *See* Decl. of Mincheol So dated Nov. 24, 2025, ECF No. 15 ("So Decl."), ¶¶ 3-4. According to Petitioner, he has lived in the United States for the past 18 years. *See* Am. Pet., ECF No. 9, ¶¶ 16; Declaration of E.M.M., ECF No. 1-2, ¶ 2.

U.S. Immigration and Customs Enforcement ("ICE") arrested Petitioner on May 19, 2025. So Decl. ¶ 4. That day, ICE served Petitioner with a Notice to Appear ("NTA"), charging him with removability pursuant to Immigration and Nationality Act ("INA") § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General. *Id.* ¶ 5 & Ex. A. Petitioner was booked into the 26 Federal Plaza, New York City Hold Room, and, later that day, transferred to the Orange County Jail. *Id.* ¶ 7.

On May 22, 2025, ICE filed the NTA with the Executive Office for Immigration Review, thereby commencing removal proceedings. *Id.* ¶ 9. The NTA directed Petitioner to appear before an Immigration Judge ("IJ") on May 27, 2025. *Id.* Petitioner appeared for several master calendar hearings between May 27, 2025, and July 29, 2025. *Id.* ¶¶ 10-12, 14-16.

On August 1, 2025, Petitioner filed a motion for release on bond pursuant to 8 U.S.C. § 1226(a) with the IJ. *Id.* ¶ 17. On August 11, 2025, the IJ held a bond hearing, granted Petitioner's motion for bond, and ordered Petitioner released from custody under bond of $7,500. *Id.* ¶ 19. Petitioner was not released, however, because DHS filed a Notice of Service Intent to Appeal Custody Redetermination (Form EOIR-43) that same day, which automatically stayed the IJ's order that Petitioner be released on bond. *Id.* ¶ 20. On August 21, 2025, DHS appealed the IJ's bond determination to the Board of Immigration Appeals ("BIA"), contending in the appeal that Petitioner was not eligible for bond because his detention was governed by 8 U.S.C. § 1225(b)(2)(A), which mandates detention, rather than 8 U.S.C. § 1226(a), which permits release on bond. *See id.* ¶ 22.

On August 13, 2025, Petitioner filed an application for relief from removal with the immigration court, *id.* ¶ 21, and, on September 12, 2025, Petitioner appeared for a merits hearing before the IJ regarding that request, *id.* ¶ 24. The IJ denied Petitioner's application for relief and ordered him removed to El Salvador. *Id.* Petitioner appealed the IJ's order of removal with the BIA on October 8, 2025. *Id.* ¶ 25. That appeal remains pending.

Petitioner filed a habeas petition ("Petition" or "Pet.") on November 17, 2025, seeking release from ICE custody. Petitioner argued in his petition that the automatic stay of the IJ's bond order violated his due process rights and that the mandatory detention provision of 8 U.S.C. § 1225(b)(2)(A) does not apply to him because he had already entered and had been residing in

the United States at the time he was arrested by ICE. Pet. ¶¶ 51-52, 64-65.

On November 20, 2025, the BIA issued a decision sustaining DHS's appeal of the IJ's August 11, 2025, order granting Petitioner release on bond. *Id.* ¶ 26. The BIA's decision vacated the IJ's bond order on the basis that there was no authority to grant bond because, consistent with the BIA's decision in *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216, 221 (BIA 2025), Petitioner was present in the United States without admission and, accordingly, his detention was governed by 8 U.S.C. § 1225(b)(2)(A). *Id.*

Petitioner amended his petition after the BIA issued its November 20, 2025, decision. ECF No. 9 ("Amended Petition" or "Am. Pet."). He repeated the arguments he made in the Petition and also argued that his detention, which by then had exceeded six months, had become unconstitutionally prolonged, entitling him to a bond hearing regardless of whether he was detained pursuant to § 1226(a) or § 1225(b)(2)(A). Am. Pet. ¶¶ 4, 80-86.

On November 25, 2025, Respondents filed a letter response to the Petition. ECF No. 16 ("Gov't Opp."). Respondents reserved all rights, but "to conserve judicial and party resources, and to expedite the Court's consideration of this case," informed the Court that the Court had already determined the key legal issues in a prior decision—*Lopez Benitez v. Francis*, No. 25 Civ. 5937 (DEH), 2025 WL 2371588 (S.D.N.Y. Aug. 13, 2025)—and conceded that the *Lopez Benitez* "decision would appear to control the result in this case if the Court adheres to it." *Id.* at 3–4. The government also noted that Petitioner's challenge to ICE's invocation of the automatic stay had become moot because the BIA dissolved the automatic stay when it vacated the IJ's release order. *Id.* at 4. The government acknowledged, however, that the Court had already concluded in a prior case, *J.M.P. v. Arteta*, 807 F. Supp. 3d 265 (S.D.N.Y. 2025), that ICE's invocation of an automatic stay to an IJ's bond order violated due process and that *J.M.P.* "would likely control the result in

this case" if the Court did not agree that the automatic stay issue was moot. Gov't Opp. at 4.

The next day, November 26, 2025, the Court granted the Amended Petition. ECF No. 17. In doing so, the Court stated that it was granting the Amended Petition and ordering Petitioner's release "[f]or the reasons stated" in *Lopez Benitez* and *J.M.P.*, "and in light of Respondents' concession that these cases would appear to 'control the result in this case.'" *Id.* ICE released Petitioner from custody that same day. ECF No. 18.

On December 15, 2025, the Court issued a more detailed opinion and order, ECF No. 19 ("Op."), and, on January 9, 2026, the Clerk entered judgment, ECF No. 20.

B. Fee Motion

On March 17, 2026, Petitioner filed the Fee Motion requesting $11,751.22, in fees and expenses under the EAJA, as well as $245.58 in costs, in addition to fees for any time spent preparing a reply brief if the government opposes this motion. ECF No. 22, at 12. Specifically, Petitioner requested fees for 44.9 hours of attorney time, split among two lawyers, at a rate of $261.72 per hour. Mot. at 12-13.

LEGAL STANDARDS

The EAJA is a limited waiver of the United States' sovereign immunity, and therefore "must be strictly construed in favor of the United States." *Ardestani v. I.N.S.*, 502 U.S. 129, 137 (1991).[1] Under the EAJA, "a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded . . . , incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless

[1] The Second Circuit has held that non-criminal habeas petitions are "civil actions" for the purposes of the EAJA. *Vacchio v. Ashcroft*, 404 F.3d 663, 667–72 (2d Cir. 2005). However, there is a circuit split on this issue, and thus Respondents preserve this issue for appeal.

the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). "Thus, eligibility for a fee award in any civil action requires: (1) that the claimant be a 'prevailing party'; (2) that the Government's position was not 'substantially justified'; (3) that no 'special circumstances make an award unjust'; and, (4) pursuant to 28 U.S.C. § 2412(d)(1)(B), that any fee application be submitted to the court within 30 days of final judgment in the action and be supported by an itemized statement." *Comm'r, I.N.S. v. Jean*, 496 U.S. 154, 158 (1990). The EAJA only authorizes the payment of "reasonable" attorneys' fees and expenses. 28 U.S.C. § 2412(d)(2)(A).

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *see also Kerin v. U.S. Postal Service*, 218 F.3d 185, 190 (2d Cir. 2000). In determining a reasonable number of hours, "the fee applicant bears the burden of . . . documenting the appropriate hours expended." *Hensley*, 461 U.S. at 437. "Attorneys are not entitled to fees under the EAJA for work that is unreasonable, redundant, excessive, or unnecessary." *Salvo v. Comm'r of Soc. Sec.*, 751 F. Supp. 2d 666, 674 (S.D.N.Y. 2010). Attorneys' fees are to be awarded "with an 'eye to moderation.'" *N.Y. State Ass'n for Retarded Child., Inc. v. Carey*, 711 F.2d 1136, 1139 (2d Cir. 1983) (quoting *Beazer v. N.Y.C. Transit Authority*, 558 F.2d 97, 101 (2d Cir. 1977)). "In determining whether a reasonable number of attorney hours were expended, the court should 'examine the hours expended by counsel and the value of the work product of the particular expenditures to the client's case' and '[i]f the court determines that certain claimed hours are excessive, redundant, or otherwise unnecessary, the court should exclude those hours in its calculation of the lodestar.'" *Kahlon v. Yitzhak*, 270 F. Supp. 3d

583, 591 (E.D.N.Y. 2017) (quoting *Gierlinger v. Gleason*, 160 F.3d 858, 876 (2d Cir. 1998) (alteration in original).

ARGUMENT

I. The Fee Motion Should Be Denied in its Entirety

A. Respondents' Position Was Substantially Justified

A party is entitled to fees and expenses only if "the position of the United States" was not "substantially justified." 28 U.S.C. § 2412(d)(1)(A). While Respondents have the burden to show that their position was substantially justified, there is no "presumption that the Government position was not substantially justified simply because it lost the case." *Scarborough v. Principi*, 541 U.S. 401, 415 (2004); *see also Cooper v. U.S. R.R. Ret. Bd.*, 24 F.3d 1414, 1416 (D.C. Cir. 1994) (explaining that the reasonableness inquiry "may not be collapsed into our antecedent evaluation of the merits, for EAJA sets forth a 'distinct legal standard'" (quoting *Fed. Elec. Comm'n v. Rose*, 806 F.2d 1081, 1089 (D.C. Cir. 1986))). As the Supreme Court has explained, "substantially justified" does not mean "'justified to a high degree,' but rather 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (quoting Advisory Committee's Notes on 1970 Amendments to Fed. R. Civ. P. 37(a)(4)). In other words, "[t]he 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." *Commodity Futures Trading Comm'n v. Dunn*, 169 F.3d 785, 787 (2d Cir. 1999)); *see also Vacchio*, 404 F.3d at 677 (the United States' position was substantially justified where the government presented a "viable, but far from compelling, legal theory").

The Court's ruling against Respondents in this case does not entitle Petitioner to fees because there is reasonable disagreement nationwide regarding the principal legal issue in this case—whether a noncitizen in Petitioner's position is subject to detention under 8 U.S.C. § 1225(b)(2)(A), as Respondents assert, or under 8 U.S.C. § 1226, as Petitioner asserts. The Board of Immigration Appeals ("BIA")—the highest administrative appellate body in the United States for interpreting and applying immigration laws—issued a decision adopting ICE's application of § 1225(b)(2). *See Matter of Yajure Hurtado*, 29 I. & N. Dec. 216 (BIA 2025). This Court correctly observed in its written opinion in December 2025 that the majority of district courts have disagreed with Respondents' application of § 1225(b)(2)(A), and that "the only Court of Appeals to weigh in preliminarily thus far, the Seventh Circuit, has agreed." Op. at 24 (citing *Castanon-Nava v. U.S. Dep't of Homeland Security*, 161 F.4th 1048, 1060-61 (7th Cir. 2025)). Since then, however, two courts of appeals have directly addressed the issue—the Fifth Circuit and the Eighth Circuit—and both courts ruled in favor of Respondents' position that § 1225(b)(2)(A) governs detention of a noncitizen in Petitioner's position. *See Herrera Avila v. Bondi*, No. 25-2348, — F.4th — , 2026 WL 819258, at *2–6 (8th Cir. Mar. 25, 2026) (holding that statutory text, structure, and purpose support Respondents' interpretation and application of § 1225(b)(2)(A)); *Buenrostro-Mendez v. Bondi*, 166 F.4th 494, 498–508 (5th Cir. 2026) (holding that the plain language of § 1225(b)(2) and congressional intent support Respondents' construction that any noncitizen "present in the United States who has not been admitted" is subject to mandatory detention without bond pending removal proceedings).

So too, have five district court judges in this district—Judges Vyskocil, Cronan, Rearden, Woods, and Halpern—among others within the Second Circuit. *See, e.g.*, *Liang v. Almodovar*, No. 25 Civ. 9322 (MKV), 2025 WL 3641512 (S.D.N.Y. Dec. 15, 2025); *Chen v. Almodovar*, No.

25 Civ. 9670 (JPC), 2026 WL 100761 (S.D.N.Y. Jan. 14, 2026); *Weng v. Genalo*, No. 25 Civ. 9595 (JHR), 2026 WL 194248 (S.D.N.Y. Jan. 25, 2026); *Arana v. Arteta*, No. 26 Civ. 240 (GHW), 2026 WL 279786 (S.D.N.Y. Feb. 3, 2026); *Portilla Hernandez v. Noem*, 25 Civ. 10393 (PMH), 2026 WL 836735 (Mar. 26, 2026); *see also, e.g.*, *Candido v. Bondi*, No. 25 Civ. 867 (JLS), 2025 WL 3484932 (W.D.N.Y. Dec. 4, 2025); *Saamishvili v. Flanagan*, No. 25 Civ. 6178 (BMC), 2026 WL 377574 (E.D.N.Y. Feb. 11, 2026). There is no Second Circuit precedent to the contrary; the lead case on this issue, *Da Cunha v. Moniz*, was argued yesterday, April 6, 2026. *See* No. 25-3141, ECF No. 72. Courts in this district have recognized that "[r]easonable minds can differ" and until "additional authority from higher courts" on the legal issue presented in Petitioner's habeas case is available, district courts "continue to try [their] best to wrestle with complicated questions of law in good faith." *Goorakani v. Lyons*, 812 F. Supp. 3d 401, 416 (S.D.N.Y. 2025); *accord Chen*, 2026 WL 100761, at *14.

Respondents' legal position thus has been accepted by two U.S. Courts of Appeals, the Board of Immigration Appeals, and a minority of district courts. Although the Court has ruled against Respondents on the merits in this case, the split in federal courts as to the validity of ICE's statutorily grounded application of § 1225(b)(2)(A) demonstrates that—as this Court observed—"[r]easonable minds can differ" on "difficult and important legal questions" like this. *Goorakani*, 812 F. Supp. 3d at 416. Respondents' position is therefore "substantially justified" under the EAJA. *See Vacchio*, 404 F.3d at 675 ("[T]he issue is far from settled law, the Government's legal argument is far from unreasonable, and it thus cannot be said that the Government's position on the question is not substantially justified."); *cf. Kirkland v. Railroad Retirement Bd.*, 706 F.2d 99, 105 (2d Cir. 1983) ("On the facts of this case, we believe the Board has sustained its burden of

showing that its position, although erroneous, was not so devoid of legal or factual support that a fee award is appropriate.").

Over the past few months, courts across the country who have disagreed with the government's position that § 1225(b)(2)(A) mandates detention of applicants for admission have nonetheless rejected EAJA fee applications in connection with habeas cases hinging on Respondents' interpretation. For example, a district court in New Mexico found that it was "unable to say that a position is substantially unjustified, which requires only reasonableness in law and in fact, when a Court of Appeals, the Fifth Circuit, as well as district courts across the country, embrace that same position" and did not permit the petitioner to file an EAJA fee motion. *Garcia-Lopez v. Castro*, No. 25 Civ. 1144 (JB) (SCY), 2026 WL 524082, at *36 (D.N.M. Feb. 25, 2026). So too did a district court in Nebraska. *Sanchez Lopez v. Jeffreys*, No. 25 Civ. 3241, 2026 WL 309994, at *2 n.3 (D. Neb. Feb. 5, 2026) ("[T]he Court cannot say that the Federal Respondents' pre-litigation decision to treat [the petitioner] as being subject to mandatory detention under § 1225, while not ultimately correct in this Court's view, lacked a reasonable basis in law or fact."). And within the Second Circuit, a Vermont district court similarly denied EAJA fees under these exact circumstances. *See Lala Inamagua v. Hale*, No. 25 Civ. 892 (GWC), ECF No. 24 (D. Vt. Jan. 22, 2026) (concluding "the government ha[d] met its burden of showing that its position was 'substantially justified'" despite finding the government's position incorrect in the underlying habeas case); *Lopez v. Trump*, No 25 Civ. 863 (GWC), 2026 WL 114708, at *2 (D. Vt. Jan. 14, 2026) (holding that "the Government's position cannot be described as unjustified" because, although ruling against the Government in that case, "other courts have differed, and there is no authoritative appellate guidance on the issue"). The government acknowledges that certain judges in this district have held otherwise, but notes that certain such decisions were reached before two

circuit courts and additional district judges in this district issued decisions agreeing with the government. *See Yao v. Almodovar*, No. 25 Civ. 9982 (PAE), 2025 WL 3653433, at *12 (S.D.N.Y. Dec. 17, 2025); *Cornejo Guanuquiza v. Francis*, No. 25 Civ. 10267 (RA), 2025 WL 3678121, at *2 (S.D.N.Y. Dec. 18, 2025).

Plaintiffs are also incorrect that EAJA fees are warranted because the government's position with regard to ICE's invocation of the automatic stay was not sufficiently justified. *See* Op. 11-24. As an initial matter, the Court's written opinion makes clear that the Court's decision did not turn on ICE's invocation of the automatic stay. The government conceded in its letter response that this Court's decision in *J.M.P.* "likely would control the result" if the Court were to determine that the automatic stay issue was not moot, Gov't Opp. at 4, and the Court referred briefly to *J.M.P.* in its initial order on November 26, 2025, ECF No. 17. But the Court did not discuss the automatic stay or *J.M.P.* in explaining the bases for its decision in the longer written opinion it issued in December. *See* Op. 11-24.

In any event, the government's position with respect to the automatic stay was substantially justified. The government principally argued that because the automatic stay was no longer in place by the time Petitioner filed the Amended Petition, Petitioner's challenge to the invocation of the automatic stay was moot. Numerous courts have found such challenges to be moot under similar circumstances. *See, e.g.*, *Altayar v. Lynch*, No. 16-cv-2479 (JZB), 2016 WL 7383340, at *1 (D. Ariz. Nov. 23, 2016), *report and recommendation adopted*, No. 16-cv-2479 (GMS), 2016 WL 7373353 (D. Ariz. Dec. 20, 2016) (petition challenging detention under automatic stay provision rendered moot after BIA granted ICE a discretionary stay pending custody appeal); *Murillo-Flores v. Mukasey*, No. 08-cv-943 (JAT), 2009 WL 310143, at *4 (D. Ariz. Feb. 6, 2009) ("Because Petitioner is no longer detained under the automatic stay, this

Court may no longer grant any relief as to [the automatic stay and procedural due process claims], and they must be dismissed as moot."); *Hussain v. Gonzales*, 492 F. Supp. 2d 1024, 1031 (E.D. Wis. 2007) (finding challenges related to automatic stay provision moot because "DHS's automatic stay was replaced by a discretionary stay entered by the BIA, and even that stay is of no effect at this point since the BIA vacated the IJ's bond order and remanded the case for further proceedings"); *El-Dessouki v. Cangemi*, No. 06-cv-3536 (DSD), 2006 WL 2727191, at *2 (D. Minn. Sept. 22, 2006) (because the BIA issued a discretionary stay, habeas challenge to detention pursuant to the automatic stay provision is moot). Indeed, because the automatic stay was no longer in place, the Court could not grant Petitioner relief from it—the "hallmark of a moot case or controversy." *See Martin-Trigona v. Shiff*, 702 F.2d 380, 386 (2d Cir. 1983).

Moreover, ICE's invocation of the automatic stay itself was substantially justified. In assessing the validity of procedures in the immigration context, courts must "weigh heavily" the fact "that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). Courts also must consider that Congress "emphatic[ally]" intended the government's discretionary decisions regarding detention to be "presumptively correct and unassailable except for abuse." *Carlson v. Landon*, 342 U.S. 524, 540 (1952). The Department of Homeland Security ("DHS") has discretion to invoke an automatic stay of an IJ's custody order, provided that DHS files a notice of intent to appeal the custody redetermination (Form EOIR-43) with the immigration court within one business day of the order, and so long as DHS files a notice of appeal with the BIA within ten business days of the IJ's order. *See* 8 C.F.R. §§ 1003.6(c); 1003.19(i)(2).

As the government has acknowledged, this Court's decision in *J.M.P.* suggests that the Court most likely would have concluded that ICE's invocation of the automatic stay in this case violated due process had the Court reached the issue—but, as discussed above, that does not mean that the government's position was not substantially justified, as reasonable minds can differ. The Supreme Court has explained that "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal," *Demore v. Kim*, 538 U.S. 510, 528 (2003), and that "due process is flexible and calls for such procedural protections as the particular situation demands," *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quotation marks omitted). Whether the administrative procedures provided are constitutionally sufficient requires analysis of three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335. The government would not have been unjustified to argue that applying those three factors here, the procedures provided to Petitioner were adequate.

Because Respondents' position was substantially justified, the Fee Motion should be denied.

B. Special Circumstances Render a Fee Award Improper

Alternatively, and for similar reasons, the Court should find that "special circumstances" render a fee award under the EAJA inappropriate. *See* 28 U.S.C. § 2412(d)(1)(A). This exception to the EAJA operates, in part, to ensure "that the Government is not deterred from advancing in good faith the novel but credible extensions of the law that often underlie vigorous enforcement efforts." *Taylor v. United States*, 815 F.2d 249, 252 (3d Cir. 1987) (citing legislative history); *cf.*

Roanoke River Basin Ass'n v. Hudson, 991 F.2d 132, 139 (4th Cir. 1993) ("While the EAJA redresses governmental abuse, it was never intended to chill the government's right to litigate or to subject the public fisc to added risk of loss when the government chooses to litigate reasonably substantiated positions, whether or not the position later turns out to be wrong."). Here, Respondents advanced a credible argument that 8 U.S.C. § 1225(b)(2)(A) applies to Petitioner—an argument and interpretation that has been upheld by two courts of appeals and remains pending in the Second Circuit amidst a split among judges in the Southern District of New York. The Court should therefore deny the Fee Motion.

II. In the Alternative, Plaintiff's Fee Request Should Be Reduced

Where a prevailing party qualifies for EAJA fees, "a court may award *reasonable* fees and expenses of attorneys." 28 U.S.C. § 2412(d)(2)(A) (emphasis added); *see also Hensley v. Eckerhart*, 461 U.S. 424, 433–34 (1983) (compensating only time that is "reasonably expended on the litigation"). The EAJA does not entitle a prevailing party to compensation of *all* billed hours—only those *reasonably expended* on the litigation. The fee applicant has the burden of establishing the reasonableness of the hours expended. *Hensley*, 461 U.S. at 433. The Supreme Court has cautioned that "[c]ounsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Id.* at 434.

While the overall hours that Petitioner seeks here are not grossly excessive, a review of the attorneys' billing records reflects certain instances of unreasonable or excessive billing that warrant a reduction in the fee award Petitioner seeks. First, the entries include more than two hours of clerical tasks, such as sending and preparing FedEx packages, printing mailing labels,

binding documents, printing copies of filings, and submitting[2] filings on ECF. *See* ECF No. 22-2, pages 4-5.[3] Tasks that are clerical in nature "are not recoverable in an attorney's fee award under the EAJA." *Kottwitz v. Colvin*, 114 F. Supp. 3d 145, 148 (S.D.N.Y. 2015); *Finch v. Saul*, No. 17 Civ. 892 (OTW), 2020 WL 1940308, at *6 (S.D.N.Y. Apr. 22, 2020).

Second, certain billing entries reveal excessive billing for a habeas case (1) that essentially presented indistinguishable facts from hundreds—if not thousands—brought across the country, which Respondents essentially conceded based on the Court's prior decision in this case, and (2) that was handled by an attorney with at least 10 years of experience. In determining whether an attorney's hours are excessive or unnecessary, a court may consider the complexity of the case and the familiarity of counsel with the subject matter at issue. *See, e.g.*, *Banks v. Berryhill*, No. 10 Civ. 6462 (KMK) (JCM), 2017 WL 3917141, at *3–4 (S.D.N.Y. June 30, 2017), *report and recommendation adopted*, 2017 WL 3923676 (S.D.N.Y. Sept. 6, 2017). Here, between reviewing the facts, speaking with Petitioner, researching, drafting, reviewing, and editing, it took counsel more than 25 hours to prepare the Petition and associated filings. *See* ECF No. 22-2, at 5-6; ECF No. 22-3, at 3. Counsel then billed another 3 hours for drafting the Amended Petition, *see* ECF No. 22-2, at 4-5, which is largely identical to the Petition except that it contains approximately 14 new paragraphs, *see* ECF No. 9-2 (redline of Amended Petition against Petition). For a case such as this, a reduction in the amount of time billed is warranted. *See Rothschild v. Arcadia Recovery*

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[2] One entry is a block-billed entry for both "drafting and filing" the Amended Petition. ECF No. 22-2, at 4. While drafting is compensable, filing is not. Another entry vaguely states "Preparing filing for submission on ECF." *Id.* at 5. It is unclear what counsel means by "preparing filing for submission," but counsel devoted a number of entries to drafting, revising, and reviewing filings. Thus, the entry for "[p]reparing" a document "for submission on ECF" appears to refer to tasks associated with filing the document.

[3] The pincites provided here for exhibits to Plaintiff's Fee Motion refer to the page numbers in the ECF headers.

Bureau, LLC, No. 17 Civ. 721 (VB), 2017 WL 6512303, at *1 (S.D.N.Y. Dec. 19, 2017) (finding, in routine case, "18 hours investigating the facts and the law and initiating the action" "is plainly excessive" in case that was "quickly resolved").

Finally, counsel included time entries for certain communications with opposing counsel that were either excessive or entirely unwarranted. Counsel billed 42 minutes of time for preparing a "strategy email" to "removal defense counsel." ECF No. 22-2, at 7. It is not clear what is meant by this entry, but it presumably refers to counsel emailing DHS counsel about Petitioner's removal proceedings; such an email would appear to be unrelated to this habeas action, which was brought to seek Petitioner's release from detention, and, thus, not compensable under the EAJA. *See* ECF No. 22-2, at 7. Counsel also billed excessive amounts for drafting simple, ministerial emails attaching documents or proposing scheduling—18 minutes for drafting a short email to government counsel attaching a courtesy copy of the Petition; 12 minutes for drafting a two-sentence email providing the notice of conference; and another 18 minutes for drafting an email to opposing counsel regarding scheduling. *See id.* at 5.

A "percentage reduction, typically in the range of twenty to thirty percent, is often applied as a 'practical means of trimming fat from a fee application.'" *Conforti v. Berryhill*, No. 19 Civ. 2958 (JGK), 2021 WL 796494, at *3 (S.D.N.Y. Mar. 2, 2021) (quoting *Ass'n for Retarded Children*, 711 F.2d at 1146); *see also Cathay Bank v. Seo*, No. 06 Civ. 15445 (LTS) (RLE), 2009 WL 5341672, at *5 (S.D.N.Y. Dec. 16, 2009) (collecting cases). Here, should the Court grant fees at all, it would be appropriate to reduce the proposed amount by at least 20%. *See, e.g.*, *Conforti*, 021 WL 796494, at *3 (reducing fee by 20%, despite the fact that the amount of time requested for reimbursement was "within the range that courts generally consider reasonable," where Court

found various deficiencies or unreasonable expenditures in the attorney's documentation of hours billed); *Finch*, 2020 WL 1940308, at *6 (reducing fees requested by 30%).

CONCLUSION

For the reasons set forth above, the Court should deny Petitioner's Fee Motion in its entirety, or, in the alternative, reduce the request.

Dated: New York, New York
April 7, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.1(c), the above-named counsel hereby certifies that this memorandum complies with the word-count limitation of this Court's Local Civil Rules. As measured by the word processing system used to prepare it, this memorandum contains 4,990 words.