

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

**Abdulkareem Taher Ahmed Al-Sadeai v. U.S. Immigration and
Customs Enforcement et al.**

Al-Sadeai v. U.S. Immigration and Customs Enforcement, No. 3:21-cv-00296-GPC-MDD (S.D. Cal. Mar. 25,
2025) · No. 3:21-cv-00296-GPC-MDD · Decided March 25, 2025

SUMMARY

The United States District Court for the Southern District of California denied Plaintiff Abdulkareem Taher Ahmed Al-Sadeai’s motion for attorney’s fees under the Equal Access to Justice Act. Although the court recognized Plaintiff as the prevailing party, it held that the Government’s position regarding the burden of proof in an immigration bond hearing was substantially justified amid unsettled Ninth Circuit law following *Jennings v. Rodriguez*. The underlying habeas petition had previously resulted in an order requiring Plaintiff’s release or a new custody redetermination hearing.

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 SOUTHERN DISTRICT OF
CALIFORNIA 10 11 ADBULKAREEM TAHER AHMED AL- Case No. 3:21-cv-00296-GPC-
MDD SADEAI, 12 ORDER DENYING MOTION FOR Plaintiff, 13 ATTORNEYS’ FEES v. 14
[ECF No. 14] US. IMMIGRATION AND CUSTOMS 15 ENFORCEMENT et al., 16 Defendants.
17 18 Before the Court is Abdulkareem Taher Ahmed Al-Sedeai’s¹ (“Plaintiff” or “Al- 19
Sedeai”) Motion for Attorney’s Fees under the Equal Access to Justice Act (“EAJA”) 20 pursuant
to 28 U.S.C. § 2412.

ECF No. 14 (“Motion” or “Mot.”). Respondent 21 Immigration and Customs Enforcement (“ICE”
or “the Government”) filed an opposition, 22 and Plaintiff filed a reply. ECF Nos. 17
 (“Opposition” or “Opp.”), 18 (“Reply”).

The 23 24 25 1 The Government notes that Plaintiff’s name is spelled “Al-Sedeai” on official
documents he has filed 26 and provided. ECF No. 3 at 1 n.2. In this opinion, on occasions to
employ Plaintiff’s name, the Court will use this official spelling. 27 1 Court stayed the motion
pending the Ninth Circuit’s issuance of an opinion in a case, 2 *Vargas v. Wolf*, No.21-15439, and
later lifted the stay when the case was dismissed.

ECF 3 Nos. 22, 24. 4 The Court finds this motion suitable for disposition without oral argument
pursuant 5 to Civ. L.R. 7.1(d)(1) and accordingly VACATES the hearing on this matter currently
set 6 for March 28, 2025. 7 For the reasons that follow, the Court hereby DENIES Plaintiff’s
motion. 8 I. BACKGROUND 9 The underlying action involves Plaintiff’s habeas corpus petition

to this Court 10 (“Petition”) pursuant to 28 U.S.C. § 2241, which the Court granted on May 18, 2021.

11 ECF Nos 1, 6. The following is an account of the factual and procedural history in this 12 case, as needed to understand the current Motion. 13 A. Factual history 14 Plaintiff is a citizen of Yemen. In December 2012, while working for the Qatar 15 Embassy in Yemen as a driver for the ambassador of Qatar, Plaintiff accidentally hit a 16 Houthi² leader, inflicting serious injury.

ECF No. 1 ¶ 43. Plaintiff later worked at the 17 U.S. Embassy in Yemen as a security guard for a contracted security company. Id. ¶ 45. 18 On approximately June 1, 2015, and again several times thereafter, Plaintiff was 19 kidnapped and attacked by Houthis who had discovered he was the driver who had hit the 20 Houthi leader and who had worked for the Qatar and U.S. embassies.

Id. ¶ 46. Fearing 21 for his life and safety, Plaintiff attempted to move to southern Yemen, but discovered that 22 even there, individuals suspected to be from northern Yemen are automatically turned 23 24 25 2 Yemen is currently in the middle of a civil conflict between Houthi forces and the Republic of Yemen 26 Government. See U.S. State Dep’t, 2022 Country Reports on Human Rights Practices: Yemen (2022), <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/yemen/>.

27 1 over to the Houthis. On about November 23, 2019, Plaintiff left Yemen with the intent to 2 seek asylum in the United States. Id. ¶ 48. 3 On November 1, 2020, Plaintiff attempted to enter the United States without 4 inspection near Calexico, California. Id. ¶ 49. He was apprehended and placed in 5 expedited removal proceedings and subsequently detained at the Imperial Regional 6 Detention Facility.

Id. ¶¶ 50, 52; ECF No. 3-1 at 4. During this time, Plaintiff received 7 asserted an asylum claim and was afforded a credible fear interview by an asylum officer. 8 Id. ¶¶ 6, 51, 53-54. The officer determined that Plaintiff had stated a credible fear of 9 persecution or torture on the basis of political opinion. ECF No. 1-2 at 35-40, Ex. G. 10 Plaintiff was thereafter placed in removal proceedings before an Immigration Judge 11 (“IJ”) under 8 U.S.C. § 1182.

12 B. Procedural history 13 On January 7, 2021, ICE determined that Plaintiff would be detained pursuant to 8 14 U.S.C § 1226(a) and denied Plaintiff parole. ECF No. 1-2 at 44-48, Ex. I. On January 15 21, 2021, Plaintiff appeared for a bond redetermination hearing before an IJ. ECF No. 1 16 ¶ 60. At the hearing, the Government submitted a memorandum from the Federal Bureau 17 of Investigation (“the FBI”) that stated that Plaintiff claims to be from Sana’a, Yemen, an 18 area that “has been known as a security concern due to multiple terrorist organizations 19 fighting for control of the capital.” ECF No. 1-4, Ex. K (“FBI Memo”).

The FBI Memo 20 also stated that from 2017 to 2019, Plaintiff lived in Hadhramaut, Yemen, an area 21 “known as an al-Qa’ida in the Arabian Peninsula stronghold, which requires a higher 22

level of suspicion and investigation of the people from the locale.” Id. The FBI Memo 23 noted that the FBI required more time to analyze data from Plaintiff’s email and 24 cellphone and that the FBI supported the detention of Plaintiff while it completed its 25 assessment.

Id. For his part, Plaintiff presented evidence in support of his request for 26 bond in the form of financial statements, documents supporting his family ties to the 27 1 U.S., and declarations from family members, and emphasized his lack of criminal history. 2 ECF No. 1-2 at 49-92; ECF No. 1-3, Ex. J. The same day, the IJ denied Plaintiff’s 3 request for bond.

ECF No. 1-4 at 7-9, Ex. L (“IJ Order”). The IJ reasoned that 4 “[n]ational security concerns raised by the Government and investigation is [sic] 5 ongoing.” Id. And the IJ found that “Respondent has not carried his burden to show not 6 a danger [sic] to community or threat to national security.” Id. 7 On January 28, 2021, Plaintiff appealed the bond determination decision to the 8 Board of Immigration Appeals (“BIA”).

ECF No. 3-1 at 20-23; ECF No. 4-2 at 7 n.9. 9 After Plaintiff appealed, the IJ issued a more detailed reasoning for the denial of bond in 10 a bond memorandum. ECF No. 3-1 (“IJ Bond Memo”) at 16-19. In the IJ Bond Memo, 11 the IJ reaffirmed the position that “[a] respondent in a custody hearing under section 12 236(a) of the Immigration and Nationality Act must establish to the satisfaction of the 13 immigration judge that he does not present a danger to persons or property, is not a threat 14 to national security and does not pose a risk of flight.” Id. at 16.

The IJ applied the 15 multi-factor test from *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006) to conclude that 16 Petitioner poses a national security concern and alternatively is an “extreme flight risk.” 17 Id. at 16-17. 18 On February 18, 2021, Plaintiff filed a petition for writ of habeas corpus pursuant 19 to 28 U.S.C. § 2241, seeking an order directing the Government to release him from 20 custody or, in the alternative, provide a new custody redetermination hearing.

ECF No. 21 1. The Government opposed the Petition, advancing three main arguments: (1) national 22 security concerns existed due to Abdulkareem’s nationality; (2) Abdulkareem had the 23 burden of establishing he was not a flight risk or danger to the community; and (3) 24 Abdulkareem was required to exhaust direct appeals before filing a petition for writ of 25 habeas corpus.

ECF No. 3 at 6-7. On May 18, 2021, this Court granted Abdulkareem’s 26 Petition. ECF No. 6. Specifically, this Court held that “the IJ’s placement of the burden 27 1 of proof on Petitioner [to show he was not a flight risk or danger to national security] 2 violated the Fifth Amendment Due Process Clause.” Id. at 12.

The Court further held 3 that BIA review prior to District Court review would have been “futile,” and thus 4 Petitioner was not required to exhaust administrative remedies prior to filing his Petition 5 in the District Court. Id. at 6-7.

The Court granted Plaintiff's petition and ordered Plaintiff to be released from custody or provided a new custody redetermination hearing within 45 days applying the standard set forth in the Order. Id. On July 15, 2021, the Government appealed the Court's order to the Ninth Circuit. ECF No. 9.

On September 22, 2021, the Government filed a motion to voluntarily dismiss its appeal, and on January 21, 2022, the Ninth Circuit entered an order granting the Government's motion. ECF No. 11. On February 18, 2022, Plaintiff filed a motion for attorney's fees under the EAJA seeking \$107,976.86 in attorney's fees and costs. ECF No. 14 ("Motion" or "Mot.").

The Government opposed the motion, arguing that the Government's position was substantially justified and that even if Ms. Goldberg were entitled to fees, any award should not exceed the statutory maximum. ECF No. 17.

The Government also raised the possibility of a stay to allow for the Ninth Circuit to reach a decision in *Vargas v. Mayorkas*, No. 20-16237. Id. On September 27, 2022, the Court issued a stay to allow for a resolution to what was then titled *Vargas v. Wolf*, No. 21-15439. ECF No. 22.

The case was dismissed with a stipulation (sealed). On September 16, 2024, the Court lifted the stay on proceedings and ordered a Joint Status report. ECF No. 24. A report was filed on September 27, 2024, with parties disagreeing on whether and how the Ninth Circuit's holding in *Rodriguez Diaz v. Garland*, 53 F.4th 1189 (9th Cir. 2022) applied.

ECF No. 25. The Court ordered supplemental briefing, ECF No. 26, which the parties then submitted, ECF Nos. 29, 30, 26 31. Upon review of the moving papers and for the reasons below, the Court DENIES the Motion. II. LEGAL STANDARD Under EAJA, courts "shall award to a prevailing party other than the United States fees and other expenses... unless 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).

To prevail on a motion for attorney's fees under the EAJA, "it must be shown that (1) the plaintiff is the prevailing party; (2) the government has not met its burden of showing that its positions were substantially justified or that special circumstances make an award unjust; and (3) the requested attorney's fees and costs are reasonable." *Perez-Arellano v. Smith*, 279 F.3d 791, 793 (9th Cir.

2002). "[T]he 'position of the United States' means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." *Gutierrez v. Barnhart*, 274 F.3d 1255, 1259 (9th Cir. 2001) (citing 28 U.S.C. § 2412(d)(2)(D) and *Comm'r INS v. Jean*, 496 U.S. 154, 159 (1990) (explaining that the

“position” relevant to the inquiry “may encompass both the agency's 17 prelitigation conduct and the [agency's] subsequent litigation positions”)).

Thus, the 18 court focuses on two questions: “first, whether the government was substantially justified 19 in taking its original action; and, second, whether the government was substantially 20 justified in defending the validity of the action in court.” *Kali v. Bowen*, 854 F.2d 329, 21 332 (9th Cir. 1988). 22 A position is “substantially justified” if it has a reasonable basis in law and fact.

23 *Pierce v. Underwood*, 487 U.S. 552, 565-66 (1988); *United States v. Marolf*, 227 F.3d 24 1156, 1160 (9th Cir. 2002). Substantially justified has been interpreted to mean “justified 25 to a degree that could satisfy a reasonable person.” *Al-Harbi v. INS*, 284 F.3d 1080, 1084 26 (9th Cir. 2002) (quoting *Pierce*, 487 U.S. at 565). “Conceivably, the Government could 27 1 take a position that is not substantially justified, yet win; even more likely, it could take a 2 position that is substantially justified, yet lose.” *Pierce*, 487 U.S. at 568.

In short, if 3 reasonable minds could differ on the merits of the case, the Ninth Circuit will not reverse 4 a district court's decision to deny EAJA attorney fees. *Gonzalez v. Free Speech 5 Coalition*, 408 F.3d 613, 621 (9th Cir. 1995). 6 The government bears the burden of proving that its position, both in the 7 underlying administrative proceedings and in the subsequent litigation, was substantially 8 justified.

Meier v. Colvin, 727 F.3d 867, 870 (9th Cir. 2013). “The test is not whether 9 the government was correct, but whether it was for the most part justified in taking the 10 position that it did... A position that was not contrary to clearly established law is thus 11 substantially justified.” See *Meza-Vasquez v. Garland*, 993 F.3d 726, 729 (9th Cir. 2021) 12 (internal quotation marks and citation omitted). “That the government lost (on some 13 issues) does not raise a presumption that its position was not substantially justified.” 14 *Ibrahim v. U.S. Dep’t of Homeland Sec.*, 912 F.3d 1147, 1168 (9th Cir.

2019). However, 15 if the government violates its own regulations, or fails to acknowledge settled circuit law, 16 this weighs heavily against substantial justification. See *Gutierrez*, 274 F.3d at 1259-60; 17 *Singh v. Gonzalez*, 502 F.3d 1128, 1129 (9th Cir. 2007). 18 Although parties’ positions on individual matters may be more or less justified, the 19 EAJA “favors treating a case as an inclusive whole, rather than as atomized line items.” 20 *Al-Harbi*, 284 F.3d at 1084-85 (internal quotation marks and citation omitted).

The court 21 can also consider any “extraneous circumstances bearing upon the reasonableness of the 22 government’s decision which can include relevant legal or factual precedents.” *Medina 23 Tovar v. Zuchowski*, 41 F.4th 1084, 1090 (9th Cir. 2022) (cleaned up). 24 III. DISCUSSION 25 The Government does not dispute that Al-Sedeai was the prevailing party and that 26 no special circumstances exist that would justify a denial of fees and expenses.

See 27 1 Opposition. Instead, the Government argues that its position was substantially justified, 2 and that in any case, the fees calculation by Plaintiff's Counsel is unreasonable. See id. 3 A. Substantially justified 4 The Government's position here encompasses (a) the IJ's order in denying bond to 5 Al-Sedeai and (b) the litigation positions that the Government took in defending the IJ's 6 order and opposing the petition for writ of habeas corpus.³ In arguing the 7 unreasonableness of the Government's position, Plaintiff brings forth two major reasons: 8 that the IJ and the Government incorrectly placed the burden of proof on Plaintiff to 9 prove he was not a flight risk or a danger; and that the IJ and the Government 10 inappropriately discriminated against Plaintiff based on his nationality and hometown.⁴ 11 Mot. at 24-26, 30-35.

The Court takes each in turn. 12 13 14 3 Contrary to what Plaintiff argues, the Government's position does not include the actions of 15 governmental officers that occurred prior to the bond hearing before the IJ. Plaintiff's Motion expounds 16 at length about the actions of the FBI, DHS, and the BIA (pre-bond hearing), and argues that this "collective pre-litigation position among the several agency levels... gave rise to this Court's order for 17 writ of habeas corpus." That is a misunderstanding of the Court's order.

The Court did not grant habeas because of the actions of government officers that occurred prior to the bond hearing in front of the IJ. 18 See ECF No. 6. Instead, the Court's order was keenly focused on the IJ placing the burden of proof on Plaintiff during the bond hearing. ECF No. 6 at 6-11.

In fact, the Court again emphasized this in its 19 subsequent order staying the Motion. ECF No. 22 at 6 n.2 ("The Government's conduct during 20 interrogations and searches is not relevant to recovery under the EAJA."). Now, as then, the Court finds that the Government's "position" here refers only to the Government's litigation position before the 21 District Court and the IJ's actions in denying bond to Plaintiff; the actions by other governmental officers are not included as part of the Government's "position." 22 4 In its Reply, Plaintiff argues that Plaintiff's EAJA motion is timely because it was filed 28 days after 23 the Ninth Circuit ordered the Government's appeal dismissed.

Reply at 4. An EAJA motion must be filed 30 days from the date of entry of final judgment. 28 U.S.C. § 2412(d)(1)(B). The Ninth Circuit 24 has held "final judgment" to mean the date on which a party's case has met its "final demise," such that there is no longer any possibility that the district court's judgment is open to attack; the 30 days only 25 begins to run upon expiration of the period of filing a petition for writ of certiorari with the Supreme 26 Court.

Al-Harbi, 284 F.3d at 1084. The Court finds nothing in the Government's Response indicating that the Government contested the timeliness of this EAJA motion. See Response at 6. The only 27 utterance from the Government on this matter is the following single sentence: "On February 18, 2022, 1 1. Allocation of burden of proof in bond hearings 2 Plaintiff argues that the Government,

in the IJ's decision to deny bond and in the 3 litigation position defending the IJ's decision, was not substantially justified in placing 4 the burden of proof on Plaintiff to prove that he was not a flight risk, national security 5 concern, or a danger to the community.

Plaintiff points to the Ninth Circuit's holding in 6 *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011), which he believes squarely addresses the 7 issue, while the Government argues that the Supreme Court's decision in *Jennings v. 8 Rodriguez*, 583 U.S. 281 (2018), created ambiguity on how much of Singh's holding 9 survives. This Court, for the reasons below, finds that the Government acted reasonably 10 in the face of changing Ninth Circuit case law, and therefore was substantially justified.

11 To fully answer this, it is imperative to take a tour through the twists and turns of 12 the caselaw in the Ninth Circuit regarding bond hearings in the immigration detention 13 context. 14 First, in *Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942 (9th Cir. 15 2008), the Ninth Circuit addressed a challenge to detention under § 1226(c). 5 The 16 17 18 Petitioner filed the instant motion before the mandate had issued." *Id.* The Court does not construe this as any challenge to the timing of this Motion, and in any case, finds that the Motion was timely filed.

19 5 8 U.S.C. § 1226 provides the general authority and process for detaining aliens who are eligible 20 for removal. The Section distinguishes between "two different categories of aliens." *Jennings*, 583 U.S. at 288. 21 Section 1226(a) is the "default rule" and gives the Attorney General broad discretion in detaining 22 an alien pending a decision on whether the alien is to be removed from the U.S. *Id.* If a person is apprehended under Section 1226(a), an ICE officer makes the initial custody determination.

8 C.F.R. § 23 236.1(c)(8). If the officer determines that the alien should be detained, the detainee may then request a 24 bond redetermination hearing before an IJ at any time before a removal order becomes final. See 8 C.F.R. §§ 236.1(d)(1), 1003.19. At this hearing, if the detainee demonstrates by a preponderance of the 25 evidence that he is not a national security threat, a danger to the community, or a flight risk, the IJ will order his release.

See *Matter of Guerra*, 24 I & N. Dec. 37, 40 (BIA 2006). If denied bond, an 26 individual can also request an additional (second) bond hearing whenever she experiences a material change in the circumstances. See 8. C.F.R. § 1003.19(e). 27 1 petitioner Casas had been mandatorily detained under § 1226(c), and while he sought 2 review of his removal order, he was detained for seven years without a bond hearing.

3 *Casas-Castrillon*, 535 F.3d at 944-46. He filed a habeas petition, and the Ninth Circuit 4 concluded that once the BIA had dismissed the detainee's appeal, "detention authority 5 shift[s] to § 1226(a)." *Id.* at 947 (emphasis added). Then, relying on the canon of 6 constitutional avoidance,

the Court held that §1226(a) must be construed as requiring a 7 bond hearing, and thus Casas was entitled to a bond hearing, like all §1226(a) detainees.

8 Id. at 951-52. The Court later extended its holding in Casas to any alien detained under 9 §1226(c) for more than six months. *Rodriguez v. Robbins*, 715 F.3d 1127, 1138-39 (9th Cir. 2013) (quotations omitted). 11 In *Singh v. Holder*, the Ninth Circuit analyzed exactly what kind of procedure was 12 constitutionally required for such prolonged-detention “Casas hearings.”⁶ *Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir.

2011). *Singh* also involved a noncitizen who was 14 detained without bond under § 1226(c) and received a “Casas hearing” approximately 16 15 months after he was first detained. Id. at 1201. The Court held that the government must 16 prove by clear and convincing evidence that the alien is a flight risk or a danger to the 17 community to justify a denial of bond, and based this conclusion on general principles of 18 procedural due process.

Id. at 1203-05. 19 20 21 22 “Section 1226(c), on the other hand, carves out a class of aliens for whom detention is mandatory.” *Rodriguez Diaz*, 53 F.4th at 1197. On its face, there is no opportunity for release on bond. 23 See 8 U.S.C § 1226(c); *Prieto-Romero v. Clark*, 534 F.3d 1053, 1066 (9th Cir. 2008).

The U.S. Supreme Court upheld the constitutionality of mandatory detention under § 1226(c) in *Demore v. Kim*, 24 538 U.S. 510 (2003). 25 6 “Casas hearings” refer to the type of bond hearing at issue in Casas: one afforded to mandatorily detained noncitizens (i.e., initially detained under § 1226(c)) who had not yet received a bond hearing 26 after their detention had become prolonged while awaiting judicial review of their removal order.

See *Rodriguez v. Robbins*, 715 F.3d 1127, 1134-35 (9th Cir. 2013). 27 1 Then, in 2018, the U.S. Supreme Court issued its holding in *Jennings v. Rodriguez*. 2 This would “substantially upend the [Ninth C]ircuit precedent” just mentioned. 3 *Rodriguez Diaz*, 53 F.4th at 1200.

In *Jennings*, the Supreme Court reversed the Ninth 4 Circuit decision in *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), and in doing so, 5 reversed “some of the prior circuit precedent on which” *Robbins* was based. Id. 6 *Jennings* held that the Ninth Circuit had misapplied the canon of constitutional avoidance 7 because its interpretation of §§ 1226(a) and (c), as requiring periodic bond hearings 8 during prolonged detention, was implausible and lacked “any arguable statutory 9 foundation.” *Jennings*, 583 U.S. at 842-44.

The Supreme Court found simply no 10 statutory support for interpreting § 1226(c) as ceasing to govern mandatorily detained 11 noncitizens after six months of detention. Id. at 842-43, 846. As such, there was no 12 “shifting” to § 1226(a) authority during prolonged detention, as Casas had earlier held. 13 There was also no support from the text of § 1226(a) itself that required periodic bond 14 hearings.

Id. at 847. The Supreme Court did not reach whether these bond hearings were 15 constitutionally required. Id. at 851. A few years later, in *Aleman Gonzalez v. Barr*, 955 F.3d 762 (9th Cir. 2020), the 17 Ninth Circuit held that despite *Jennings*, the procedural requirements for bond hearings 18 imposed by prior circuit precedent, including *Singh*, remained in place.

See *Aleman Gonzalez*, 955 F.3d at 765-66. The Court reasoned that *Jennings* involved statutory 20 provisions other than the one at issue in *Aleman Gonzalez*, namely § 1231(a)(6), and thus 21 did not preclude reading procedural requirements into § 1231(a)(6) as a matter of 22 statutory interpretation. Id. at 777-78.

The Court also emphasized that *Singh* was 23 decided on constitutional grounds, and that *Jennings* left open any constitutional 24 questions posed by prolonged detention. Id. at 781. 25 After *Jennings* and *Aleman Gonzalez*, the Ninth Circuit took up the question of 26 what procedures were constitutionally required to attach to a bond hearing for a 27 1 noncitizen detained under § 1226(a).

Rodriguez Diaz v. Garland, 53 F.4th 1189 (9th Cir. 2022). The parties dispute whether and how *Rodriguez Diaz* is relevant to the disposition 3 of this question. Clearly, in determining whether the Government's position was 4 substantially justified, the Court must only look at the legal landscape as it existed at the 5 time of the Government's actions. See *Meza-Vasquez*, 993 F.3d at 729 (the court looks to 6 "controlling law at the time the [government] decisions were rendered").

Rodriguez Diaz 7 was decided in November 2022, more than a year after the IJ denied Plaintiff bond and 8 the Government opposed Plaintiff's habeas petition. The holding in *Rodriguez Diaz*, 9 therefore, is not directly instructive for the Court's analysis of substantial justification. 10 The Court looks to *Rodriguez Diaz*, however, because the Ninth Circuit provides a 11 helpful overview and interpretation of the legal landscape at the time of the 12 Government's actions in this case, namely the period after *Jennings v. Rodriguez* leading 13 up to *Rodriguez Diaz*.

14 In *Rodriguez Diaz v. Garland*, the Ninth Circuit considered an appeal from Aroldo 15 *Rodriguez Diaz*, a citizen of El Salvador who was detained pursuant to 8 U.S.C § 1226(a) 16 and denied bond by an IJ, who concluded that *Rodriguez Diaz* posed a danger to the 17 community due to his gang affiliation. *Rodriguez Diaz*, 53 F.4th at 1195. *Rodriguez* 18 *Diaz* claimed that his continued detention was unconstitutional because under the Due 19 Process Clause of the Fifth Amendment, the government should have borne the burden of 20 proof by clear and convincing evidence at his (second) bond redetermination hearing.

7 21 Id. To address this question, the Court surveyed the long line of its cases in this area, 22 many "key aspects" of which are "no longer good law." Id. at 1196. "Unencumbered by 23 binding circuit precedent" as to detention under § 1226(a), the Court ultimately 24 25 7 *Rodriguez Diaz* asked for this second bond hearing because under § 1226(a), a detainee can seek 26

additional bond hearings whenever they experience a material change in circumstances warranting a redetermination of custody status.

See 8 C.F.R. § 1003.19(e). 27 1 concluded that the Due Process Clause did not entitle Rodriguez Diaz to a second bond 2 hearing at which the government bore the burden of proof by clear and convincing 3 evidence. Id. at 1203. 4 The Rodriguez Diaz court reasoned that Singh was inapposite because although 5 Singh relied on the Due Process Clause in its holding, it “did so in service of an implied 6 statutory right to a bond hearing for persons detained under § 1226(c) – an implied right 7 that the Supreme Court has now rejected” under Jennings.

Rodriguez Diaz, 53 F.4th at 8 1202. Furthermore, Singh dealt with a noncitizen who was detained under § 1226(c); 9 Rodriguez Diaz (along with Plaintiff in this case) was detained under § 1226(a). Thus, to 10 the extent Singh remined good law post-Jennings, the Court questioned how much of 11 Singh would even apply here because “Singh did not purport to establish a freestanding 12 set of constitutionally mandated procedures that would apply to any detained alien.” Id. 13 at 1196, 1202.

According to the Court, the Ninth Circuit has “never held that Singh 14 provided the constitutional baseline for persons like Rodriguez Diaz, who were never 15 mandatorily detained and who have been subject to § 1226(a) and its implementing 16 regulations throughout their detention.” Id. at 1203. 17 Since Jennings gutted much of the statutory interpretation that led up to Singh, the 18 question remained – and still remains for the Ninth Circuit and Supreme Court to decide 19 – whether a § 1226(a) detainee is entitled to a bond hearing as a matter of constitutional 20 due process and if so, what procedures are constitutionally required to attach to such 21 hearings.

22 Here, the Government was faced with this legal uncertainty in the post-Jennings 23 landscape. It acknowledged this uncertainty in its opposition to the habeas petition. See 24 ECF No. 3 at 7. “As recently noted, ‘[n]o circuit court has addressed the allocation of the 25 burden of proof in § 1226(a) bond hearings post-Jennings,’ Brito v. Barr, 415 F. Supp. 3d 26 258, 266 (D.

Mass. 2019)...” Id. The Government argued that Singh v. Holder was 27 1 distinguishable because it concerned “extended detention” and “petition-for-review 2 proceedings.” Id. In other words, Singh involved a Casas hearing. And while there were 3 Supreme Court rulings about due process protections for aliens against “indefinite” 4 detention, citing to Zadvydas v. Davis, 533 U.S. 678, 690-91 (2001), the Government 5 noted that there were no Supreme Court decisions that required the government, as a 6 constitutional matter, to prove flight risk and/or danger at immigration bond hearings.

7 Thus, in placing the burden of proof on Plaintiff, the Government was substantially 8 justified, even if it ultimately lost on the merits for the habeas petition in front of this 9 Court. 10 Rodriguez

Diaz, as mentioned, explores the uncertainty left by Jennings on cases 11 exactly like the one in front of the Court: the constitutional procedures for a § 1226(a) 12 detainee's statutorily-granted bond hearing.

And in that sense, Rodriguez Diaz aligned 13 with the Government's position here that Singh did not answer what the government must 14 do (or not do) for these § 1226(a) bond hearings. Subsequent caselaw that aligns with the 15 government's position can bolster the finding that the position was substantially justified 16 if the government contested the issues on the same grounds "on which those [subsequent] 17 cases were decided.

See *Abela v. Gustafson*, 888 F.2d 1258, 1265 (9th Cir. 1989). Thus, 18 Rodriguez Diaz, while decided more than a year after the events of this case, provides 19 some support for the reasonableness of the Government's position. 20 Plaintiff and the Government each provide their own string cites of district court 21 cases to support their position on whether the Government was substantially justified.

22 Compare *Perez v. McAleenan*, 435 F. Supp. 3d 1055 (N.D. Cal. 2020) (holding that due 23 process requires that the government bear the burden at an immigration bond hearing); 24 *Cruz-Zavala v. Barr*, 445 F. Supp. 3d 571, 576 (N.D. Cal. 2020) (same); *Darko v. Sessions*, 342 F. Supp. 3d 429, 436 (S.D.N.Y. 2018) (same) with *Mathurin v. Searls*, No. 26 19-cv-6885, Doc.

36 at 12 (W.D.N.Y. Aug. 12, 2021) (finding substantial justification in 27 1 the wake of the ambiguity left by Jennings); *Viruel Arias v. Choate*, 2022 WL 4467245, 2 at *4 (D. Colo. Sept. 26, 2022) ("courts are split on how this burden should be allocated 3 in bond hearings for non-citizens detained under § 1226").

For the Court, this clash of 4 cases emphasizes the open nature of this question. Furthermore, just because a court 5 decides against the government's position does not make the government's position 6 substantially unjustified. "Conceivably, the Government could take a position that is not 7 substantially justified, yet win; even more likely, it could take a position that is 8 substantially justified, yet lose." *Pierce*, 487 U.S. at 568.

And in any case, district court 9 decisions are only persuasive authority on IJs, see *infra*. 10 Plaintiff also argues that it is not clear Singh was overruled by Jennings because 11 "[s]ome tension between the intervening higher authority and prior circuit precedent" is 12 not enough to overrule circuit precedent. Reply in Support of Supplemental Briefing at 5 13 (citing Fed.

Trade Comm'n v. Consumer Def., LLC, 926 F.3d 1208, 1213 (9th Cir. 2019) 14 (internal citations and quotations omitted)). This elides the point. Under the substantial 15 justification analysis, the court must merely look to see if the Government was acting 16 reasonably. "The test is not whether the government was correct... A position that was 17 not contrary to clearly established law is thus substantially justified." *Meza-Vazquez*, 993 18 F.2d at 729 (internal citations omitted).

The fact that the law on this matter is not 19 “clearly established” because of “some tension” between the higher courts actually 20 supports the reasonableness of the Government’s litigation position, because greater 21 ambiguity allows for greater range of the reasonable. What matters is not parsing exactly 22 how much of Singh survives Jennings; what matters is whether in the face of ongoing 23 ambiguity, the Government acted reasonably.

The Court finds that it did. 24 For the same reasons, the Court also finds that the IJ acted reasonably. An IJ is 25 required to follow BIA precedent, the Attorney General, and the circuit court of appeal 26 that has geographic jurisdiction. *Matter of Garcia*, 28 I. & N. Dec. 693, 695 (B.I.A. 27 1 2023). Neither the BIA nor the IJ is required to follow the decision of a United States 2 District Court.

Matter of K-S-, 20 I. & N. Dec. 715 (B.I.A. 1993). Although there may 3 be considerations of comity between the IJ and district courts within the same 4 geographical circuit, the holdings in district courts are merely persuasive on the IJ. See 5 *id.* at 719. 6 According to BIA precedent and regulations, Plaintiff had the burden of proof at 7 his initial bond hearing.

8 C.F.R. § 236.1(c)(8) (“the alien must demonstrate... that such 8 release would not pose a danger to property or persons”); see *Matter of Fatahi*, 26 I&N 9 Dec. 791, 793 (BIA 2016) (“An alien who seeks a change in custody status must establish 10 to the satisfaction of the Immigration Judge and the Board” that he is not a danger to the 11 public or likely to abscond).

12 Here, in his bond memorandum, the IJ cited *Matter of Adeniji*, 22 I&N Dec. 1102 13 (BIA 1999), stating that “a respondent in a custody hearing under section 236(a) of the 14 Immigration and Nationality Act must establish to the satisfaction of the immigration 15 judge that he does not present a danger to persons or property, is not a threat to national 16 security, and does not pose a risk of flight.” ECF No. 3, Exhibit p. 15.

The IJ clearly 17 believed he was following BIA precedent, and he was substantially justified in believing 18 that there was no contrary circuit precedent because, as determined above, post-Jennings, 19 there had been no Ninth Circuit decisional law that squarely imposed procedural 20 requirements on bond hearings for § 1226(a) detainees. 21 2. Equal Protection Clause 22 Plaintiff also argues that the IJ did not provide adequate reasoning for deeming 23 Plaintiff to be a national security threat apart from his national origin – violating equal 24 protection – and that the Government, in its litigation position, unreasonably continued to 25 defend the IJ’s decision and rationale.

The Court will now examine the IJ’s actions in 26 27 1 finding that Plaintiff posed a national security concern and a flight risk, and determine 2 whether the IJ was reasonable to find him so. 3 An alien placed in removal proceedings and detained by the federal government 4 does not have a constitutional right to be released on bond. *Matter of Guerra*, 24 I. & N. 5 Dec.

37, 39 (B.I.A. 2006) (citing *Carlson v. Landon*, 342 U.S. 524, 534 (1952)). 6 However, for those detained under § 1226(a), the Attorney General has the authority to 7 grant bond, should the alien's circumstances warrant it. See 8 U.S.C. § 1226(a).

The 8 Attorney General has extremely broad discretion to decide what factors are relevant to a 9 custody redetermination, and how much weight to give to those factors. *Matter of* 10 *Guerra*, 24 I. & N. at 40. An IJ, acting under the Attorney General, “must consider 11 whether an alien who seeks a change in custody status is a threat to national security, a 12 danger to the community at large, likely to abscond, or otherwise a poor bail risk.” *Id.* 13 (citing *Matter of Patel*, 15 I. & N. Dec.

666 (B.I.A. 1976)). The IJ may look to a number 14 of factors in determining whether bond should be granted, including: 15 (1) whether the alien has a fixed address in the United States; (2) the alien's length of residence in the United States; 16 (3) the alien's family ties in the United States, and whether they may entitle 17 the alien to residence permanently in the United States in the future; (4) the alien's employment history; 18 (5) the alien's record of appearance in court; 19 (6) the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; 20 (7) the alien's history of immigration violations; 21 (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and 22 (9) the alien's manner of entry to the United States.

23 *Matter of Guerra*, 24 I. & N. at 40. IJs, in their broad discretion, may choose to give 24 greater weight to one factor over another, as long as the decision is “reasonable.” *Id.* As 25 noted, under BIA precedent, “[t]he burden is on the alien to show to the satisfaction of 26 the [IJ] that he or she merits release on bond.” *Matter of Guerra*, 24 I. & N. at 40.

27 1 Generally, the IJ renders a decision orally. See U.S. Dep't of Just., Immigration Court 2 Practice Manual, § 9.3 (2023). If the parties decide to pursue an appeal, only then does 3 the IJ typically prepare a written bond memorandum based on their notes from the 4 hearing.⁸ *Id.* 5 Here, the IJ considered the factors stated above and denied Plaintiff bond, 6 specifically citing “[n]ational security concerns raised by the Government... [and that Al- 7 Sedeai] has not carried his burden to show [he is] not a danger to the community or threat 8 to national security.” ECF No. 1-4 at 8.

Once the immigration court was notified that 9 Al-Sedeai filed an appeal with the BIA, the IJ, following DOJ protocol, issued a bond 10 memorandum to provide additional information explaining the court's decision. ECF No. 11 3-1 at 16. 12 In this bond memorandum, the IJ concluded that Plaintiff was “a national security 13 concern and also an extreme flight risk that [could not] be mitigated by bond.” *Id.* at 18.

14 For support, the IJ cited to a Department of Homeland Security (“DHS”) memorandum 15 from the Federal Bureau of Investigations (“FBI”), stating that detention was necessary to 16 further investigate Plaintiff’s “past residence in an area with heavy terrorist infestation.” 17 Id. at 17. 18 Because the IJ has broad discretion to give greater weight to any factor he sees fit, 19 the IJ was substantially justified in giving significant weight to the DHS memorandum in 20 his decision.

Further, this greater weight was reasonable because the IJ cited to binding 21 BIA precedent directing IJs to consider sources from the Executive Branch with relevant 22 23 24 8 Plaintiff in his Motion for Attorneys’ Fees and Costs characterizes the bond memorandum as “retroactive... raising unsupported claims which were neither addressed or cited in the IJ order.” Mot.

25 at 9. However, Plaintiff provides no reason to conclude that the IJ, in issuing a “retroactive” order, was acting in an inappropriate or even unreasonable manner. In fact, the DOJ protocol itself indicates that 26 IJs typically issue a bond memorandum (with more comprehensive reasoning) only after there is an appeal to the BIA. 27 1 expertise “in all future bond proceedings.” See Matter of D-J-, 23 I. & N. at 581 (“In 2 bond proceedings involving aliens seeking to enter the United States illegally, where the 3 Government offers evidence from sources in the Executive Branch with relevant 4 expertise establishing that significant national security interests are implicated, 5 Immigration Judges and the Board of Immigration Appeals shall consider such 6 interests.”).

7 The IJ also concluded that Plaintiff posed a flight risk. ECF No. 3-1 at 18. For 8 support, the IJ noted that Plaintiff “has no fixed address, length of residence, nor 9 employment history in the United States.” Id. at 17. Even though Plaintiff did submit 10 evidence to support his family ties in the United States,⁹ the IJ noted that none of these 11 individuals could extend immigration benefits to Plaintiff.

Id. Further, the IJ determined 12 that Plaintiff’s proposed sponsors made insufficient income to adequately sponsor him, 13 and any other listed sponsors appeared to not have a close relationship with Plaintiff. Id. 14 Additionally, the IJ noted that Plaintiff’s manner of illegal entry, despite his 15 understanding of legal immigration procedures from having worked for the Qatari and 16 American embassies in Yemen, demonstrated “a disregard for the law.” Id. at 18.

The 17 IJ’s reliance on Guerra factors (1)-(3) and (9) as a basis for determining whether Plaintiff 18 was a flight risk was reasonable, especially in light of the broad discretion allowed under 19 § 1226(a). See, e.g., Matter of R-A-V-P-, 27 I. & N. Dec. 803 (B.I.A. 2020) (“The 20 respondent’s limited avenue for relief, combined with his other minimal ties to the United 21 States, support the Immigration Judge’s determination that the respondent poses a high 22 flight risk and should be held without bond pending the outcome of his removal 23 proceedings.”).

24 25 26 9 His sister is a lawful permanent resident, her husband is a U.S. citizen, and his wife's brother is a U.S. citizen. ECF No. 3-1 at 17-18. 27 1 Because the IJ had a reasonable basis for denying Al-Sedeai bond, his conclusion 2 || was substantially justified. See *Renee v. Duncan*, 686 F.3d 1002, 1017 (9th Cir. 2012) 3 || (interpreting substantial justification to encompass reasonable positions).

Furthermore, 4 || as already discussed, the IJ acted reasonably, and was substantially justified, in placing 5 burden of proof on Plaintiff. Under this burden-of-proof framework, it is even more 6 || reasonable that the IJ would conclude that Plaintiff was a national security concern and a 7 || flight risk: the IJ reasonably determined that Plaintiff's proffered evidence was 8 ||insufficient to meet his burden of proof.

The Court therefore finds that the IJ, in all of his 9 || actions (placing the burden of proof on Plaintiff, analyzing the Guerra factors, and 10 || concluding that Plaintiff should be denied bond), acted reasonably and thus was 11 || substantially justified. 12 B. Reasonable attorneys' fees 13 Because the Court has determined that the Government was substantially justified 14 its prelitigation and litigation positions, and therefore denies the motion for attorneys' 15 || fees, the Court does not need to reach the reasonableness of the proposed fees here.

16 IV. CONCLUSION 17 Based on the foregoing, the Court DENIES the Motion for Attorneys' Fees. 18 IT IS SO ORDERED. 19 Dated: March 25, 2025 = 21 United States District Judge 22 23 24 25 26 27 20 28 21-cv-00296-GPC-MDD