No. 19-7736

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOSE OBANDO-SEGURA

Petitioner-Appellant,

v.

WILLIAM P. BARR, *et al*.

Respondents-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF FOR NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, LEGAL AID JUSTICE CENTER, AND AMERICAN IMMIGRATION COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER-APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 19-7736 Caption: Jose Obando-Segura v. William P. Barr, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Immigration Project of the National Lawyers Guild
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: Feb. 11, 2020

Counsel for: National Immigration Project

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 19-7736 Caption: Jose Obando-Segura v. William P. Barr, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Legal Aid Justice Center
(name of party/amicus)

who is amicus, makes the following disclosure:
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Signature: _____ Date: Feb. 11, 2020

Counsel for: Legal Aid Justice Center

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 19-7736 Caption: Jose Obando-Segura v. William P. Barr, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Immigration Council
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: _____ Date: Feb. 11, 2020

Counsel for: American Immigration Council

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STATEMENT OF CONSENT TO FILING

Both Petitioner-Appellant and Respondent-Appellee have consented to the filing of this *amici curiae* brief.

INTEREST OF *AMICI*

The National Immigration Project of the National Lawyers Guild ("National Immigration Project") is a non-profit membership organization of immigration attorneys, legal workers, jailhouse lawyers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. The National Immigration Project provides technical assistance to the bench and bar, litigates on behalf of noncitizens and as amicus curiae in the federal courts, hosts continuing legal education seminars on the rights of noncitizens, and authors numerous practice advisories as well as *Immigration Law and Crimes* and three other treatises published by Thomson West. Through its membership network and its litigation, the National Immigration Project is acutely aware of the problems faced by noncitizens who are detained for extended periods of time and have very limited access to legal representation or other assistance to obtain release from detention.

The Legal Aid Justice Center ("LAJC") is a Virginia nonprofit legal aid organization that provides legal advice and representation to thousands of individuals each year who cannot afford private counsel, regardless of their immigration status. LAJC's Immigrant Advocacy Program represents immigrants in civil rights litigation, with a special focus on combatting Immigration and Customs Enforcement's field enforcement and detention abuses. LAJC has

represented dozens of detained immigrants in filing individual, group, and class-action habeas corpus petitions in the Eastern and Western Districts of Virginia, winning release for the majority.

The American Immigration Council (the "Council") is a national non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council has a strong interest in ensuring that noncitizens unlawfully detained do not unfairly bear the legal costs of challenging their detention and that attorneys can seek Equal Access to Justice Act fees for providing vital representation to noncitizens in civil habeas proceedings.

STATEMENT PURSUANT TO RULE 29(C)(5)

No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission.

PRELIMINARY STATEMENT

Over the last several decades, the federal government has detained increasing numbers of immigrants pending the resolution of civil removal proceedings brought against them. These civil detentions have also become unreasonably lengthy, leaving some detainees deprived of their liberty for years. Mr. Obando's two-year detention is just one example. The great majority of immigrant detainees go unrepresented by counsel, and even if they are able to obtain counsel for their immigration cases, they frequently do not have the resources to obtain representation on matters collateral to their immigration proceedings, such as the lawfulness of their detention. Such detainees are therefore unable to effectively challenge the basis for their detention, even if that detention is unconstitutional.

In 1980, Congress passed a law specifically tailored to ensure that lack of resources did not prevent individuals from challenging unreasonable and arbitrary government action. The Equal Access to Justice Act ("EAJA," or "Act") provided that litigants who succeed in a civil action against the United States can recover attorneys' fees unless the government can show that its position was "substantially justified." *See* 28 U.S.C. § 2412(d)(1)(A). The law helps to ensure that individuals are not prevented from challenging "unjustified governmental action because of the expense involved" in securing the vindication of their rights,

Scarborough v. Principi, 541 U.S. 401, 407 (2004) (quoting H.R. Rep. No. 99-120, at 4 (1985)), and to address "the disparity between the resources and the expertise of . . . individuals [challenging government action] and their government," H.R. Rep. No. 96-1418, at 6 (1980).

In holding that this Court's precedent barred the award of attorneys' fees under the EAJA for a habeas petition brought to challenge the lawfulness of civil immigration detention, the district court ignored not only Supreme Court precedent holding that removal proceedings are civil in character, *see, e.g.*, *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010), but also that the nation's large population of unrepresented detained immigrants are exactly the kind of under-resourced litigants whose challenges to government action the EAJA was designed to facilitate. Affirmance of the district court's ruling would create an unconscionable and unintended gap in the availability of attorneys' fees for indigent claimants challenging their unlawful detention—a result inconsistent with both the text and congressional intent of the EAJA. This Court should therefore reverse the district court's decision and hold that the EAJA applies to immigration habeas proceedings.

ARGUMENT

IMMIGRANT DETAINEES ARE PRECISELY THE TYPE OF UNDER-RESOURCED LITIGANTS WHOSE CHALLENGES TO GOVERNMENT OVERREACH THE EAJA WAS DESIGNED TO FACILITATE

A. There is an Undersupply of Legal Representation for the Growing Population of Immigrant Detainees

Immigrant detainees like Mr. Obando comprise a large population of individuals who, even if their detention is completely unlawful, lack the legal representation needed to challenge it. The number of immigrants detained by the federal government has grown dramatically in the past twenty-five years. In 1994, on any given day, an average of 6,785 individuals were in immigration detention in the United States. Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. Chi. L. Rev. 137, 137 (2013). By 2012, that number had more than quintupled, rising to 34,069. *Id.* As of 2012, the government detained close to four hundred thousand immigrants annually. *Id.* at 138.[1] These civil immigration detentions can last for months, if not years, as did Mr. Obando's. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 869 (2018) (Breyer, J.,

[1] More recent numbers released by Immigration and Customs Enforcement ("ICE") indicate that the average number of individuals in ICE custody increased to 50,165 in fiscal year 2019. *See* U.S. Immigration and Customs Enforcement, *U.S. Immigration and Customs Enforcement Fiscal Year 2019 Enforcement and Removal Operations Report* 5 (2019), https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf. And the number of persons detained increased to 510,854. *See id.* at 4-5.

dissenting) (noting that "thousands of people here are held [in immigration detention] for considerably longer than six months").

Whether or not an immigrant is detained is crucial to their ability to succeed in their underlying immigration case. In 2011, among represented immigrants, those who were detained succeeded in their underlying immigration proceedings—in other words, the proceedings were terminated or the person obtained relief—only 18 percent of the time, whereas those who were not detained succeeded 74 percent of the time. *See* Peter L. Markowitz et al., *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 Cardozo L. Rev. 357, 363-64 (2011). Even among unrepresented immigrants—who, as discussed below, have lower success rates overall—those who were not detained enjoyed success rates over four times greater than their detained counterparts. *See id.* (explaining unrepresented, non-detained immigrants succeeded 13% of the time, whereas unrepresented, detained immigrants succeeded only 3% of the time).

At the same time, very few of the immigrants detained by the federal government are able to obtain legal representation to help them navigate the byzantine immigration laws.[2] As few as 14% of detained immigrants nationally

[2] Unlike criminal defendants, indigent respondents in removal proceedings are not guaranteed representation. *See* 8 U.S.C. § 1362 (permitting counsel to represent a person in removal proceedings "at no expense to the Government").

are represented by counsel in their removal proceedings. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 32 (2015).[3] This is likely due in part to the fact that detained immigrants cannot work and therefore have difficulty paying for counsel. *Id.* at 36. Additionally, because immigrants suffer from higher poverty levels than the national average, they are likely unable to afford the services of a private attorney. *See* Jessica Semega et al., *Income and Poverty in the United States: 2018*, United States Census Bureau 13 (Sept. 2019), https://www.census.gov/content/dam/Census/library/publications/2019/demo/p60-266.pdf (showing that poverty rates for foreign-born non-citizens is 17.5% compared to 11.4% for the native-born population). These cost concerns affect all detained immigrants, regardless of the merits of their underlying immigration cases or the unlawfulness of their ongoing detention. *See also* Robert A. Katzmann, *The Legal Profession and the Unmet*

[3] Even in New York City, where a high concentration of attorneys provides a comparatively plentiful supply of pro bono legal services, only 40% of detainees are able to obtain counsel. *See* Study Group on Immigrant Representation, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings* 4 (2011), *available at* https://justicecorps.org/s/New-York-Immigrant-Representation-Study-I-NYIRS-Steering-Committee-1.pdf. New Yorkers who are detained and transferred outside of New York see their representation rates fall to 19%. *Id.* at 4, 11. For broader discussion on the limitations placed on legal assistance organizations that reduce their ability to represent immigrants, *see also* Geoffrey Heeren, *Illegal Aid: Legal Assistance to Immigrants in the United States*, 33 Cardozo L. Rev. 619 (2011).

Needs of the Immigrant Poor, 62 Rec. of the Ass'n of the Bar of the City of N.Y. 287, 289 (2007) ("Justice should not depend upon the income level of immigrants."). Moreover, detained immigrants located in, or transferred to, remote detention centers face substantial obstacles to obtaining representation. *See* Robert A. Katzmann, *Study Group on Immigrant Representation: The First Decade*, 87 Fordham L. Rev. 485, 495 (2018) (reviewing statistics from 2011 that noncitizens transferred "to far-off detention centers" faced significant obstacles obtaining representation and 79% of immigrants detained outside of New York were not represented).

Without counsel, detainees are at a significant disadvantage in challenging the basis for their detention. Unrepresented detainees are released at a much lower rate than their represented counterparts. *See* Eagly & Shafer at 70 (explaining represented detainees are "almost seven times more likely than their pro se counterparts to be released from the detention center," with a 48% release rate for represented detainees and 7% for underrepresented ones). In fact, unrepresented detainees are significantly less likely to receive a custody hearing in the first place. *See id.* (explaining represented detainees are almost two-and-a-half times more likely to be granted a custody hearing, with represented civil immigration detainees obtaining such a hearing before a judge at a rate of 44% as opposed to 18% for their unrepresented counterparts). While this data does not directly measure

success in habeas petitions by detained immigrants, the enormous disparity of outcomes in custody hearings between detained immigrants with counsel and those without suggests that represented, non-criminal habeas petitioners would see greater success than those without counsel.

Additionally, the impact of counsel on habeas petitions is likely to be at least as great as in other immigration contexts. Even in underlying immigration proceedings, the impact of counsel can be seen in the difference in success rates between represented and unrepresented persons with success being defined as obtaining the ability to remain in the United States. For example, detained noncitizens represented by counsel are "ten-and-a-half times more likely to succeed" in their immigration cases than unrepresented detained noncitizens. *Id.* at 49 (explaining that 21% of represented detained immigrants succeed in remaining the United States as opposed to only 2% of unrepresented detainees). This disparity between represented and unrepresented noncitizens is true even for those persons who are never detained: represented, non-detained persons are more than three-and-a-half times more likely to succeed than those that are unrepresented. *Id.* (showing rates of success of 60% for represented, never detained persons versus 17% for those unrepresented). This data backs up what common sense suggests: that detained, unrepresented immigrants are almost completely unable to navigate

the immigration system on their own, no matter the merits of their case, and that the services of an attorney are critical to the protection of a detainee's rights.

Mr. Obando's case is illustrative of this larger trend: he languished in civil detention for more than two years, unsuccessfully seeking to challenge the basis for his detention. He was released only after he obtained legal representation and his attorneys were able to overcome the legal barriers that the government had erected to prevent Mr. Obando from obtaining habeas relief in federal court.

B. Applying the EAJA to Immigration Habeas Proceedings is Consistent with the Statute's Language and Purpose

The EAJA was passed "to eliminate the barriers that prohibit . . . individuals from securing vindication of their rights in civil actions and administrative proceedings brought by or against the Federal Government." *Scarborough*, 541 U.S. at 406 (quoting H.R. Rep. No. 96-1005, at 9 (1980)). Drafted to apply to "any civil action," the broad sweep of the Act ensures that "certain individuals, partnerships, corporations, businesses, associations, or other organizations" will not be discouraged from seeking review of "unjustified governmental action because of the expense involved in securing the vindication of their rights." H.R. Rep. No. 99-120, at 2 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 132. By providing attorneys' fees to meritorious challenges to government action, the EAJA achieves three interconnected legislative goals.

First, by providing for the award of attorneys' fees where the government has not acted with a substantial basis, the EAJA facilitates challenges to government overreach. *See* H.R. Rep. No. 99-120, at 2; *see also* S. Rep. No. 96-253, at 1 (1979) ("The bill rests on the premise that certain individuals . . . may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights.").

Second, the EAJA's provisioning for attorney fee awards serves to deter arbitrary government action. *See* H.R. Rep. No. 96-1418, at 12 (noting that the EAJA will "assure that administrative decisions reflect informed deliberation" and that "fee shifting becomes an instrument for curbing . . . the unreasonable exercise of Government authority.").

Third, the EAJA ensures that those subject to arbitrary government action and who challenge that action are compensated for their expenses. *See* H.R. Rep. No. 96-1418, at 10 ("Where parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable Government action and also bear the costs of vindicating their rights.").

Interpreting EAJA to cover non-criminal habeas proceedings like Mr. Obando's is consistent with all of these purposes underlying the EAJA. *See also* *Sullivan v. Hudson*, 490 U.S. 877, 890 (1989) (reading the EAJA "in light of its

purpose to diminish the deterrent effect of seeking review of, or defending against, governmental action") (internal quotations omitted).

1. The EAJA facilitates challenges to government overreach where litigants would be otherwise deterred.

The EAJA recognizes that even those with meritorious cases may fail to properly defend themselves against "unjustified governmental action because of the expense involved" in securing the vindication of their rights. *Scarborough*, 541 U.S. at 407 (internal quotations omitted).[4] And wrongfully detained immigrants are, by definition, private parties subjected to unjustified government overreach. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.");

[4] *See also* H.R. Rep. No. 96-1418, at 10 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4988; *accord* Harold J. Krent, *Fee Shifting Under the Equal Access to Justice Act—A Qualified Success*, 11 Yale L. & Pol'y Rev. 458, 463 (1993) ("The government can marshal more resources in litigation than can most private noninstitutional parties. Indeed, the government's sheer size may give it an unfair advantage in litigation, much like that which General Motors or Exxon enjoy over smaller adversaries. Private parties may not be able to afford protracted litigation against the government . . . because of this comparative lack of resources." (footnote omitted)); Nancy A. Streeff, Comment, *Gavette v. Office of Personnel Management: The Right to Attorney Fees Under the Equal Access to Justice Act*, 36 Am. U. L. Rev. 1013, 1013 (1987); Catherine M. Brennan, *Beating a Bully: Small Business Owner Wins Legal Fees from Department of Labor*, Daily Rec., Nov. 2, 1996, at 23A ("[If] you're right on the facts and right on the law—and it's important to you—you can litigate and you don't need to back down just because it's the federal government.")

see also Kholyavskiy v. Schlecht, 479 F. Supp. 2d 897, 901 (E.D. Wis. 2007) ("The unjustified detention of an individual is probably the most serious type of unjustified government action, and the EAJA contemplates that an individual subject to such action should be compensated for having to defend against it."). Such detainees are frequently indigent and unable to pay for representation, and they are especially vulnerable to abuses of their rights.

Moreover, facilitating challenges to immigration detention reflects the EAJA's recognition that litigation plays an important role in shaping and refining government policy. As noted in its legislative history:

> [The EAJA] rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy. An adjudication or civil action provides a concrete, adversarial test of Government regulation and thereby insures the legitimacy and fairness of the law. An adjudication, for example, may show that the policy or factual foundation underlying an agency rule is erroneous or inaccurate, or it may provide a vehicle for developing or announcing more precise rules.

H.R. Rep. No. 96-1418, at 10; S. Rep. No. 253, at 5-6. In many cases, non-criminal habeas actions are the only option immigrants like Mr. Obando have to contest the legality of their detention and to test the government's rationale for such detention. *Cf. INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of

[e]xecutive detention, and it is in that context that its protections have been strongest.").

While the district court relied on this Court's decision in *O'Brien* to deny relief to Mr. Obando, the *O'Brien* case addressed a criminal habeas petition. *O'Brien* should not be read to categorically exclude non-criminal habeas actions from the EAJA. Such a reading, plainly at odds with the statute's language and statutory purpose, would deprive a large population of vulnerable individuals a primary means of challenging the policies applied to them. Because most immigration counsel are fee-seeking, representation rates of detained immigrants seeking release from unlawful custody are likely to increase in response to the availability of fees. *Cf.* Government Accountability Office, Report No. HRD-90-22BR, 5 (1989) (noting that representation rates in education disability cases increased after federal law provided for attorneys' fees in such cases).[5] And because noncitizens not in immigration detention are in a better position to obtain

[5] At the same time, the EAJA does not incentivize attorneys to take on unmeritorious cases. Mere victory is not enough to win an award of fees under the EAJA. These are only available where the United States cannot show that its position was "substantially justified," and can also be denied where "special circumstances make an award unjust." *See* 28 U.S.C. § 2412(d)(1)(A). This high bar for success encourages attorneys to focus on clearly egregious examples of governmental overreach.

representation for their other immigration proceedings, the EAJA helps to ensure that the immigration justice system as a whole functions more fairly.

2. The availability of attorneys' fees in immigration habeas proceedings would help deter unlawful or arbitrary government action.

Granting attorneys' fees in non-criminal habeas proceedings would also deter the government from unlawfully detaining noncitizens in removal proceedings. In the immigration detention context, habeas petitions have taken on a new importance since the Supreme Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). There, the Supreme Court held that there was no implicit requirement in the immigration laws that certain detained immigrants receive periodic bond hearings. *Id.* at 842-51. Absent this statutory requirement, a detainee has no opportunity to challenge the lawfulness of a lengthy detention except to file a habeas action in federal district court.

Thus, habeas relief is the only recourse for individuals in Mr. Obando's situation, and the only check on the federal government's power to keep detainees in custody "until the end of applicable proceedings," whenever that may be. *Id.* at 842. Mr. Obando's case provides a stark example. Respondents asserted that they could detain Mr. Obando pending his removal proceedings because of his earlier conviction for possession of marijuana. However, Respondents' authority to detain him suffered a serious blow when the Board of Immigration Appeals ("BIA") found Respondents had not proven that Mr. Obando actually committed

the offense that gave them such authority. Although Respondents then did not object to Mr. Obando receiving a bond hearing, they nevertheless kept Mr. Obando in detention for nearly four more months from the date of that BIA decision. Respondents unnecessarily extended Mr. Obando's detention by continuing to erect unsubstantiated, procedural barriers to his obtaining a bond hearing. For example, Respondents insisted that the District Court must order a bond hearing and that Mr. Obando had received a bond hearing although the hearing was simply a master hearing. Respondents also filed a motion to dismiss that claimed Mr. Obando had not exhausted his administrative remedies by requesting a bond hearing before the immigration judge even though Mr. Obando had twice requested such a hearing. Had Respondents known that the government could be liable for attorneys' fees, they may have been incentivized to consider whether Mr. Obando should be detained.[6]

[6] Anecdotal evidence of amici suggests that the government voluntarily offers to, or actually does, release detainees as soon as petitions for habeas corpus are filed by their representatives in federal court. In particular, amicus curiae Legal Aid Justice Center ("LAJC") has had cases in which the government released the immigrant prior to a ruling on the merits of the petition, effectively mooting the case and preventing the attorney from seeking fees under EAJA. Even in the cases where a proper motion for EAJA fees is filed, amicus LAJC notes that the government often settles (with awards of attorneys' fees) before a ruling on the EAJA motion is provided.

3. The availability of attorneys' fees in non-criminal habeas proceedings compensates unlawfully detained persons and avoids the injustice of requiring them to pay to challenge arbitrary government action.

The EAJA avoids the double injustice of forcing those subjected to arbitrary government action to pay for their own challenges to such action. The great bulk of immigration representation in the United States—as much as 90%—is provided by fee-seeking counsel, not by nonprofit legal services organizations or other sources of pro bono representation. Eagly & Shafer at 26-27.[7] "[F]ree legal services for low-income immigrants" are "scarc[e]," so even if they can obtain counsel, unlawfully detained immigrants are likely to bear the costs of challenging their detention. *Id.* at 27. Moreover, to the extent that fees would become available to nonprofit legal service organizations, those organizations would then be able to increase their capacity to provide better representation to unlawfully detained persons. Those organizations might be able to bring actions to challenge the detention of noncitizens they represent in underlying immigration proceedings or fund further efforts to challenge the unlawful detention of other noncitizens who cannot afford their own counsel.

[7] Eagly & Shafer found that 90% of immigration representation was by solo practitioners or small firms, and concluded that all or almost all of this representation was on a paid basis. *Id.* at 26-28.

The EAJA was designed to remedy the inequity of forcing petitioners to pay the costs of defending against unreasonable government action, because—whether for the benefit of small businesses challenging overregulation or immigrant detainees challenging the basis for their detention—the fundamental policy underlying the EAJA remains the same: balancing the odds impecunious individuals face when litigating against the vast power and resources of the federal government. The huge numbers of unrepresented immigrant detainees are exactly the kind of litigants the EAJA was designed to help.

C. Denying EAJA Fees to Petitioners in Non-Criminal Habeas Proceedings Introduces a Gap into Congress's Provision of Fees for Individuals Facing Arbitrary Government Action.

Respondents' position introduces a gap in the Congressional scheme that ensures that those facing potentially arbitrary government action, including arbitrary deprivations of their liberty, are not overwhelmed by superior resources. Individuals facing similar consequences in other kinds of proceedings are entitled to compensation or free representation. For example, individuals facing criminal charges are guaranteed counsel by the Sixth Amendment regardless of their ability to pay, ensuring they are not arbitrarily deprived of their liberty. And the EAJA would have made attorneys' fees available to Mr. Obando in other civil actions, such as an appeal from a BIA decision or the denial of a naturalization application. *Cf. Nken v. Holder*, 385 F. App'x 299 (4th Cir. 2010) (petition for review of BIA

order); *Cody v. Caterisano*, 631 F.3d 136 (4th Cir. 2011) (naturalization application). The 1997 Hyde Amendment applied the same rules governing EAJA fees to criminal cases even for individuals who could afford counsel, specifically applying the "procedures and limitations (but not the burden of proof) provided for an award under [the EAJA]." *See* Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (codified as amended act 18 U.S.C. § 3006A).[8] But here the government urges an absurd result: that although Congress sought to ensure attorneys were incentivized to represent criminal defendants and civil litigants against arbitrary government overreach, it excluded non-criminal habeas petitioners who are unlawfully detained pending civil proceedings.

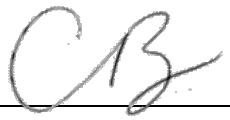
[8] Representative Henry Hyde described the genesis of this amendment as follows: it "occurred to [him], if that [the EAJA] is good for a civil suit, why not for a criminal suit? . . . We have had it and we have been satisfied with [the EAJA] in civil litigation. I am simply applying the same situation to criminal litigation." 143 Cong. Rec. H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde), 143 Cong. Rec. H7786, at H7791 (LEXIS).

CONCLUSION

For the foregoing reasons, amici urge this Court to reverse the district court's ruling and hold that the EAJA makes attorneys' fees available to habeas petitioners challenging their civil detention pursuant to the immigration laws.

Dated: February 11, 2020
New York, New York

Respectfully submitted,



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