

C.A. Nos. 14-16161 & 14-17272  
Published Opinion issued August 30, 2016  
Richard R. Clifton and Sandra S. Ikuta, Circuit Judges  
Royce C. Lamberth, Senior District Judge.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

RAHINAH IBRAHIM,  
Plaintiff-Appellant

vs.

U.S. DEPARTMENT OF HOMELAND  
SECURITY, et al.,  
Defendants-Appellees

---

Appeal from the United States District Court  
for the Northern District of California  
The Honorable William H. Alsup, Judge Presiding  
Case No. CV 06-0545 (WHA)

---

**APPELLANT'S PETITION FOR REHEARING EN BANC  
[REDACTED]**

---

James McManis, State Bar No. 40958  
Marwa Elzankaly, State Bar. No. 206658  
Elizabeth Pipkin, State Bar No. 243611  
Christine Peek, State Bar No. 234573  
Ruby Kazi, State Bar No. 243872  
Jennifer Murakami, State Bar No. 273603  
McMANIS FAULKNER  
50 West San Fernando Street, 10th Floor  
San Jose, California 95113  
(408) 279-8700

Attorneys for Plaintiff-Appellant/Cross-Appellee,  
Rahinah Ibrahim

**TABLE OF CONTENTS**

**INTRODUCTION.....1**

**STATEMENT OF FACTS AND PROCEDURAL HISTORY .....3**

**LEGAL ARGUMENT .....11**

**I.    THIS CASE RAISES QUESTIONS OF EXCEPTIONAL  
          IMPORTANCE CONCERNING ACCESS TO JUSTICE AND  
          THE INTEGRITY OF THE JUDICIARY.....11**

**II.   EN BANC CONSIDERATION IS NECESSARY TO ENSURE  
          THIS COURT’S DECISIONS ARE CONSISTENT WITH  
          *HENSLEY* .....17**

**CONCLUSION .....19**

**CERTIFICATE OF COMPLIANCE .....20**

**TABLE OF AUTHORITIES**

**CASES**

*Brown v. Sullivan*,  
916 F.2d 492 (9th Cir. 1990).....16

*Caesar v. Mountanos*,  
542 F.2d 1064 (9th Cir 1976).....14

*Copeland v. Martinez*,  
603 F.2d 981 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980)..... 2, 13

*Crittenden v. Chappell*,  
804 F.3d 998 (9th Cir. 2015).....11

*Hensley v. Eckerhart*,  
461 U.S. 424 (1983) ..... 3, 10, 11, 17, 18, 19

*Ibrahim v. Dep’t of Homeland Sec. (“Ibrahim I”)*  
538 F.3d 1250 (9th Cir. 2008).....4, 6

*Ibrahim v. Dep’t of Homeland Sec. (“Ibrahim II”)*  
669 F.3d 983 (9th Cir. 2012)..... 2, 4, 6, 12, 14

*Limone v. United States*,  
815 F. Supp. 2d 393 (D. Mass. 2011).....16

*Maritime Management, Inc. v. United States*,  
242 F.3d 1326 (11th Cir. 2001).....16

*Moreno v. City of Sacramento*,  
534 F.3d 1106 (9th Cir. 2008).....12

*Rawlings v. Heckler*,  
725 F.2d 1192 (9th Cir. 1984).....16

*Rodriguez v. United States*,  
542 F.3d 704 (9th Cir. 2008).....15

*Ruiz v. I.N.S.*,  
813 F.2d 283 (9th Cir. 1987).....12

*United States v. Bowen*,  
799 F.3d 336 (5th Cir. 2015).....14

*Webb v. Sloan*,  
330 F.3d 1158 (9th Cir. 2003).....17

**STATUTES**

28 U.S.C. § 2412(b) ..... 2, 11

28 U.S.C. § 2412, *et seq.*.....2

**RULES**

FRAP, Rule 35(a)(1).....17

## INTRODUCTION

Rahinah Ibrahim, (“Ibrahim”), is a Stanford Ph.D. in construction engineering, the dean of a major state university in Malaysia, and a renowned scholar. For eight (8) years, she lived under a cloud of suspicion because the Government blacklisted her as a “terrorist.” A small San Jose law firm prosecuted her case, resulting in two historic decisions of this Court and the first ever court order removing an individual’s name from a terrorist watch list. These decisions secured basic constitutional rights for U.S. citizens.

The panel’s decision leaves in place the award of the District Court, (“the Court”), of a pittance in attorneys’ fees in Ibrahim’s groundbreaking case. This raises a question of exceptional importance that requires en banc consideration. If we are to live in a free society, courts cannot make it infeasible to contest Government blacklists, against the Government’s vast resources.

The panel’s decision rewarded the Government’s underhanded attempts to thwart Ibrahim’s access to justice:

- Vigorously defending Ibrahim’s action for over eight (8) years, despite knowing she has “no nexus to terrorism” and should not have been placed on any watchlists. (2 ER 445:22-26.)
- Secretly contacting the Court *ex parte* to give the Court “secret evidence.” (12 ER 3131-3132.)
- Shrouding this case with false claims of secrecy to avoid addressing the substance of Ibrahim’s claims. (2 ER 431:8-24, 432:7-10, 432:23-

25, 433:9-12; 11 ER 2685:3-2690:12; 13 ER 3189:13-25, 3193:12-21, 3202:19-3203:1, 3204:20-23.)

- Attempting to hide the details of this case from the public and press at trial, closing the courtroom at least 10 times, even though no classified information was used. (2 ER 463:10-16.)
- Barring Ibrahim and her U.S. citizen daughter from attending trial by blacklisting them, [REDACTED] (2 ER 433:26-434:1; 9 ER 2313-2314; 18 ER 4584:22-4585:10, 4697:15-20, 4700:10-4701:5; 21 ER 5450:10-14.)
- Falsely claiming Ibrahim’s issue had been resolved, when in fact, [REDACTED] following trial. (2 ER 455:9, 19; 26-27; 16 ER 4169-4170; 18 ER 4615:5-14.)

The panel’s decision that the Government did not act in bad faith under the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412, *et seq.*, severely limits access to the courts for individuals who are erroneously watchlisted or misidentified, a question which affects thousands who have been similarly wronged. 28 U.S.C. § 2412(b); *Ibrahim v. Dep’t of Homeland Sec.* (“*Ibrahim II*”) 669 F.3d 983, 990 (9th Cir. 2012). The decision also affirms that the integrity of the judicial system can be compromised in cases where the Government uses “national security” as an excuse for baseless fearmongering. *See, e.g. Copeland v. Martinez*, 603 F.2d 981, 984 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980) (purpose of a fee award under the bad faith exception includes “protecting the integrity of the judicial process”).

In addition, the panel's decision that Ibrahim's "unsuccessful" First Amendment and equal protection claims were unrelated to her successful procedural due process claim conflicts with *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Consideration by an en banc panel is necessary to secure and maintain uniformity of the Court's decisions.

### **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

Dr. Ibrahim lived in the United States for 13 years on a student visa as a law-abiding citizen. (2 ER 435:3-20.) While living in Seattle and attending the University of Washington, she married and gave birth to her first daughter, Raihan. (2 ER 435:5-7.) She became the first female lecturer in the architecture department at the Universiti Putra Malaysia, and was selected as Deputy Dean in 2006, and Dean for the Faculty of Design and Architecture in 2011. (2 ER 435:11-12, 451:12-13.)

On January 2, 2005, Ibrahim was arrested at San Francisco Airport en route to Hawaii, publicly handcuffed, and placed in a jail cell, because she was on the No-Fly List. (2 ER 428:24-28.) The Government eventually allowed her to fly to Hawaii and on to Malaysia, but revoked her visa without notice or explanation. (*Id.*)

In March, 2005, Ibrahim filed a Passenger Identity Verification Form (PIVF), the then-existing administrative redress procedure, only to receive a

“vague and inconclusive” response almost a year later, after she filed this action in January, 2006. (2 ER 441:25-26, 445:16-17, 446:3-13.)

“Government counsel has conceded at trial that Dr. Ibrahim is not a threat to our national security. She does not pose (and has not posed) a threat of committing an act of international or domestic terrorism with respect to an aircraft, a threat to airline passenger or civil aviation security, or a threat of domestic terrorism.” (2 ER 435:21-25.) The Court emphasized this in its Findings of Fact, Conclusions of Law, and Order for Relief at least nine (9) times. (2 ER 435:21-25, 445:12-15, 453:3-4, 454:14-15, 456:12-14, 457:18-19, 459:12-13, 459:16-17, 460:14-16.)

Yet for over eight (8) years, the Government refused to acknowledge Ibrahim’s innocence, employing its vast resources to stop Ibrahim from pursuing her action and hide the truth from the Court and from the public. The Government dragged Ibrahim through litigation worthy of a mammoth business dispute, including three motions to dismiss, two Ninth Circuit appeals, extensive discovery battles, depositions, a motion for summary judgment, motions *in limine* and a week-long trial, until the Court exonerated Ibrahim. (2 ER 429:1-438:18; *Ibrahim v. Dep’t of Homeland Sec.*, 538 F.3d 1250 (9th Cir.) (“*Ibrahim I*”); *Ibrahim II*, 669 F.3d 983.)

The Court concluded Ibrahim was misplaced on the No-Fly List in **November, 2004**. FBI Special Agent, Kevin Kelley, made a mistake in

completing a Government form and accidentally nominated Ibrahim to the Transportation Security Administration's ("TSA"), No-Fly List and the Interagency Border Information System (IBIS). (2 ER 436:2-27.) The Court found Agent Kelley did not learn of his "error" until his deposition – **nine (9) years later, in September, 2013.** (2 ER 436:27-28.)

The Court also found that shortly after Kelley incorrectly completed this form, **the Government had notice that Ibrahim had no connection to terrorism and should be removed from all Government watchlists.** As early as January 3, 2005, in an email between two visa officials, one wrote: "these [including Ibrahim's] revocations contain virtually no derogatory information." (2 ER 443:25-444:6 (emphasis added).) Moreover, a State Department employee wrote: Ibrahim's visa was "probably issuable" in February, 2005. (2 ER 444:23-445:4.)

A Government agent requested Ibrahim be "[r]emove[d] from ALL Watchlisting Supported Systems (For terrorist subjects: due to closure of case AND no nexus to terrorism)" in February, 2006, right after Ibrahim filed her case. (2 ER 445:22-26 (emphasis added).) The agent also noted Ibrahim was not qualified for the No-Fly List or the Selectee List. (*Id.*)

The Government had every opportunity to resolve this issue when Ibrahim submitted her administrative redress form. (2 ER 441:4-26, 445:16-17.) The Government ignored Ibrahim's submission for almost a year until she filed her

action, after which she received a response that gave her no information. (2 ER 441:25-26, 456:1-15.)

The Government then attempted to have Ibrahim's case thrown out. The Government asserted frivolous standing arguments, including in three motions to dismiss, a motion for summary judgment, requests during trial, and post-trial briefs. (*See Ibrahim I*, 538 F.3d at 1254; *Ibrahim II*, 669 F.3d at 991-92; 12 ER 3086:10-12, 3092:5-3096:3; 22 ER 5628:17-18, 5636:8-5640:22; 20 ER 5164:3-10; 22 ER 5584:15-16.) The Court itself found that "the government's stubborn persistence in arguing that Dr. Ibrahim lacked standing was unreasonable." (2 ER 411:28-412:3.)

In November, 2012, the Government called the Court unilaterally and proposed to send a "Court Information Officer" from Washington, D.C., to show documents to the Court *ex parte*, and then take the documents back to the Capital. (12 ER 3131-3132.) Ibrahim learned of this when the Court issued an order expressing dismay at the Government's actions. (12 ER 3056:16-3057:12, 3068:8-3069:2.) The Government's secrecy extended to redacting case law and statutes from its third motion to dismiss, never serving a copy on Ibrahim's counsel. (12 ER 3081-3085.)

The Government litigated the discovery in this case with equal bad faith. In a December, 2009 hearing on discovery issues, the Court referred to allegedly

privileged information as “old,” and “stale,” and information that “can’t possibly really affect this national security.” (13 ER 3189:13-25, 3193:12-21, 3202:19-3203:1, 3204:20-23.)

In order to avoid discovery, the Government reassured the Court “on at least two occasions” that if “state secrets” were invoked, such evidence could not be relied on by either side. (2 ER 431:8-23.) The Government then sought summary judgment against Ibrahim based on “state secrets” it said it would not invoke. (2 ER 432:23-25, 433:9-12.) In the Court’s words, “[i]t was unsettling for the government to completely reverse its prior position that the effect of invoking the state secrets doctrine was to exclude the evidence from the action.” (2 ER 433:13-15.)

The Government asked the Court to bar the public from hearings and at least ten (10) times at trial. (2 ER 432:7-10, 463:15-16; 11 ER 2685:3-2690:12.) “In stubborn resistance to letting the public and press see the details of this case, the government has made numerous motions to dismiss on various grounds, including an overbroad complete dismissal request based on state secrets. When it could not win an outright dismissal, it tried to close the trial from public view via invocation of a statutory privilege for ‘sensitive security information’ . . . and the ‘law enforcement privilege.’” (2 ER 463:10-15.) These various privilege assertions were made even though “[n]o classified information was used at trial[.]” (2 ER

434:11-16.)

The Government barred Ibrahim from attending her own trial. Government counsel declared that it denied Ibrahim's visa on the fourth day of trial, although neither Ibrahim nor her counsel was ever informed. (2 ER 451:8-10; 19 ER 4950:5-4951:22.)

The Government also barred Raihan, a U.S. citizen, from boarding her flight from Kuala Lumpur to attend trial. (2 ER 433:26-434:1.) The Government made blatant misrepresentations to the Court, reporting that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (21 ER 5450:10-14.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (18 ER 4584:22-4585:10; 9 ER 2313-2314 (¶¶ 11-

19).) [REDACTED], and [REDACTED]

[REDACTED] (9 ER 2313-2314

(¶¶ 16-20); 18 ER 4700:10-4701:5.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (18 ER 4677:22-4678:22, 4697:15-20.)

The Government refused to [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (21 ER 5433:5-11.) The Government never explained why it placed Ibrahim's name on any list. Nor has the Government explained why it defended this action even though it knew at least since February, 2006, that Ibrahim has no nexus to terrorism and should be removed from all watchlists. Nor has the Government provided any reason why, of the at least 26 lawyers it had defending Ibrahim's case, not one talked to Agent Kelley to determine why he had nominated her to the No-Fly List and prevent him from making future errors.

As a last resort, the Government misrepresented to the Court that the issue of which Dr. Ibrahim complained had already been fixed. The Government argued at trial and at the hearing on Ibrahim's fee motion that it was [REDACTED]

[REDACTED] (18 ER 4615:5-14.) The Court notes that the Government claimed to have learned of and corrected the mistake, but that "[i]f the government has already cleansed its records, then no harm will be done in making sure again and so certifying to the Court." (2 ER 455:9, 19, 26-27.) On April 15, 2014, when the Government filed

its statement of compliance with the Court's order, [REDACTED]

[REDACTED] (16 ER 4169-4170.)

The Government pressed over 26 lawyers into service, and spent at least 6,800 hours more than Ibrahim's counsel, to defend the indefensible. (4 ER 862; 6 ER 1405.) Despite all of this, Ibrahim successfully brought her case to trial, and received an Order from the Court requiring the Government to trace all of its terrorist watchlists and records and remove all references to the designations that led to her arrest or add a correction that such designations were erroneous. (2 ER 465:5-14.) Ibrahim sought her attorney's fees under the EAJA.

In spite of her unprecedented win both at the appellate level and at trial, and in spite of the Government's misconduct, the Court cut Ibrahim's attorney's fees by 90 percent. The Court held that: a) the Government did not act in bad faith; b) although the Government was not "substantially justified" in its "pre-litigation conduct" and in defending this action for years, it was "substantially justified" at various stages of the proceedings; and c) Ibrahim's attorney's fees would be restricted to work related to her "procedural due process, substantive due process, Administrative Procedure Act claims and post-2012 remand standing issues" under *Hensley*. (2 ER 400:9-11, 411:14-27, 415:8-20, 418:2-13, 422:5-423:16, 427:15-21.)

Ibrahim appealed and this Circuit issued its Opinion on August 30, 2016. The panel reversed the Court's reductions imposed on Ibrahim's fees arising from its incorrect substantial justification analysis. Ninth Circuit Dkt. 66-1, p. 4. The panel, however, affirmed the Court's bad faith findings as well as its findings under *Hensley*.

### **LEGAL ARGUMENT**

Rehearing en banc is proper (1) if en banc consideration is necessary to maintain uniformity of the court's decisions because the panel decision conflicts with a decision of its own court or the United States Supreme Court; or (2) if the proceeding involves questions of exceptional importance. Fed. R. App. P. 35(a)(1)-(2).

#### **I. THIS CASE RAISES QUESTIONS OF EXCEPTIONAL IMPORTANCE CONCERNING ACCESS TO JUSTICE AND THE INTEGRITY OF THE JUDICIARY.**

The EAJA makes the United States liable for fees and expenses “to the same extent that any other party would be liable under the common law[.]” 28 U.S.C. § 2412(b). Here, the panel correctly recited the standard for bad faith – reckless conduct combined with an additional factor such as frivolousness, harassment, or an improper purpose – but incorrectly concluded the Court's account of the evidence was “plausible” in light of the record. Dkt. 66-1, pp. 16-17 (quoting *Crittenden v. Chappell*, 804 F.3d 998, 1012 (9th Cir. 2015)).

The EAJA was enacted because of “a concern for the unequal position of the individual vis à vis an insensitive and ever-expanding governmental bureaucracy.” *Ruiz v. I.N.S.*, 813 F.2d 283, 288 (9th Cir. 1987). Congress recognized “the government with its greater resources and expertise can in effect coerce compliance with its position.” *Id.* (citation omitted). “If private citizens are to be able to assert their civil rights, and if those who violate the Nation[‘s] fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.” *Moreno v. City of Sacramento*, 534 F.3d 1106 (9th Cir. 2008) (citation omitted).

The U.S. Justice Department has criticized the Terrorist Screening Center for its “weak quality assurance process.” *Ibrahim II*, 669 F.3d at 990 (citation omitted). “Tens of thousands of travelers have been misidentified because of misspellings and transcription errors in the nomination process, and because of computer algorithms that imperfectly match travelers against the names on the list.” *Id.* (emphasis added). “One major air carrier reported that it encountered 9,000 erroneous terrorist watchlist matches every day during April, 2008.” *Id.*

Those individuals should not have to unnecessarily undertake, long, difficult, and expensive litigation against the Government to vindicate constitutional rights. The Court’s decision and the panel’s affirmation that no bad faith existed, allows the Government to give individuals the run around, provide

them with no real remedy for their misclassification, waste tremendous Government resources vigorously defending cases that lack factual support, and attempt to hide it all from the general public, with no real repercussions.

One of the purposes of a fee award for “bad faith” under the EAJA is to preserve the integrity of the judicial process. *Copeland*, 603 F.2d at 984. The Government’s misconduct threatens that integrity and therefore raises an issue of exceptional importance. This is an issue of exceptional importance also because the Government’s authority to watchlist individuals is not founded on congressional action, but on Presidential Directives – actions of the executive branch without any checks or balances from the legislative branch. (20 ER 5081:19-5082:2.)

The panel upheld the Court’s refusal to find bad faith because: 1) at the time the Government placed Ibrahim on its watchlists, there was no uniform standard for such nominations; 2) prior to this suit, “no court had held a foreign national” could challenge the placement of his or her name on a Government watchlist; 3) at the time Ibrahim’s action was filed in 2006, the Government had already removed Ibrahim from the No-Fly List and the lists on which she did appear were the same lists Agent Kelley intended that she be placed; 4) there was a “colorable argument” that the different procedural phases of the cases rendered the Government’s standing motions nonfrivolous; 5) the Government won on at least some of its

privilege assertions; and 6) no evidence indicates the Government's initial refusal to allow Ibrahim's daughter in the country was anything but a "mistake." Dkt. 66-1, pp. 16-20.

The panel's reasoning ignores the evidence. Regardless of what Agent Kelley did in 2004, as early as January, 2005, the Government knew it had "no derogatory information" pertaining to Ibrahim. (2 ER 443:25-444:6.) As of February, 2006, the Government knew Ibrahim had "no nexus to terrorism," should be removed from all watchlists, and was not qualified for the No-Fly or Selectee List. (2 ER 445:22-26.)

Moreover, even if the Government did not know that foreign nationals could challenge the placement of their name on a Government watchlist, the Government does not explain why it continued to vigorously defend the litigation after it lost in *Ibrahim II*, which affirmed Ibrahim could assert constitutional rights. *Ibrahim II*, 669 F.3d at 997. The Court criticized the Government's "stubborn persistence" in reasserting its standing arguments as "unreasonable." (2 ER 411:28-412:3.)

The Government is a public body with an obligation to protect the constitutional rights of individuals and respect the judiciary's compelling interest in the ascertainment of truth. *Caesar v. Mountanos*, 542 F.2d 1064, 1069 (9th Cir 1976); *see also United States v. Bowen*, 799 F.3d 336, 353-54 (5th Cir. 2015) (affirming prosecutors' overarching duty to do justice).

The Government overreached on many of its privilege arguments, for the improper purpose of hiding its errors and preventing Ibrahim from receiving her day in court. The Government claimed the existence of an FBI investigation was a state secret even though [REDACTED]

[REDACTED] (11 ER 2649:1-2660:19, 2757-2758 (¶¶ 16-19), 2743-2744 (¶ 6); 13 ER 3353; 14 ER 3482, 3545, 3548.) The Government claimed privilege over public information at trial, to the dismay of the trial judge. (2 ER 434:11-16; 21 ER 50:6-55:3, 56:20-59:9; 20 ER 382:13-383:8.) Moreover, the Court found that much of the “Sensitive Security Information” about the workings of the Terrorist Screening Database was already public. (2 ER 463:22-464:17.) Even a technically meritorious claim, argued for the purpose of harassing an opponent, amounts to bad faith. *See Rodriguez v. United States*, 542 F.3d 704, 709 (9th Cir. 2008).

Finally, Raihan’s inability to fly to the United States to testify in her mother’s trial, even though she is a U.S. Citizen with a U.S. passport, is strong circumstantial evidence that her placement in the TSDB and consequent denial of boarding could not be a “mistake.” Neither the Court, nor the panel, addresses the Government’s blatant misrepresentation to the Court that [REDACTED]

██████████. (21 ER 5450:10-14.)

The panel rejects Ibrahim's argument that the Court must look at the totality of the circumstances in assessing bad faith. Dkt. 66-1, p. 20. Yet, this Court's own prior decision mandates this. *See Rawlings v. Heckler*, 725 F.2d 1192, 1195-1196 (9th Cir. 1984) ("It is our opinion that the remedial purpose of the EAJA is best served by considering the totality of the circumstances prelitigation and during trial.") (emphasis added).

Existing case law supports a finding of bad faith in these circumstances. (*See, e.g., Brown v. Sullivan*, 916 F.2d 492, 496 (9th Cir. 1990) (had Appeals Council reviewed a hearing transcript, there would have been no need for the litigation); *Maritime Management, Inc. v. United States*, 242 F.3d 1326, 1335 (11th Cir. 2001) (the Government was so recalcitrant in performing its duties, plaintiff was forced to undertake otherwise unnecessary litigation); *Limone v. United States*, 815 F. Supp. 2d 393, 403-410 (D. Mass. 2011) (the Government hid behind procedural arguments, hiding documents from production with exculpatory evidence).)

Here, the Government engaged in a variety of intentional and reckless misconduct, for the improper purposes of obscuring the truth and denying Ibrahim access to justice. The Court's finding was illogical, implausible, and unsupported by the inferences that may be drawn from the facts in the record.

**II. EN BANC CONSIDERATION IS NECESSARY TO ENSURE THIS COURT’S DECISIONS ARE CONSISTENT WITH *HENSLEY*.**

Rehearing en banc is proper under Rule 35(a)(1) because the panel misapplied *Hensley*. Rather than analyzing whether Ibrahim’s claims involved a common core of facts or were based on related legal theories, the panel affirmed the Court’s finding that her claims were unrelated using its own test: whether or not the claims involved different “mental states.” *Hensley*, 461 U.S. at 435-37; Dkt. 66-1, pp. 24-26.

The panel found Ibrahim’s procedural due process claims were unrelated to her First Amendment and equal protection claims because they are “mutually exclusive.” Dkt. 66-1, p. 26. It argued: “if the government negligently placed Ibrahim on its watchlists because it failed to properly fill out a form, then it could not at the same time have intentionally placed Ibrahim on the list based on constitutionally protected attributes Ibrahim possesses, and vice versa.” *Id.* The panel found Ibrahim’s claims “unrelated” because the “mental states” required were “mutually exclusive,” not because the claims arise from a different course of conduct or different set of facts. *See id.* (“These mental states are mutually exclusive.”). In fact, Ibrahim’s claims related to the same course of conduct – Ibrahim’s ensnarement in the Government’s vast terrorist watchlisting network. *Webb v. Sloan*, 330 F.3d 1158, 1169 (9th Cir. 2003).

The panel ignored the rule in *Hensley* that “[l]itigants in good faith may raise alternative legal grounds for a desired outcome, and the court’s rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee.” *Hensley*, 461 U.S. at 435 (emphasis added). Even the Court repeatedly acknowledged Ibrahim did not “lose” her other claims; it was simply unnecessary to reach them because doing so would not have led to further relief. (2 ER 415:11-14, 462:2-9; 7 ER 1810:22-1811:2.)

The panel further asserted that “even if it were the case that Ibrahim’s unsuccessful claims arose out of the same factual context as her successful claim, it is not true that the work expended on those claims necessarily contributed to her ultimate success.” Dkt. 66-1, p. 27. This cannot save its earlier misapplication of *Hensley*, because this statement is not supported by the record. The overwhelming majority of the litigation was spent defending the Government’s jurisdictional attacks on Ibrahim’s claims and its state secrets arguments. The issues tried all related to the circumstances surrounding the placement of Ibrahim’s name on the Government’s watchlists. (2 ER 428-465; 10 ER 2362-2531; 18 ER 4596-4728; 19 ER 4729-4955; 20 ER 4956-5189; 21 ER 5190-5455.)

The panel also misapplied *Hensley* by rejecting without analysis Ibrahim’s contention that she obtained “excellent results.” Instead, the panel claimed, “a ruling that Ibrahim also obtained excellent results on two of her four claims would

have no effect on her potentially recoverable fee award.” Dkt. 66-1, p. 28. This is contrary to *Hensley*, which recognized that where a plaintiff obtains an “excellent result,” his attorney should recover a fully compensatory fee which “should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.” *Hensley*, 461 U.S. at 435.

### **CONCLUSION**

For the reasons set forth herein, Ibrahim requests en banc review of the panel’s decision: 1) finding the U.S. Government did not act in bad faith; and 2) finding Ibrahim did not prevail on “unrelated” claims under *Hensley*.

Dated: October 14, 2016

McMANIS FAULKNER

/s/ Marwa Elzankaly  
MARWA ELZANKALY  
ELIZABETH PIPKIN  
CHRISTINE PEEK

Attorneys for Appellant,  
RAHINAH IBRAHIM

**CERTIFICATE OF COMPLIANCE**

I hereby certify that Pursuant to Circuit Rule 40-1, the foregoing Petition for Rehearing En Banc is proportionately spaced, has a typeface of 14 points and contains 4,191 words, excluding material not counted under Rule 32 of the Federal Rules of Appellate Procedure.

Dated: October 14, 2016

McMANIS FAULKNER

/s/ Marwa Elzankaly  
MARWA ELZANKALY  
ELIZABETH PIPKIN  
CHRISTINE PEEK

Attorneys for Appellant,  
RAHINAH IBRAHIM

9th Circuit Case Number(s) 14-16161; 14-17272

**NOTE:** To secure your input, you should print the filled-in form to PDF (File > Print > PDF Printer/Creator).

\*\*\*\*\*

**CERTIFICATE OF SERVICE**

**When All Case Participants are Registered for the Appellate CM/ECF System**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system

on (date)  .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format)

\*\*\*\*\*

**CERTIFICATE OF SERVICE**

**When Not All Case Participants are Registered for the Appellate CM/ECF System**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system

on (date)  .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)

Nos. 14-16161 & 14-17272

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

RAHINAH IBRAHIM

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants-Appellees.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

---

**RESPONSE TO PETITION FOR REHEARING *EN BANC***

---

BENJAMIN C. MIZER  
*Acting Assistant Attorney  
General*

MELINDA HAAG  
*United States Attorney*

SHARON SWINGLE  
(202) 353-2689

JOSHUA WALDMAN  
(202) 514-0236  
*Attorneys, Appellate Staff  
Civil Division, Room 7232  
U.S. Department of Justice  
950 Pennsylvania Ave., N.W.  
Washington, D.C. 20530*

---

## Table of Contents

	<u>Page</u>
INTRODUCTION .....	1
BACKGROUND .....	2
I.    LEGAL BACKGROUND.....	2
II.   FACTUAL AND PROCEDURAL BACKGROUND .....	5
A.   Underlying Litigation on the Merits. ....	5
B.   District Court Decision on Attorney’s Fees and Expenses. ....	6
C.   Unanimous Panel Affirms in Relevant Part and Remands for Reconsideration. ....	11
REASONS FOR DENYING THE PETITION .....	13
I.    THE PETITION RAISES NO IMPORTANT QUESTION OF LAW .....	13
II.   THE PANEL CORRECTLY DECIDED THIS CASE .....	15
III. <i>EN BANC</i> REVIEW IS UNWARRANTED AS THIS TIME .....	19
CONCLUSION .....	21
CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 40-1(a)	
CERTIFICATE OF SERVICE	
STATEMENT OF RELATED CASES	

**TABLE OF AUTHORITIES**

<u>Cases</u>	<u>Page(s)</u>
<i>Barry v. Bowen</i> , 825 F.2d 1324 (9th Cir. 1987).....	4
<i>Barry v. Bowen</i> , 884 F.2d 442 (9th Cir. 1989).....	4
<i>Beaudry Motor Co. v. Abko Properties, Inc.</i> , 780 F.2d 751 (9th Cir. 1986).....	4
<i>Cazares v. Barber</i> , 959 F.2d 753 (9th Cir. 1992).....	4, 5
<i>Gutierrez v. Barnhart</i> , 274 F.3d 1255 (9th Cir. 2001).....	2
<i>Hensley v. Eckerhart</i> , 461 U.S. 424 (1983) .....	3, 8, 20
<i>Kyocera Corp. v. Prudential-Bache Trade Servs.</i> , 341 F3d 987 (9th Cir. 2003) (en banc) .....	20
<i>Maritime Management, Inc. v. United States</i> , 242 F.3d 1326 (11th Cir. 2001).....	4
<i>Osterneck v. Ernst &amp; Whinney</i> , 489 U.S. 169 (1989) .....	4
<i>Perez-Arellano v. Smith</i> , 279 F.3d 791 (9th Cir. 2002).....	2

**TABLE OF AUTHORITIES (cont'd)**

<b><u>Cases</u></b>	<b><u>Page(s)</u></b>
<i>Rodriguez v. United States</i> , 542 F.3d 704 (9th Cir. 2008).....	4, 14
<i>Schwarz v. HHS</i> , 73 F.3d 895 (9th Cir. 1995).....	15
 <b><u>Statutes</u></b>	
28 U.S.C. § 2412(b).....	4
28 U.S.C. § 2412(d)(1)(A).....	2
28 U.S.C. § 2412(d)(2)(A).....	3

## INTRODUCTION

The district court awarded nearly half a million dollars in attorney's fees, expenses, and costs. The United States did not appeal from that award, and has already paid those uncontested amounts. The panel unanimously and correctly affirmed the district court's finding that the government did not act in bad faith and, therefore, plaintiff is not entitled to attorney's fees above the statutory maximum hourly rate. The panel likewise unanimously and correctly affirmed the district court's finding that plaintiff's fee request should be reduced for work on unsuccessful claims that were unrelated to the claims on which she prevailed.

Plaintiff comes nowhere close to meeting the standard for *en banc* review. First, the petition raises no question of law at all, let alone the kind of significant legal question of far-reaching consequences or on which appellate courts are divided that would warrant further consideration. The petition presents only fact-bound determinations – reviewed under the highly deferential clear-error or abuse-of-discretion standards – that do not warrant *en banc* consideration. Second, the panel correctly affirmed the

district court's factual findings on the questions presented, finding no clear error or abuse of discretion. Third, this attorney's fee matter is in an interlocutory posture, with the panel remanding for a recalculation of the fee award which could be "substantially more or substantially less" than the original amount. Op. 33. Any possible *en banc* review is plainly premature at this point.

## BACKGROUND

### I. LEGAL BACKGROUND.

The Equal Access to Justice Act (EAJA) authorizes courts to award attorney's fees and expenses in civil litigation against the United States. 28 U.S.C. § 2412(d)(1)(A). To be eligible for fees and expenses, the plaintiff must be a "prevailing party," who "has gained by judgment or consent decree a 'material alteration of the legal relationship of the parties.'" *Perez-Arellano v. Smith*, 279 F.3d 791, 794 (9th Cir. 2002). The court must also find that the position of the United States was not "substantially justified," meaning that it is not "justified to a degree that could satisfy a reasonable person." *Gutierrez v. Barnhart*, 274 F.3d 1255, 1258 (9th Cir. 2001).

Satisfaction of these criteria simply “brings the plaintiff only across the statutory threshold,” to be eligible for fees and expenses. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). “It remains for the district court to determine what fee is ‘reasonable.’” *Ibid.*

A court considers multiple factors in determining what fee is reasonable. One “important factor” is the “results obtained” in the litigation. *Hensley*, 461 U.S. at 434. “This factor is particularly crucial where a plaintiff is deemed ‘prevailing’ even though he succeeded on only some of his claims for relief.” *Id.* at 434. In such a situation, the district court must consider whether the plaintiff “fail[ed] to prevail on claims that were unrelated to the claims on which he succeeded.” *Id.* at 435. The court must examine whether “counsel’s work on one claim [was] unrelated to his work on another claim” and “no fee may be awarded for services on the unsuccessful [unrelated] claims.” *Id.* at 435.

Under EAJA, attorney fees are limited to \$125 per hour. 28 U.S.C. § 2412(d)(2)(A). However, a court may award attorney’s fees above EAJA’s

statutory hour rate cap if it finds the United States litigated in bad faith.

*Cazares v. Barber*, 959 F.2d 753, 754 (9th Cir. 1992); *see* 28 U.S.C. § 2412(b).

Bad faith is found “only in exceptional cases,” *Beaudry Motor Co. v. Abko Properties, Inc.*, 780 F.2d 751, 756 (9th Cir. 1986), where an attorney “knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent,” *Rodriguez v. United States*, 542 F.3d 704, 709 (9th Cir. 2008). The bad faith standard is “higher than the substantial justification standard,” and thus “[n]ot all cases in which the government lacks substantial justification under the EAJA are defended in bad faith.” *Barry v. Bowen*, 825 F.2d 1324, 1333-34 (9th Cir. 1987), *abrogated on other grounds by Barry v. Bowen*, 884 F.2d 442 (9th Cir. 1989); *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989). *See also Maritime Management, Inc. v. United States*, 242 F.3d 1326, 1332 n.8 (11th Cir. 2001) (“Bad faith is generally considered to be a higher standard than substantial justification, in the context of the EAJA.”) (citing authorities). “Mere recklessness does not alone constitute bad faith; rather, an award of

attorney's fees is justified when reckless conduct is combined with an additional factor such as frivolousness, harassment, or an improper purpose." *Cazares*, 959 F.2d at 754.

## II. FACTUAL AND PROCEDURAL BACKGROUND.

### A. Underlying Litigation on the Merits.

1. Plaintiff is a non-U.S. citizen from Malaysia. 2 ER 435. She was lawfully in the United States, in student status, from 2000 to 2005. 2 ER 435-438. On January 2, 2005, plaintiff planned to fly from San Francisco to Malaysia, but was unable to do so because an FBI Special Agent had mistakenly nominated her to the No Fly List. 2 ER 436-438. Shortly thereafter, the government determined that plaintiff should not have been on the No Fly List, told plaintiff that her name had been removed, and did, in fact, remove her name from the No Fly List. 2 ER 438, 443. Plaintiff was able to fly to Malaysia the next day, on January 3, 2005. 2 ER 438. On January 31, 2005, plaintiff's student visa was revoked, which plaintiff learned of in March 2005. 2 ER 444. Plaintiff's subsequent applications for visas were denied in 2009 and 2013. *See* 2 ER 448, 451.

2. The district court found that plaintiff was put on the No Fly List in 2004 “by human error,” 2 ER 453, but “[t]hat error was *not* motivated by race, religion, or ethnicity,” 2 ER 462 (emphasis added). The court held that as a matter of procedural due process, plaintiff is entitled to an order directing the federal government to correct its records to remove all references to plaintiff’s erroneous 2004 nomination. 2 ER 454-455. The government was also ordered to inform plaintiff that she is no longer on the No Fly list and has not been since 2005. 2 ER 457.

**B. District Court Decision on Attorney’s Fees and Expenses.**

Plaintiff sought \$3,630,057.50 in attorney’s fees, \$293,860.18 in expenses, and \$58,615.31 in costs. The district court noted that plaintiff’s counsel “violated our district’s rules” by failing to meet and confer prior to filing the motion, and “offered no acceptable reason for their failure,” other than to refer to confidential matters – which itself “was another violation” of local rules – and these violations were “permissible ground[s] for the denial of a motion for attorney’s fees” in its entirety. 2 ER 404-405. The district court, in its discretion, permitted the request to go forward, and

held that plaintiff was eligible for fees and expenses as a prevailing party.

2 ER 404-408.

The district court – which was intimately familiar with this litigation, having overseen the case for nearly a decade – found that plaintiff was not entitled to the enormous fees and expenses requested, describing those amounts as “whopping,” 2 ER 411, “grossly excessive,” 1 ER 86, “unfair,” 2 ER 412, “grossly overstated,” “patently excessive,” and “unjustified,” 1 ER 80.

As relevant here, the district court found that the government did not act in bad faith, and therefore plaintiff was not entitled to attorney’s fees above the statutory hour rate as she had requested. 2 ER 422-423.

Emphasizing that the “bad-faith exception is a narrow one,” the court addressed plaintiff’s six arguments alleging bad faith and found each argument unpersuasive. 2 ER 422. The court found that the government’s underlying error in placing plaintiff on the No Fly List was “unintentional and made unknowingly,” that the government’s merits arguments, even if

unsuccessful, were not made in bad faith, and that there “is no evidence” that the government’s actions were otherwise made in bad faith. 2 ER 422-423.<sup>1</sup>

The district court also found that plaintiff’s fee request should be reduced because “[p]laintiff did not prevail on all her claims” and “counsel’s work on unsuccessful unrelated claims should not be entirely recovered.” 2 ER 411 (citing *Hensley*, 461 U.S. at 434-35). The district court *agreed* with plaintiff that although she did not prevail on some of her claims, plaintiff was still entitled to fees for those claims because they were related to the claims on which she did prevail. 2 ER 415. However, plaintiff “cannot recover for work done” on unsuccessful claims that “were not related to the procedural due process claim (for which she received relief) because they involved different evidence, different theories, and arose from a different alleged course of conduct.” 2 ER 414. The court

---

<sup>1</sup> The district court did permit an upward cost-of-living adjustment of \$250 per hour (twice the statutory limit) for one attorney with distinctive knowledge and skills justifying that rate. 2 ER 425.

found that plaintiff's unsuccessful First Amendment and Equal Protection claims were unrelated to her successful procedural due process claim, and therefore plaintiff should not recover fees for those unsuccessful and unrelated claims. *Ibid.*

In addition, the court found that plaintiff's fee request should be reduced where her recordkeeping was inadequate, and where plaintiff had failed to demonstrate billing judgment or had engaged in impermissible block billing. *See, e.g.*, 2 ER 413 (fee request "lack[ed] adequate details [on] whether billing judgment was applied for inefficiencies and overstaffing"); 2 ER 406, 417 (plaintiff sought "double recovery for items \* \* \* on which fees were already recovered" and "[i]t is hard to accept that counsel have been so brazen"); 2 ER 426 (plaintiff "never provided \* \* \* invoices or itemized spreadsheets" for expenses and "utter[ly] fail[ed] to explain why those expenses are reasonable or recoverable").

Despite being given *three chances* to revise her request, plaintiff not only "stubbornly insisted on '100% of [her] fees,'" 1 ER 89, but committed

yet another violation of the court's rules, leading the district court to strike plaintiff's brief regarding expenses as a sanction, 1 ER 88. Ultimately, following a detailed recommendation by an appointed special master (who examined the fee request in painstaking detail), the district court awarded \$419,987.36 in attorney's fees, \$34,768.71 in expenses, and \$20,640.67 in costs, for a total of \$475,396.74. *See* 1 ER 87-88, 93; 1 ER 220-221, 224; 2 ER 380, 393.

Plaintiff later sought to add \$85,467.50 in additional fees for work objecting to the special master's report, which the district court rejected as a "grossly overstated" and "patently excessive" demand that is "unjustified, especially considering that \* \* \* [a]ll of counsel for plaintiff's objections were overruled," and coming "after a history of plaintiff's counsel stubbornly refusing to cooperate in this significantly protracted satellite fee litigation." 1 ER 80.

**C. Unanimous Panel Affirms in Relevant Part and Remands for Reconsideration.**

1. A unanimous panel affirmed the district court's finding that the government did not act in bad faith. Op. 15-21. The district court found that plaintiff was originally placed on the No Fly List by human error, and not because of race, religion or ethnicity; plaintiff did not contest that finding on appeal, and it was not clearly erroneous for the district court to find no bad faith. Op. 17 & n.10. The panel likewise affirmed the district court's finding that the government did not act in bad faith by arguing that plaintiff (a non-citizen) could not raise a constitutional challenge to her placement on the No Fly List, that plaintiff lacked standing, and by making privilege assertions. Op. 18-20. Finally, there was no evidence in the record on which to find that the government acted in bad faith with respect to plaintiff or her daughter attending the trial. Op. 20.

2. The panel also unanimously affirmed the district court's finding that plaintiff's fee request should be reduced for those claims on which plaintiff did not succeed and which were unrelated to the claims on which

she prevailed. Op. 22-27. The panel concluded that the district court did not abuse its discretion in finding that plaintiff's First Amendment and Equal Protection claims were unrelated to her successful due process claim because those unsuccessful claims "involve different evidence, different theories, and arose from a different alleged course of conduct." Op. 24. The panel noted that "[u]nrelated claims are those that are both factually *and* legally distinct," Op. 24, and found no abuse of discretion in the district court's finding that plaintiff's First Amendment and equal protection claims were unrelated to plaintiff's successful due process claim. Specifically, plaintiff's due process claim was "based on her allegations that the government failed to provide adequate procedures to remove her name from its lists," while her First Amendment and Equal Protection claims "were based on her allegations that the government intentionally put her name on the lists based on constitutionally protected attributes," Op. 27. Those claims, the court noted, are "mutually exclusive" because "if the government negligently placed [plaintiff] on its watchlists [by error]," as

the due process claim contended, “then it could not at the same time have intentionally placed [plaintiff] on the list based on constitutionally protected attributes [plaintiff] possessed, and vice versa.” Op. 26.

## REASONS FOR DENYING THE PETITION

### I. THE PETITION RAISES NO IMPORTANT QUESTION OF LAW

*En banc* review is reserved for questions of law of broad significance, or on which the courts are divided. Neither is presented here.

A. Plaintiff concedes that the panel “correctly recited the standard for bad faith.” Pet. 11. Plaintiff argues that although the panel applied the correct legal standard, it reached the wrong result under the specific circumstances of this case. But that is a question of fact, not a question of law, let alone a legal issue of such significance or with such far-reaching consequences that *en banc* review is warranted. Any resolution of the fact-bound question presented in the petition would control this case and this case only. Moreover, the district court’s factual finding that the government did not act in bad faith was reviewed by the panel (and would be reviewed by an *en banc* court) under the clearly-erroneous standard.

*Rodriguez v. United States*, 542 F.3d 704, 709 (9th Cir. 2008). The full Court's review is not warranted.

B. The same is true for plaintiff's argument that the district court erred in reducing her fee request with respect to plaintiff's unsuccessful claims that were unrelated to the claim on which she prevailed. Plaintiff's contention (Pet. 17) that the panel applied the wrong legal standard is unfounded. Plaintiff concedes that the correct legal question is "whether [her] claims involved a common core of facts or were based on related legal theories," Pet. 17. That is the same legal standard the panel applied: "Unrelated claims are those that are both factually *and* legally distinct." Op. 24. It was also the standard applied by the district court: "Plaintiff \* \* \* cannot recover for work done on" claims "involv[ing] different evidence, different theories, and ar[ising] from a different alleged course of conduct." 2 ER 414. Thus, plaintiff's argument once again does not present any question of law, but boils down to a fact-bound question of whether her particular unsuccessful claims were related to her particular successful

claims – a factual finding that would be reviewed for an abuse of discretion, *Schwarz v. HHS*, 73 F.3d 895, 902-04 (9th Cir. 1995). The outcome would have consequences for this case only, and would have no significance beyond this specific attorney’s fee dispute. The petition should be denied.

## II. THE PANEL CORRECTLY DECIDED THIS CASE

The petition should also be denied because the panel correctly held that there was no clear error in the district court’s finding that the government did not act in bad faith, and correctly held that the district court did not abuse its discretion in finding that two of plaintiff’s unsuccessful claims were unrelated to the claims on which she prevailed.

A. Plaintiff argues that the government acted in bad faith by failing to remove her from the No Fly and Selectee Lists. Pet. 14. But the district court found the government *did* remove plaintiff from both lists in 2005. 2 ER 443, 445. *See* Op. 18 (“government had already removed Ibrahim from the No-Fly List”). Plaintiff argues she should have been removed from “all watchlists,” Pet. 14, but the district court found that plaintiff was included

in three other watchlists and databases without any suggestion of unlawfulness. Plaintiff's disagreement with the district court's factual findings is not evidence of bad faith.

Plaintiff contends that the government acted in bad faith by "reasserting its standing arguments," Pet. 14, but the district court correctly found the argument was not made in bad faith, 2 ER 422, and the panel properly found that even if the government lost its standing argument at the pleading stage, it had "a colorable argument" to reassert standing in a motion for summary judgment, Op. 19.

Plaintiff asserts that the government's privilege arguments were in bad faith, Pet. 15, but the district court *upheld* the government's assertion of the state secrets privilege (refusing to require disclosure of classified information), 2 ER 430-431, 434, 458, and *upheld* some of the government's other privilege assertions, 2 ER 431, finding that plaintiff's "hundreds of objections" were "largely unwarranted," 2 ER 425. The district court thus reasonably found that "the government's privilege assertions \* \* \* were not

made in bad faith,” 2 ER 422-23, and the panel correctly found that plaintiff’s contrary argument was “unconvincing” and failed to demonstrate that the district court’s findings were clearly erroneous, Op. 19-20.

Finally, plaintiff wrongly argues that the government acted in bad faith by preventing plaintiff or her daughter from testifying. Pet. 8-9, 15-16. The district court found “no evidence that the government obstructed plaintiff or her daughter from appearing at trial.” 2 ER 423. Plaintiff’s daughter was not permitted to board her flight due to an error that the government discovered in six minutes and corrected the next day. 2 ER 452. The court gave plaintiff the option to reopen the trial to permit her daughter’s late testimony, but plaintiff declined. 2 ER 434. As for plaintiff herself, she could not testify in person because she is not a U.S. citizen and had no valid visa, and the district court rejected her challenge to the denial of her visa. 2 ER 458-459. The panel correctly found “no evidence” of bad faith, let alone clear error in the district court’s finding. Op. 20.

B. The panel also correctly held that the district court did not abuse its discretion in finding that plaintiff's unsuccessful First Amendment and Equal Protection claims were unrelated to her successful due process claim. The district court *agreed* with plaintiff that some of her unsuccessful claims *are* related to her successful claims, and allowed fees for those claims. 2 ER 415. However, the district court correctly found that two of plaintiff's claims – her First Amendment and Equal Protection arguments – were unrelated. Specifically, those claims “were based on allegations \* \* \* that defendants intentionally discriminated against her,” 2 ER 414, whereas her successful due process claim was based not on intentional discrimination but on “human error,” 2 ER 453, that was “made unknowingly,” 2 ER 422. Accordingly, her unsuccessful First Amendment and Equal Protection claims “did not contribute to her prevailing procedural due process claim,” 2 ER 415, because they “involved different evidence, different theories, and arose from a different alleged course of conduct,” 2 ER 414. The panel correctly held that the district court did not abuse its discretion in so

finding, agreeing that the successful and unsuccessful claims were not only based on different “facts and legal theories,” but were “mutually exclusive.” Op. 26.

### **III. EN BANC REVIEW IS UNWARRANTED AS THIS TIME**

As noted above, the questions presented in the petition were correctly decided by the panel and would not warrant *en banc* review in any event. Further review is especially unwarranted given the interlocutory posture of this case. Although the panel affirmed the district court with respect to the issues presented in the petition, the panel reversed and remanded on one issue, and ordered the district court to recalculate the fee award. As the panel noted, the fee amount on remand “may well be \* \* \* substantially more or substantially less” than the previous award. Op. 33. Any *en banc* review should await a final resolution of the amount of the fee award by the district court.

Moreover, the district court on remand could obviate the need to address plaintiff’s argument that her unsuccessful claims are related to her successful claims. As the panel noted (Op. 28-29), even if plaintiff’s

unsuccessful claims were related to her successful claims, the district court could *still* impose precisely the same fee reduction on the independent ground that plaintiff's lack of overall success justifies the same reduction. Op. 28-29. *See Hensley*, 461 U.S. at 436 (where "plaintiff has achieved only partial or limited success," court can reduce fees "even where the plaintiff's claims were interrelated"). Although the panel found that the district court had not "clearly and concisely explained" whether the reduction of plaintiff's fee request could be independently justified on this basis, Op. 29, the panel left that possibility open on remand. Because proceedings on remand might obviate the question presented in the petition, *en banc* review is unwarranted.<sup>2</sup>

---

<sup>2</sup> Denial of *en banc* review at this stage would not preclude plaintiff from raising the same issues in a subsequent petition, assuming those issues remained relevant to the outcome of this case. *See Kyocera Corp. v. Prudential-Bache Trade Servs.*, 341 F3d 987, 995 (9th Cir. 2003) (en banc).

## CONCLUSION

For the foregoing reasons, this Court should deny the petition for rehearing *en banc*.

Respectfully submitted,

BENJAMIN C. MIZER  
*Acting Assistant Attorney  
General*

MELINDA HAAG  
*United States Attorney*

SHARON SWINGLE  
(202) 353-2689

JOSHUA WALDMAN  
(202) 514-0236  
*Attorneys, Appellate Staff  
Civil Division, Room 7232  
U.S. Department of Justice  
950 Pennsylvania Ave., N.W.  
Washington, D.C. 20530*

DECEMBER 12, 2016

**CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 40-1(a)**

I hereby certify pursuant to Circuit Rule 40-1(a), the foregoing  
Response to Petition for Rehearing *En Banc* contains 3614 words, according  
to the count of Microsoft Word.

/s/ Joshua Waldman  
JOSHUA WALDMAN  
*Counsel for Appellees*

### CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2016, I caused the foregoing Response to Petition for Rehearing *En Banc* to be filed with the Court through the electronic filing system. Counsel for the appellant is a registered CM/ECF user and service will be accomplished by the appellate CM/ECF system.

/s/ Joshua Waldman  
JOSHUA WALDMAN  
*Counsel for Appellees*

**STATEMENT OF RELATED CASES**

Appellees are not aware of any related cases pending in this Court.

/s/ Joshua Waldman  
JOSHUA WALDMAN  
*Counsel for Appellees*