IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ASSOCIATION OF AMERICAN UNIVERSITIES, *et al.*, Plaintiffs, v. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, Defendants.	Case No. 1:25-cv-10346 Leave to file granted on June 25, 2026

PLAINTIFF AAU'S SUR-REPLY IN RESPONSE TO DEFENDANTS' MOTION TO CONDUCT DISCOVERY

AAU has already gone well beyond what the EAJA requires to prove its eligibility, submitting multiple declarations establishing that AAU is the only entity responsible for paying attorneys' fees and does not have enforceable agreements with any other entity. Despite repeatedly invoking the Supreme Court's admonition not to turn fee proceedings into a second litigation, Defendants move the goal posts yet again, distort AAU's declaration, and seek a deposition—a form of discovery not requested in their opening motion and unsupported by precedent. Defendants' arguments lack basis in law or fact, as underscored by the absence of supportive case law in their filings. And their conduct flips the EAJA on its head: The statute is intended to remove barriers for challenging government conduct, but Defendants' intrusive and escalating requests, wholly untethered to the statute itself, seem designed to deter parties from seeking fees, if not challenging government action altogether. The Court should deny Defendants' requests.

ARGUMENT

I. AAU has gone above and beyond to demonstrate its statutory eligibility, and the specifics of how it collects dues from its members are irrelevant to that inquiry.

AAU, as a 501(c)(3) organization with fewer than 500 employees, Doc No. 108-1 ¶ 2, meets EAJA's eligibility requirements. *See* 28 U.S.C. § 2412(d)(2)(B) (a 501(c)(3) organization, "regardless of . . . net worth," is eligible if it does not have "more than 500 employees at the time the civil action was filed"). Congress did not intend for these requirements to be an exacting bar. *See Tang v. Chertoff*, 689 F. Supp. 2d 206, 211 (D. Mass. 2010) ("Although [EAJA] imposed certain eligibility limits . . . Congress expressly extended the benefits of the EAJA to nearly all citizens or entities contesting unreasonable exercises of government authority." (internal quotation marks and brackets omitted)). No examination into AAU's finances or operations is needed for this Court to conclude that AAU satisfies the statutory criteria. *See, e.g.*, *N.H. Hosp. Ass'n v. Azar*, No. 15-cv-460, 2019 WL 1406631, at *5–6 (D.N.H. Mar. 28, 2019) (association eligible where it

"paid . . . for all legal fees incurred in this litigation").

AAU sought to avoid a discovery dispute by providing a supplemental declaration making clear that AAU is a dues-funded organization. It first funded this case through its dues reserves, but when those reserves ran out, it collected supplemental dues from each of its 69 U.S.-based members, in equal amounts, regardless of whether they were a plaintiff or a declarant or not involved at all. Doc No. 115-1 ¶ 9. That was consistent with AAU's past practice: AAU collects supplemental dues in equal amounts from its U.S.-based members when it lacks sufficient funds to cover the costs of special projects affecting those members. *Id.* ¶¶ 7–9. (AAU's two Canadian members pay different, lower dues than its U.S.-based members. *Id.* ¶ 7.) In short, this collection of supplemental dues was routine and unremarkable.

In response, Defendants have invented a *new* theory for why even *more* information is needed, arguing that the collection of "supplemental" dues somehow renders an association ineligible for fees. This theory is impossible to square with EAJA's text and is unsupported by any case law. EAJA allows "association[s]" to recover fees, *see* 28 U.S.C. § 2412(d)(2)(B), and Congress undoubtedly understood that associations are funded by their members. *See Nat'l Ass'n of Mfrs. v. Dep't of Lab.* ("*NAM*"), 159 F.3d 597, 600–01 (D.C. Cir. 1998); *cf. Hunt v. Wash. Apple Advert. Comm'n*, 432 U.S. 333, 344–45 (1977) (one of the "indicia of membership" in an association is members "financ[ing] its activities"). Just like any other statute, courts interpreting the EAJA should not "read requirements into [the] statute that 'do not appear on its face.'" *United States ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d 28, 35 (1st Cir. 2013). Indeed, no court in the First Circuit has found that collecting supplemental dues to fund litigation makes an entity ineligible, and the lone case Defendants cite was clear that "payment of membership dues *does not* render a member liable for the costs of a litigation." *NAM*, 159 F.3d at 604 (emphasis added).

Moreover, it makes no sense to suggest eligibility should turn on whether an association funded litigation through annual or supplemental dues. In both scenarios the association is "us[ing] general revenues derived from membership dues to finance litigation," which *NAM* holds is consistent with EAJA eligibility. 159 F.3d at 604. The only difference is the *timing* of when dues are collected. According to Defendants, AAU could have increased its annual dues in anticipation of litigation or done the same the following year if it went into debt paying its legal bills, and either would be acceptable. So too here.

Defendants' argument would mean AAU could not seek fees simply because it did not have sufficient funding on hand at the outset of this case, foreclosing EAJA recovery for all but the richest 501(c)(3) organizations, a blatant inversion of EAJA's purpose. *See Comm'r, INS v. Jean*, 496 U.S. 154, 163 (1990) ("the specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions"); *Schock v. United States*, 254 F.3d 1, 4 (1st Cir. 2001) ("The purpose of the EAJA is to remove economic deterrents to parties who seek review of unreasonable government action . . . ." (citing H.R. Rep. No. 96–1418, at 5–6 (1980)). This case shows why this is so egregious: The government forced AAU to litigate challenges to four materially identical policies in short succession and without advance notice, requiring emergency proceedings to protect AAU's members from imminent harm, and with all four policies later declared unlawful. Defendants now contend that, because AAU did not have sufficient reserves to withstand this onslaught, that should bar recovery. Accepting that argument would allow the government to avoid liability by applying maximal pressure and exhausting an association's finances. EAJA is intended to avert that sort of outcome.

Defendants' latest attempt to malign AAU by accusing it of seeking a windfall is both factually wrong and legally irrelevant. Factually, AAU paid over $1.8 million in fees for this case

but, consistent with EAJA's limitations, is requesting only $429,914.29 in reimbursement. *See* Doc Nos. 108 at 1, 108-3, 108-5. That significant reduction eliminates any concern over a windfall, as even a full EAJA award here will leave AAU financially *worse* off than if it had not sued. *Cf.* Doc No. 116 at 4 (suggesting that an EAJA award should "put the association in the same position that it would have been in had it not sued"). That reduction also underscores that AAU is entitled to its full request, because AAU itself paid all (and indeed, more than) the requested amount, notwithstanding its informal agreements with the other associations. More fundamentally, Defendants' concerns about a "windfall" are legally irrelevant—if they were correct, entities receiving pro bono legal services would be ineligible, contrary to *NAM* itself, which involved pro bono counsel. 159 F.3d at 603–04; *see also Venegas v. Mitchell*, 495 U.S. 82, 87–88 (1990) ("Because it is the party, rather than the lawyer, who is so eligible, we have consistently maintained that fees may be awarded . . . even to those plaintiffs who did not need them to maintain their litigation[.]").

Finally, an award of fees to AAU is not barred even if there is some indirect benefit to AAU's members. *Contra* Doc No. 116 at 4, 6. That is true in every case with a dues-based association serving as the plaintiff, yet Congress explicitly permitted "association[s]" and "organization[s]" to collect EAJA fees, *see* 28 U.S.C. § 2412(d)(2)(B), and there is no basis to override that legislative choice, *see NAM*, 159 F.3d at 603 (court should not "rewrite the statute to exclude eligible associations whenever their litigation benefits ineligible members").

II. All of Defendants' discovery requests should be denied.

Despite claiming that "HHS is mindful of the Supreme Court's admonition that 'a request for attorney's fees should not result in a second major litigation,'" *see* Doc No. 116 at 7; Doc No. 112 at 4 (both citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Hum. Res.*, 532 U.S. 598, 609 (2001)), Defendants have repeatedly sought to turn it into one. Their new, open-

ended requests border on harassment and should be denied.

AAU's declaration made clear it does not have enforceable agreements with any other entity to fund this litigation. Doc No. 115-1 ¶¶ 10–11. AAU's only agreements related to this litigation are the unenforceable agreements with ACE and APLU, both of whom are EAJA eligible but did not seek fees because only AAU was liable for the fees at issue. *Id.* ¶ 11. Contrary to Defendants' conspiratorial speculation, *see* Doc No. 116 at 5–7, AAU's disclosure of these unenforceable agreements demonstrates its candor. And Defendants' demands for information about "how much [AAU] drew from its reserves" and other details have no bearing on the eligibility analysis—which is clear from their failure to cite any statutory language or case law.

Defendants' fishing expedition into picayune details of AAU's finances and operations is far removed from EAJA's eligibility criteria and unprecedented in terms of how fee disputes are litigated. The government litigated multiple fee petitions in similar cases without discovery, highlighting this information's irrelevance to the issues this Court must actually decide. *See* Opposition, *AAU v. NSF*, No. 1:25-cv-11231 (D. Mass. Dec. 12, 2025), Doc No. 98; Opposition, *AAU v. DOD*, 1:25-cv-11740 (D. Mass. Apr. 24, 2026), Doc No. 102. And for decades, EAJA petitions have routinely been litigated without anything approaching what Defendants seek here. The request for a deposition is especially egregious: Defendants do not need four hours to interrogate an AAU representative to determine whether AAU is eligible for fees, with the option for *even more* discovery afterward. At minimum, these requests appear intended to drag out these proceedings and increase the expense to AAU (which will, again, be reimbursed at rates far below the actual rates of its counsel). At worst, they are an attempt to harass and deter litigants from seeking fees or even filing suit in the first place, contrary to EAJA's purpose. Because Defendants' discovery requests do not affect AAU's statutory eligibility for fees, they should all be denied.

Dated: July 1, 2026

CLEMENT & MURPHY, PLLC

By: */s/ Paul D. Clement*

Paul D. Clement (*pro hac vice*)
Erin E. Murphy (*pro hac vice*)
James Y. Xi (*pro hac vice*)
Kyle R. Eiswald (*pro hac vice*)
706 Duke Street
Alexandria, VA 22314
Tel: (202) 742-8900
paul.clement@clementmurphy.com
erin.murphy@clementmurphy.com
james.xi@clementmurphy.com
kyle.eiswald@clementmurphy.com

Attorneys for Association of American Universities, Association of Public and Land-grant Universities, and American Council on Education

Respectfully submitted,

JENNER & BLOCK LLP

By: */s/ Lindsay C. Harrison*

Ishan K. Bhabha (*pro hac vice*)
Lindsay C. Harrison (*pro hac vice*)
Lauren J. Hartz (*pro hac vice*)
Elizabeth Henthorne (*pro hac vice*)
Zachary C. Schauf (*pro hac vice*)
Adam G. Unikowsky (*pro hac vice*)
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
Tel: (202) 639-6000
IBhabha@jenner.com
LHarrison@jenner.com
LHartz@jenner.com
BHenthorne@jenner.com
ZSchauf@jenner.com
AUnikowsky@jenner.com

Shoba Pillay, BBO No. 659739
353 N Clark Street
Chicago, IL 60654
Tel: (312) 222-9350
SPillay@jenner.com

Attorneys for All Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2026, I caused the foregoing to be electronically filed with the clerk of the court for the U.S. District Court for the District of Massachusetts, by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record, a true and correct copy of the foregoing instrument, and all attachments.

/s/ Lindsay C. Harrison
Lindsay C. Harrison (*pro hac vice*)
Jenner & Block LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
Tel: (202) 639-6000
LHarrison@jenner.com