**No. 26-60344**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

MAHMOUD KHALIL,

Petitioner,

v.

TODD WALLACE BLANCHE,
U.S. ATTORNEY GENERAL,

Respondent.

ON PETITION FOR REVIEW FROM A FINAL ORDER OF
THE BOARD OF IMMIGRATION APPEALS
[redacted], Not Detained

# BRIEF FOR RESPONDENT

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed non-governmental persons as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. This representation is made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Petitioner: Mahmoud Khalil
2. Petitioner's Counsels: Marc Van Der Hout, Johnny Sinodis, Oona Cahill, Omar Jadwat, Noor Zafar, Michael K.T. Tan, Sidra Mahfooz, Brian Hauss, Esha Bhandari, Brett Max Kaufman, Lauren Yu, Baher Azmy, Samah Sisay, Naz Ahmad, Mudassar Hayat Toppa, Shezza Abboushi Dallal, Veronica Salama, Robert Hodgson, Amy Belsher, Molly Biklen, and Alina Das

## STATEMENT REGARDING ORAL ARGUMENT

Counsel for Respondent requests oral argument because argument would be of assistance to the Court given the complex procedural history and novel issues presented in this case.

*/s/ Alanna T. Duong*
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## INTRODUCTION

Petitioner Mahmoud Khalil challenges the decision of the Board of Immigration Appeals ("BIA" or "Board") affirming an Immigration Judge's ("IJ") order finding him removable under 8 U.S.C. §1227(a)(4)(C)(i) ("foreign-policy charge") and §1227(a)(1)(A) ("fraud charge"), and denying his applications for relief and related protection. The Government's efforts to detain and remove Petitioner from the United States followed from his participation in the violent and anti-Semitic riots and protests that occurred at Columbia University during the spring and summer of 2024. During those protests, Jewish students were the victims of repeated acts of violence and blocked from access to classroom and other campus facilities by pro-Hamas protestors. Petitioner was no mere bystander; he was the lead negotiator between the campus invaders and the University administration. He was thus the conduit by which those waging anti-Semitic violence were attempting to extract concessions from Columbia.

Considering Petitioner's leadership role in orchestrating these violent and anti-Semitic protests, the Secretary of State determined that Petitioner's continued presence in the United States "would compromise a compelling United States foreign policy interest." 8 U.S.C. §1182(a)(3)(C)(iii). Petitioner was thus detained and removal proceedings were commenced based on the Secretary's determination and a separate fraud charge. The IJ held hearings, permitted Petitioner to submit evidence in support of his claims, and ultimately ordered Petitioner removed to either Alegria or Syria on both charges. The Board affirmed the IJ's decision.

The Board's final order of removal stands on solid ground. Petitioner spills much ink arguing that the foreign-policy charge and fraud charge are unconstitutional under the First and Fifth Amendments facially and as applied, but the gravamen of his argument is a retaliatory-selective-enforcement claim challenging the Government's decision to commence removal proceedings against him. The INA, specifically 8 U.S.C. §1252(g), and the Supreme Court's decision in *Reno v. America-Arab Anti-Discrimination Committee* ("*AADC*"), 525 U.S. 471 (1999), bars precisely such selective-prosecution claims.

Even if the Court were to consider the merits, the statutes easily pass constitutional muster. Notably, considering the First Amendment challenge against the foreign-policy charge, the Court should apply rational-basis review, as the Supreme Court did in another First Amendment case, *Kleindienst v. Mandel*, 408 U.S. 753 (1972). And under the highly deferential "facially-legitimate-and-bona-fide standard," the Secretary determined that Petitioner was removable because his activities "would have potentially serious adverse foreign policy consequences and compromise a compelling U.S. foreign policy interest." The constitutional analyses boil down to: if an alien who is a citizen of a foreign country wants to engage in actions that are damaging to U.S. foreign policy, he needs to leave the United States. This finding would wholly doom Petitioner's constitutional arguments.

Petitioner's remaining arguments also fail. Substantial evidence supports the agency's determinations that he is removable under both the foreign-policy and fraud

charges. He waived review of the agency's asylum, withholding-of-removal, and CAT-protection denial. This Court lacks jurisdiction to consider the agency's discretionary fraud-waiver denial. And the Board did not abuse its discretion in denying Petitioner's remand request on the various grounds he asserts. Accordingly, the Court should dismiss the petition in part and deny it in part.

## STATEMENT OF JURISDICTION

Petitioner seeks review of the Board's decision affirming the IJ's decision finding him removable as charged and denying his applications for asylum and withholding of removal under the Immigration and Nationality Act ("INA"), protection under the regulations implementing the Convention Against Torture ("CAT"), and a discretionary waiver of removability under 8 U.S.C. §1252(a)(1)(H) ("fraud waiver"), and denying his motion to remand the proceedings. *See* ROA.1804-1817 (Apr. 9, 2026 Board decision), 5149-57 (Sept. 12, 2025 IJ decision), 6894-926 (June 20, 2025 IJ decision).

The Board's jurisdiction arose under 8 C.F.R. §§1003.1(b)(3) and 1240.15, which grant it appellate jurisdiction over IJ decisions in removal proceedings. This Court's jurisdiction arises under 8 U.S.C. §1252(a)(1), which provides the exclusive procedure for judicial review of final removal orders.

However, the Court lacks jurisdiction to review the agency's discretionary decision to deny Petitioner's fraud waiver, except for legal error and constitutional claims, *id.* §§1252(a)(2)(B)(ii), (a)(2)(D), and also lacks jurisdiction over "any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney

General to commence proceedings, adjudicate cases, or execute removal orders against any alien," *id.* §1252(g). *See Wilkinson v. Garland*, 601 U.S. 209, 218, 224 (2024) (discussing how the statutory language "in the discretion of the Attorney General" reveals a bar to judicial review).

Petitioner timely filed this petition on May 10, 2026, within thirty days of the Board's April 9, 2026 decision. *See* ROA.1804; 8 U.S.C. §1252(b)(1). Venue is proper because the IJ completed the proceedings in Jena, Louisiana. *See* ROA.5149, 5274; 8 U.S.C. §1252(b)(2).

## RESTATEMENT OF THE ISSUES

I. Whether this Court lacks jurisdiction under 8 U.S.C. §1252(g) and *AADC* to consider Petitioner's retaliation claim challenging the commencement of his removal proceedings.

II. Alternatively, whether the foreign-policy and fraud charges withstand Petitioner's First and Fifth Amendment facial and as-applied challenges.

III. Whether Petitioner is removable under the foreign-policy and fraud charges.

IV. Whether Petitioner forfeited review of the asylum, withholding-of-removal, and CAT-protection denial.

V. Whether this Court lacks jurisdiction to review the discretionary fraud-waiver denial.

VI. Whether the Board acted within the bounds of its discretion in denying Petitioner's remand motion.

## STATEMENT OF THE CASE AND RELEVANT FACTS

### I. Petitioner's History

Petitioner, a native of Syria and citizen of Algeria, last entered the United States in December 2022, on a nonimmigrant student visa and adjusted his status to that of a conditional lawful permanent resident ("LPR") in November 2024. ROA.9753, 9755, 9826. While a student at Columbia, Petitioner took a lead role "in antisemitic protests and disruptive activities [that] foster[ed] a hostile environment for Jewish students in the United States." ROA.9769. By his own admission, Petitioner was the lead negotiator and facilitator between the protestors and groups participating in the protests, including Columbia University Apartheid Divest ("CUAD"), and the university administrators. ROA.4247-49, 9741-42. CUAD included members who said, "Zionists don't deserve to live," ROA.9702, and it hosted a speaker who stated that "there is nothing wrong with being a fighter in Hamas," ROA.9706. Petitioner faced disciplinary charges from Columbia for his involvement in CUAD, ROA.4249, as well as "sanctions for potentially helping to organize an 'unauthorized marching event' in which participants glorified Hamas' Oct. 7, 2023, attack." Jake Offenhartz, *Immigration Agents arrest Palestinian Activist who helped lead Columbia University protests*, U.S. News (Mar. 9, 2025)[1]; *see* ROA.9719, 9732-33.

[1] https://perma.cc/HPH9-T2SV.

Accordingly, the Secretary of State issued a memorandum determining that Petitioner was removable under 8 U.S.C. §1227(a)(4)(C)(i), which makes an alien deportable based on his "beliefs, statements, or associations" if "the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest." 8 U.S.C. §1182(a)(3)(C)(iii). The Secretary determined that Petitioner's activities and presence in the United States would have potentially serious adverse foreign-policy consequences and would compromise a compelling U.S. foreign-policy interest. ROA.9768-69.

## II. Proceedings Before the Immigration Judge

A. On March 8, 2025, the Department of Homeland Security ("DHS") detained Petitioner, and the next day, it initiated removal proceedings against him by charging him as removable under 8 U.S.C. §1227(a)(4)(C)(i), based on the Secretary's determination. ROA.9754, 9879. DHS later added a charge under 8 U.S.C. §1227(a)(1)(A), alleging that, inter alia, Petitioner failed to disclose in his Form I-485, Application to Register Permanent Residence or Adjust Status, his involvement with the U.N. Relief and Works Agency for Palestine Refugees in the Near East ("UNRWA"). ROA.9826.

B. In April 2025, in immigration court, Petitioner, through counsel, denied the factual allegations in the Notice to Appear ("NTA") as superseded by the Form I-261, Additional Charges of Inadmissibility/Deportability, and contested his removability. ROA.5179-83. Bearing the burden of proof (ROA.5183), DHS

submitted evidence in support of the two charges of removability, including, inter alia, Secretary Rubio's memorandum, ROA.9768-69; the I-485, ROA.9675-96; and a Form I-213, Record of Deportable/Inadmissible Alien, ROA.9753-63. *See* ROA.9666-748.

In response, Petitioner argued he was entitled to all documents the Government possessed regarding him to defend against the charges, and asserted that the Government had admitted that it was "attempting to deport [him] for his 'beliefs, statements or associations' that are constitutionally protected under the First Amendment." ROA.9646. Petitioner submitted evidence in support of his effort to, among other things: (1) refute allegations of antisemitism in the Secretary's memorandum; (2) show that his UNRWA position was an internship through Columbia; and (3) show that he was not a CUAD member. ROA.9524-67.

In addition to submitting evidence, Petitioner filed numerous motions, seeking the production of documents (invoking the Fifth Amendment) and to terminate his removal proceedings (invoking the Fourth Amendment). *See* ROA.6858-68, 7808-19, 9609-16, 9833-38. The first category included a motion for production of "all documents" government entities "have in their possession regarding him," ROA.9784; and a motion to compel production of "any evidence that has been, or is being, used in this matter in the government's attempt to remove him from the United States," ROA.9645. He also filed a motion to issue a subpoena directing Secretary Rubio to appear in immigration court and produce all prior copies of the memorandum, or alternatively, to respond to oral or written interrogatories. ROA.9631.

C. On April 11, 2025, the IJ held a contested removability hearing. *See* ROA.5199-269. After reviewing the evidence, overruling objections, and considering the parties' arguments, including arguments regarding an alleged First Amendment violation, the IJ sustained the foreign-policy charge, but held the fraud charge in abeyance pending additional evidence or argument. ROA.5262-65. The IJ also denied Petitioner's pending motions, including the motion to compel, citing *Matter of Ruiz-Massieu*, 22 I&N Dec. 833 (BIA 1999), where the Board held that the Secretary's memorandum stating facially-reasonable-and-bona-fide reasons for his determination that an alien is removable under §1227(a)(4)(C)(i) is sufficient evidence that the alien is removable as charged, ROA.9642-43; and the motion to issue subpoena, also relying on *Ruiz-Massieu* and *United States v. Morgan*, 313 U.S. 409 (1941), where the Supreme Court held that a high-ranking government official should not—absent exceptional circumstances—be deposed or called to testify regarding the reasons for taking official action, ROA.9628-29. After the hearing, Petitioner supplemented the record. *See* ROA.8454-9259, 9503-23. The IJ thereafter denied Petitioner's motion to terminate proceedings based on the Fourth Amendment. ROA.9568, 9830-31.

Petitioner also applied for asylum, withholding of removal, and CAT protection and requested a waiver of his removability under the fraud charge, and filed supporting documents in support of this requested relief. *See, e.g.*, ROA.7075-794, 8443-45, 8454-9259, 9262-502. [redacted]

[redacted]

After a hearing in which Petitioner and four witnesses testified in support of his applications, the IJ sustained the fraud charge and denied all relief and related protection. *See* ROA.6928-55 (DHS written closing), 6957-7033 (Petitioner's written closing), 5149-57 (Sept. 12, 2025 order), 5270-588 (May 22, 2025 hearing transcript).

## III. Proceedings in the District of New Jersey and Third Circuit

While his removal proceedings were ongoing, Petitioner filed a habeas petition in the District of New Jersey, and that court enjoined the Government from relying on the foreign-policy charge to "seek[] to remove" Petitioner, directed the Government to cause the IJ to vacate or amend her decision on the merits of Petitioner's claims, and directed the IJ to reopen proceedings and consider whether Petitioner was entitled to a fraud waiver. *See* ROA.5149-50 (Sept. 12, 2025 order detailing procedural history), 6750 (July 18, 2025 order reopening proceedings "[p]ursuant to the District Court Order of July 17, 2025"), 9841-54 (June 11, 2025 district court order).

On appeal of the district court's orders, the Third Circuit vacated and remanded the case for the district court to dismiss Petitioner's habeas petition for lack of subject-matter jurisdiction, holding that 8 U.S.C. §1252(b)(9) channels Petitioners' First and Fifth Amendment claims through the petition-for-review ("PFR") process. *See Khalil v. President, United States*, 164 F.4th 259 (3d Cir. 2026).

The Third Circuit stayed its mandate pending the filing and disposition of a petition for a writ of certiorari, which is due on October 19, 2026.

## IV. Proceedings Before the Board of Immigration Appeals

A. Meanwhile, Petitioner appealed to the Board and filed a motion to remand proceedings with over 2,800 pages of new evidence in support of the motion, including, but not limited to, the trial transcripts and trial exhibits relating to him specifically, as well as selected depositions and declarations, from the district court proceedings in *American Association of University Professors v. Rubio* ("*AAUP*"), 802 F. Supp. 3d 120 (D. Mass. 2025). *See* ROA.4981-5006, 2115-81, 2186-4980. In *AAUP*, two academic organizations initiated a lawsuit to challenge a so-called "ideological deportation policy," which they say is a "large-scale" policy of "arresting, detaining, and deporting" alien students and faculty engaged in "pro-Palestinian protests" and related "expression and association." *AAUP*, 802 F. Supp. 3d at 131. Petitioner is not a party in *AAUP*, but he was one of a handful of exemplar cases that the district court studied at trial to determine if there was a First Amendment violation. *See id.* at 142-50. In addition to the evidence from the *AAUP* proceedings, Petitioner also submitted news articles, social-media posts, and transcripts of remarks of government officials, including Secretary Rubio's, as well as additional declarations supporting his claim that the Government had retaliated against him for his speech. *See* ROA.2115-81, 2186-396.

Based on this new evidence, Petitioner argued that remand was necessary because (1) both charges were unlawful, as they were brought in retaliation for his

protected First Amendment activities, and (2) the IJ erred in denying his motions to terminate proceedings, to obtain discovery, and for continuances. ROA.4981-5007.

B. On April 9, 2026, the Board affirmed the IJ's decision and dismissed the appeal. ROA.1804-17. First, the Board concluded that Petitioner was removable under the foreign-policy charge, as the IJ properly concluded that Secretary's memorandum was sufficient evidence that Petitioner was removable. ROA.1807. The Board also concluded that Petitioner was removable under the fraud charge, as the IJ's finding that Petitioner misrepresented his involvement in UNRWA was not clearly erroneous. ROA.1808-09. The Board further affirmed the IJ's determinations that (1) regardless of whether Petitioner was granted a fraud waiver, he remained removable under the foreign-policy charge; (2) he did not warrant a fraud waiver as a matter of discretion; (3) he was ineligible for asylum due to the national-security bar; (4) he was ineligible for asylum, withholding, and CAT protection on the merits; and (5) remand was not warranted regarding the IJ's denial of his motions to terminate, for discovery, and for continuances, and for the IJ to consider his voluntary-departure request. ROA.1811-17.

Regarding Petitioner's remand request, the Board concluded that Petitioner failed to establish that remand was warranted, as he was removable as charged and that, while he was not entitled to discovery in immigration court, he failed to comply with the subpoena requirements under the regulations. ROA.1810. Specifically, he did not "clearly indicate why he sought a subpoena under 8 C.F.R. §1003.35 and instead framed his argument as a due process challenge," and his motion for the production of

documents "did not comply with the subpoena requirements of stating in writing what he expects to prove with the evidence and that he made diligent efforts to obtain it." ROA.1810 (citing 8 C.F.R. §1003.35(b)(2)).

The Board also concluded that Petitioner failed to show prejudice as DHS had submitted evidence to support the charges. ROA.1810. Moreover, while the Board recognized the evidence in *AAUP* specific to Petitioner, it also recognized that Petitioner was not a party in that case and he failed to show that it was reasonably likely that the new evidence would change the IJ's decision. ROA.1809-11. The Board noted that the evidence from *AAUP* was "now a part of the record and may be evaluated" on review from the final order of removal effectuated by the instant decision, where Petitioner may raise his constitutional claims. ROA.1809-11.

On May 14, 2026, Petitioner filed the instant petition with this Court.

## V. Reconsideration and Reopening Motions Before the Board

Meanwhile, Petitioner filed two motions with the Board. The first was a motion to reconsider the Board's April 9 decision, in which he argued that the Board erred in relying on the foreign-policy charge because the injunction entered by the District of New Jersey was still in effect. *See* ROA.1828-1912, 12-24. The second was a motion to reopen and terminate proceedings, or alternatively, to remand for a new IJ to consider his claims, where he argued that new evidence showed that the Board was not a neutral arbitrator in adjudicating his claims and reasserted his arguments that he was targeted because of his First Amendment activities. ROA.1740-83. He attached over

1,700 pages of supporting documents. *See* ROA.25-1726. On September 25, 2026, the Board denied both the reopening and reconsideration motions in separate orders. ECF 164.

## SUMMARY OF THE ARGUMENT

This Court should dismiss the petition in part and deny the petition in part.

I. Petitioner alleges that the Government initiated removal proceedings against him in retaliation for his First Amendment-protected speech, but this Court lacks jurisdiction to review the Government's discretionary decision to commence removal proceedings against him under §1252(g) and the Supreme Court's *AADC* decision.

II. In any event, Petitioner cannot prevail on his retaliation claim and resulting Constitutional attacks against the foreign-policy-charge and fraud-charge statutory provisions. The First Amendment does not prohibit the Government from removing aliens based on their political activity that impacts U.S. foreign policy when there is a facially-legitimate-and-bona-fide basis for the challenged action; the foreign-policy statute is not unconstitutionally vague facially or as applied; and Petitioner cannot bring a retaliation claim simply because the Government added a second removal charge.

III. The agency correctly concluded that Petitioner is removable on two independently dispositive bases. First, under the foreign-policy charge, the Secretary's determination is conclusive evidence of removability. Second, under the fraud charge, substantial evidence supports the agency's findings that Petitioner willfully misrepresented a material fact on his I-485.

IV. Petitioner forfeited review of the agency's denial of his applications for asylum, withholding, and CAT protection by wholly failing to provide any developed argument or record citation to challenge, let alone compel reversal of, the agency's determinations.

V. This Court lacks jurisdiction to review the agency's discretionary fraud-waiver denial, as Petitioner's complaints with the agency's denial boils down to an abuse-of-discretion argument disguised in constitutional garb.

VI. The Board acted within the bounds of its discretion in denying Petitioner's remand motion. Petitioners fails to challenge the Board's determinations that (1) he did not comply with the regulations to seek a subpoena from the IJ, (2) he failed to show prejudice where DHS filed evidence supporting the removal charges, and (3) he failed to show that it is reasonably likely that the new evidence would change the IJ's rulings regarding his removability or relief applications. Moreover, termination of these proceedings was unwarranted, as Petitioner's arrest had no bearing on the initiation of his removal proceedings. Finally, Petitioner fails to establish that he attempted to qualify for voluntary departure or that, regardless, he is eligible for voluntary departure.

Accordingly, this Court should dismiss the petition in part and deny it in part.

## SCOPE AND STANDARD OF REVIEW

"This court reviews the BIA's order but also considers the IJ's reasoning to the extent it has an impact on the BIA's determination." *Hakim v. Holder*, 628 F.3d 151, 153 (5th Cir. 2010). The Court is furthermore limited to the actual grounds the Board

relied on. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). However, "circuit precedents have made clear that this rule is not absolute, at least in the immigration context." *Maniar v. Garland*, 998 F.3d 235, 240 (5th Cir. 2021) (citation omitted). "[E]ven if there is a reversible error in the BIA's analysis, affirmance may be warranted where there is no realistic possibility that the BIA would have reached a different conclusion." *Id.* (cleaned up). As the Supreme Court observed, "[t]o remand would be an idle and useless formality. *Chenery* does not require that [a court] convert judicial review of agency action into a ping-pong game." *Id.* (citing *Morgan Stanley Cap. Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 545 (2008)).

This Court reviews constitutional claims and legal questions de novo, but factual findings—including the ultimate question of eligibility for asylum, withholding, and CAT protection—under the "highly deferential" substantial evidence standard. *See Nasrallah v. Barr*, 590 U.S. 573, 576 (2020); *Santos-Alvarado v. Barr*, 967 F.3d 428, 436-37 (5th Cir. 2020); *Pena Oseguera v. Barr*, 936 F.3d 249, 250 (5th Cir. 2019). Under that standard, findings of fact are "conclusive unless any reasonable adjudicator would be compelled to conclude otherwise." *Garland v. Ming Dai*, 593 U.S. 357, 365 (2021) (citing 8 U.S.C. §1252(b)(4)(B) (codifying the substantial evidence test articulated in *INS v. Elias-Zacarias*, 502 U.S. 478 (1992))). Stated differently, substantial evidence, as the Supreme Court has long emphasized, "is 'more than a mere scintilla,' but means—and means only—'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Urias-Orellana v. Bondi*, 607 U.S. 537, 544 (2026) (cleaned up).

This Court reviews the "denial of a motion to remand 'under a highly deferential abuse-of-discretion standard.'" *Suate-Orellana v. Barr*, 979 F.3d 1056, 1062 (5th Cir. 2020) (citing *Milat v. Holder*, 755 F.3d 354, 365 (5th Cir. 2014)).

## ARGUMENT

### I. This Court lacks jurisdiction to review the Government's prosecutorial-discretion decision to commence removal proceedings against Petitioner.

This Court should dismiss the petition in part. Under 8 U.S.C. §1252(g) and *AADC*, Petitioner's claims attacking the two charges of removability cannot prevail. Petitioner argues that the Government initiated removal proceedings against him as retaliation against his speech (OB.27-48), but this Court does not have jurisdiction to review the Government's prosecutorial-discretion decisions and should dismiss Petitioner's challenges to the charges of removability on that basis. "[W]hen dealing with jurisdictional directives, [this Court] must look through such easy evasions as creative labeling and consider the fundamental nature of the claims asserted." *Duron v. Johnson*, 898 F.3d 644, 648 (5th Cir. 2018) (citation omitted) (applying §1252(g) to the aliens' selective-enforcement claim because it was "on behalf of" an alien, arose from a decision to "execute a removal order," and was not sufficiently "outrageous" to merit consideration under constitute *AADC's* rare exception); *Cooper Butt ex rel Q.T.R. v. Barr*, 954 F.3d 901, 909 (6th Cir. 2020) (same).

Section 1252(g) provides, "No court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney

General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." 8 U.S.C. §1252(g).[2] The Supreme Court has recognized that "[§]1252(g) was directed against … attempts to impose judicial constraints upon prosecutorial discretion." *AADC*, 525 U.S. at 485 n.9. Consistently, this Court has ruled that the "Congressional aim of §1252(g) is to protect from judicial intervention the Attorney General's long-established discretion to decide whether and when to prosecute or adjudicate removal proceedings or to execute removal orders." *Alvidres-Reyes v. Reno*, 180 F.3d 199, 201 (5th Cir. 1999); *e.g.*, *Guerra Quezada v. United States*, 187 F.4th 727, 732 (5th Cir. 2026) (applying §1252(g) when the alien's false-arrest, wrongful-imprisonment, and intentional-infliction-of-emotional-distress claims were "repackaged challenges to the three discrete actions enumerated in [§1252(g)]").

*AADC* definitively bars Petitioner's claims and presents facts remarkably similar to those presented here. In *AADC*, a group of aliens—members of the Popular Front for the Liberation of Palestine—brought a suit challenging the initiation of deportation proceedings. 525 U.S. at 473-75. The aliens claimed they were targeted for their beliefs and expression and even pointed to a specific statement by the "INS regional counsel" indicating as much. *Id.* at 474. They alleged that being deported "because of their

[2] Certain functions, including in 8 U.S.C. §1252, were transferred to the Secretary of Homeland Security. 6 U.S.C. §557; *Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005).

affiliation with a politically unpopular group" was unlawful, in violation of the First and Fifth Amendments. *Id.*

The Supreme Court held such suit jurisdictionally barred. The Court reasoned that the "decision to 'commence proceedings'" against an alien (or group of aliens) fit exactly within the plain text of §1252(g)—in fact, a "challenge" to such an action was "precisely" what Congress had "in mind" when enacting that provision. *Id.* at 487; *see Humphries v. Various Fed. USINS Emps.*, 164 F.3d 936, 945 (5th Cir. 1999) (holding §1252(g) barred claim that alien was excluded from the United States on account of his exercise of First Amendment rights). The Court thus held that applying §1252(g) to the aliens' claims raised no constitutional doubt because "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." *AADC*, 525 U.S. at 488-92.

Petitioner alleges the Government has violated the First and Fifth Amendments by seeking to remove him based on the foreign-policy and fraud charges (OB.9-12, 37-43). But Petitioner's challenges fall squarely within §1252(g)'s bar on judicial review of "any cause or claim … arising from the decision or action … to commence proceedings … against any alien." 8 U.S.C. §1252(g). *AADC* held that §1252(g) unequivocally closed the door to aliens raising a First Amendment challenge to the commencement of immigration proceedings. 525 U.S. at 487-92 (holding that §1252(g) deprived district court of jurisdiction over claim that aliens were targeted for deportation in violation of the First Amendment).

Petitioner's assertion that his claims are not subject to §1252(g) because he has brought them in a PFR fails because the Supreme Court held that the selective-enforcement claim was not viable—full stop—not that it merely needed to be channeled (OB.45-46). Moreover, the courts of appeals, including this Court, routinely apply §1252(g) to aliens' claims in the PFR context. *See, e.g.*, *Garcia v. Holder*, 557 F. App'x 378 (5th Cir. 2014) (applying §1252(g) when the alien challenged DHS's prosecutorial discretion to terminate or defer his removal); *Garcia v. Holder*, 320 F. App'x 288, 291 (5th Cir. 2009) (applying §1252(g) when the alien's claims amounted to a challenge to the decision to commence proceedings); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 599 (9th Cir. 2002) (construing §1252(g) "to include not only a decision in an individual case *whether* to commence, but also *when* to commence, a proceeding" and applying §1252(g) to the alien's claim that INS was obligated to initiate proceedings against her); *Veloz-Luvevano v. Lynch*, 799 F.3d 1308, 1315 (10th Cir. 2015) (also applying §1252(g) in a PFR); *S-Cheng v. Ashcroft*, 380 F.3d 320, 324 (8th Cir. 2004) (same).

Attempting to avoid §1252(g) and *AADC*, Petitioner argues that he was not challenging his removal proceedings based on differential treatment, but instead the Government's punishment meant to suppress a message it disagrees with and done under a broader government censorship policy (OB.45). Yet the "fundamental nature" of Petitioner's claims, *Duron*, 898 F.3d at 648, "aris[es] from the decision or action … to commence proceedings" against him, 8 U.S.C. §1252(g). Regardless of how he attempts to style them, the Secretary of State's determination that his presence would

have serious adverse foreign-policy consequences was part-and-parcel of the DHS Secretary's exercise of discretion to commence proceedings against him. ROA.9768.

Petitioner also asserts that *AADC* applies only to persons "unlawfully" present, and not to LPRs like him (OB.46), but two of the eight plaintiffs in *AADC* were LPRs (and not *conditional* LPRs, like Petitioner). *See AADC v. Reno*, 70 F.3d 1045, 1052, 1054 (9th Cir. 1995). Indeed, Petitioner's case involves all of the same factors as the aliens in *AADC*: (1) the alien has a strong interest in delaying removal proceedings; (2) the Government should not have to endure discovery into its "real reasons" in the foreign-policy context; (3) removal is not punishment; (4) the removability charges hold Petitioner to the terms upon which he was admitted; and (5) the Government has a strong interest in ending an ongoing violation of law. *See* 525 U.S. at 490-92.

Moreover, contrary to Petitioner's claim (OB.46-47), circumstances arising from Petitioner's selective-enforcement claim fail to support any "outrageousness" exception. Such a claim under these circumstances is not viable, and especially under *AADC*'s reasoning for not allowing selective-enforcement claims against removal. *See* 525 U.S. at 488 n.10 ("Our holding generally deprives deportable aliens of the defense of selective prosecution."), 489 ("Even in the criminal-law field, a selective prosecution claim is a *rara avis*. Because such claims invade a special province of the Executive—its prosecutorial discretion[.]"). Accordingly, this Court lacks jurisdiction to review the Government's prosecutorial-discretion decisions under §1252(g) and should dismiss Petitioner's challenges to the charges of removability on that basis.

## II. Alternatively, the INA provisions withstand Petitioner's attacks.

Should the Court reach the issue, it should deny the aspect of the petition challenging the constitutionality of the foreign-policy and fraud statutes.[3]

### A. Legal framework

Facial challenges and as-applied challenges are two separate things with two separate standards. *See, e.g.*, *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024); *Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 449-51 (2008). "[I]n a facial challenge, the court considers the entire range of the statute's applications and determines its constitutionality as to hypothetical parties not before the court, but in an as-applied challenge, the court confines its analysis to the statute's constitutionality as to the particular plaintiff." *LIA Network v. City of Kerrville, Texas*, 163 F.4th 147, 161-62 (5th Cir. 2025) (citation omitted). It is well-settled that "[w]hen a litigant brings both as-applied and facial challenges, [this Court] generally decide[s] the as-applied challenge first." *Id.* (citations omitted).

[3] In *Standford Daily Publishing Corporation v. Rubio*, 2026 WL 2549090 (N.D. Cal. Aug. 28, 2026), a district court concluded that the challenged portion of §1182(a)(3)(C)(iii) ("unless the Secretary of State personally determines that the alien's [presence] would compromise a compelling United States foreign policy interest") was unconstitutional under the First and Fifth Amendments as applied to protected speech. That decision thus failed to address §§1182(a)(3)(C)(iii) and 1227(a)(4)(C)(i), and in any event, is wrong for the same basic reasons as Petitioner's arguments here. Notably, both the *Stanford Daily* court and the *AAUP* court recognized that "the plain language of [§§1182(a)(3)(C)(iii) and 1227(a)(4)(C)(i)]" authorizes the Government's application of the statute to Petitioner. *Id.* at *27.

This makes sense, as "[f]acial challenges are disfavored for several reasons." *Wash. State Grange*, 552 U.S. at 450. "Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records." *Id.* "Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* "Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.* at 451. The Supreme Court "has therefore made facial challenges hard to win." *Moody*, 603 U.S. at 723.

For a facial challenge in the First Amendment context, "[t]he question is whether a substantial number of the law's applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* Thus, "[t]he first step in the proper facial analysis is to assess the [challenged] laws' scope." *Id.* at 724. In a facial challenge, courts cannot ignore this requirement merely because a plaintiff has focused on the laws' application to certain situations. *See id.* Instead, the proper method for challenging the application of a statute as-applied to specific situations is in individual adjudications, such as habeas proceedings, or, in immigration cases, in eventual PFRs, where Congress has preserved aliens' rights to raise certain constitutional challenges. *See* 8 U.S.C. §1252(a)(2)(D); *AADC*, 525 U.S. at 474, 487.

### B. The foreign-policy statute does not violate the First Amendment facially or as applied.

Petitioner argues the foreign-policy provision is facially unconstitutional because it is viewpoint- and content-based discrimination subject to strict-scrutiny analysis, and the Government does not have a compelling interest to justify the discrimination, nor is the provision narrowly tailored to achieve its interest (OB.27-32). He also asserts that the provision as applied to him through the Secretary's determination cannot survive strict scrutiny for the same reasons (OB.31-32). But the First Amendment does not prohibit the Government from removing aliens based on their political activity that impacts U.S. foreign policy because such an action is supported by a facially-legitimate-and-bona-fide rationale. Petitioner's facial and as-applied challenge thus fail.

#### 1. The foreign-policy statute

The current foreign-policy provision resulted from efforts to revise and restructure the various grounds for deportation and exclusion contained in the INA. Before 1990, the INA provided that an alien could be excluded from this country if there was reason to believe that he sought "to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest." 8 U.S.C. §1182(a)(27) (1988). The prior "public interest" ground—which was arguably broader than the current provision—was long interpreted to permit the Government to exclude aliens for foreign-policy reasons.[4] That was in keeping with Congress's "long

[4] *See, e.g.*, *Abourezk v. Reagan*, 592 F. Supp. 880, 885 (D.D.C. 1984) (excluding Otto

recognized … power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

To address concerns about the breadth of the prior version, the Executive suggested replacing it "with language that limits the grounds of exclusion to potentially serious foreign policy consequences." 1987 Hearing at 40 (testimony of Legal Adviser Sofaer). Thus, the current language was enacted in 1990. *See* Immigration Act of 1990, Pub. L. 101-649, 8 U.S.C. §1251(a)(4)(C)(i) (1990) (predecessor to current §1227(a)(4)(C)). Importantly, the foreign-policy provision, §1227(a)(4)(C)(i)-(ii), specifies that an alien cannot be removable "because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, *unless the Secretary of State personally determines that the alien's [presence] would compromise a compelling United States foreign policy interest*." 8 U.S.C. §1182(a)(3)(C)(iii) (emphasis added).

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Skorzeny and Mme. Ngo Dinh Nhu on foreign-policy grounds); *El-Werfalli v. Smith*, 547 F. Supp. 152 (1982) (excluding Ahmad El-Werfalli, a Libyan national pursuing a course of study in aeronautics, on concerns about how he might use that knowledge in Libya); *Ruiz-Massieu*, 22 I&N Dec. at 833 (excluding Mario Ruiz Massieu, a former high-ranking Mexican official whom the United States had attempted to extradite for criminal offense). Indeed, when some representatives proposed to eliminate that provision in 1987, there were strong objections. *See Exclusion & Deportation of Aliens: Hearing before the Subcomm. on Immigr., Refugees & Int'l Law of the H. Comm. on the Judiciary*, 100th Cong., 1st Sess. 30 (1987) ("1987 Hearing") (testimony of Judge Abraham D. Sofaer, State Department Legal Adviser); *id.* at 45 (testimony of INS Commissioner Alan Nelson); *id.* at 47 (letter from Assistant Attorney General John R. Bolton).

### 2. Constitutional rights of aliens

The foreign-policy provision was adopted against a backdrop of jurisprudence recognizing that the First Amendment rights of citizens and aliens are not coextensive. The Supreme Court "has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens." *Demore v. Kim*, 538 U.S. 510, 522 (2003); *see, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976); *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1206 (9th Cir. 2022). This is grounded in the principle that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Kim*, 538 U.S. at 522 (cleaned up). Indeed, in the foreign-relations context, the Government can burden even citizens' First Amendment rights. *See Haig v. Agee*, 453 U.S. 280, 287 (1981) (upholding Executive's authority to revoke passport on national-security and foreign-policy grounds). The Supreme Court has therefore recognized that "[t]he alien … has been accorded a generous and ascending scale of rights as he increases his identity with our society," that "become more extensive and secure when he makes a preliminary declaration of intention to become a citizen, and [] expand to those of full citizenship upon naturalization." *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953) (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950)); *see, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (holding that only as an alien "increases his identity with our society" do the "generous and ascending scale of rights" apply).

Consistent with this principle, the Supreme Court has held that the First Amendment does not prohibit Congress or the Executive from deporting resident aliens based on their membership in the Communist Party. *Harisiades v. Shaughnessy*, 342 U.S. 580, 591-92 (1952). That decision rested on judicial findings that "the Communist Party during the period of the alien's membership taught and advocated overthrow of the Government of the United States by force and violence." *Id.* at 583. The Court recognized that "it often is difficult to determine whether ambiguous speech is advocacy of political methods or subtly shades into a methodical but prudent incitement to violence." *Id.* at 592. And the deportation orders at issue were not based on the aliens' personal advocacy for violence, but rather their mere membership in the Communist Party. *Id.* at 582-84. Nevertheless, the Court concluded that "the First Amendment does not prevent the deportation of these aliens." *Id.* at 592; *see Turner v. Williams*, 194 U.S. 279, 293 (1904) (rejecting First Amendment challenge to deportation based on alien's anarchist beliefs and advocacy); *Graham v. Richardson*, 403 U.S. 365, 377 (1971) ("[t]he national government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, [and the] regulation of their conduct").

*AADC* further illustrates this principle. There, the Ninth Circuit had held that "the values underlying the First Amendment require the full applicability of First Amendment rights to the deportation setting." *AADC*, 70 F.3d at 1064. Thus, according to the Ninth Circuit, plaintiff aliens could bring a selective-enforcement claim

on the ground that their immigration proceedings were retaliation for their speech and obtain injunctive relief to stop those proceedings to vindicate their First Amendment rights. *Id.* at 1065. The Supreme Court disagreed. *AADC*, 525 U.S. at 488. The Court explained that "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." *Id.* Ultimately, "[w]hen an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity." *Id.* at 491-92.

Like the Supreme Court, other courts have recognized that, because "[f]oreigners fall outside the community that's entitled to participate in the democratic process," "a lesser level of scrutiny could apply to" First Amendment challenges involving aliens' speech. *OPAWL-Bldg. AAPI Feminist Leadership v. Yost*, 118 F.4th 770, 777 (6th Cir. 2024) (noting issue without deciding it, because statute survived strict scrutiny); *see, e.g.*, *Bluman v. FEC*, 800 F. Supp. 2d 281, 287 (D.D.C. 2011) (Kavanaugh, J.) (citing *Harisiades* and noting that "aliens' First Amendment rights might be less robust than those of citizens in certain discrete areas"), *aff'd*, 565 U.S. 1104 (2012).

**3. Rational-basis review**

Considering the above backdrop, this Court should review Petitioner's First Amendment challenge, facially and as applied, under the highly deferential "facially-legitimate-and-bona-fide standard"—that is, solely whether the legal justification

proffered by the agency is facially valid, without further inquiry into the justifications behind the Government's actions. *Dep't of State v. Muñoz*, 602 U.S. 899, 908 (2024); *see Mandel*, 408 U.S. at 766 (finding bona-fide-and-facially-legitimate reasons sufficient to deny a waiver for a nonimmigrant visa even when First Amendment rights were implicated); *Trump v. Hawaii*, 585 U.S. 667, 704-05 (2018) (finding travel proclamation expressly premised on a legitimate purpose based on a national-security interest); *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 471-72 (2025) ("Under [rational-basis review], a law will be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for its enactment.").

Under the facially-legitimate-and-bona-fide standard, the Court looks to the legal justification proffered by the agency and, if facially valid, "the inquiry is at an end." *Muñoz*, 602 U.S. at 908. This is because Congress has plenary authority over immigration matters, which are "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Mathews*, 426 U.S. at 81 n.17 (cleaned up); *see Carlson v. Landon*, 342 U.S. 524, 534 (1952) (recognizing that as long as an alien "fail[s] to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them").

The Government's action in this case plainly satisfies the facially-legitimate-and-bona-fide standard. The foreign-policy provision expressly provides that an alien cannot be removable "because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful

within the United States *unless* the Secretary of State personally determines that the alien's [presence] would compromise a compelling United States foreign policy interest." 8 U.S.C. §1182(a)(3)(C)(iii) (emphasis added). In other words, otherwise "protected speech" could only be used as the basis for removal in cases the Secretary himself determines have a particularly and sufficiently high foreign-policy justification. Here, the Secretary did just that: he determined that Petitioner was removable under §1227(a)(4)(C)(i), because Petitioner's presence and activities "would have potentially serious adverse foreign policy consequences and compromise a compelling U.S. foreign policy interest." ROA.9768.

This determination was based on information that Petitioner took a lead role "in antisemitic protests and disruptive activities [that] foster[ed] a hostile environment for Jewish students in the United States." ROA.9769; *see* ROA.4269-73, 4291-92. The Secretary continued, "The public actions and continued presence of [Petitioner] in the United States undermine U.S. policy to combat anti-Semitism around the world and in the United States, in addition to the efforts to protect Jewish students from harassment and violence in the United States." ROA.9769. The Secretary's memorandum was based on DHS's "concern[] that [Petitioner's] distribution of Hamas-authored flyers, leadership roles in antisemitic activities, and leadership in disruptive protests may undermine U.S. foreign policy by creating a hostile environment for Jewish students and indicating support for a designated terrorist organization." ROA.4291-92.

Moreover, the Board properly concluded that the Secretary's determination is "equivalent to a duly-certified record of criminal conviction by a state or federal court[,]" and looking "behind the facially valid basis for the letter … would necessarily require [the Board] to intrude into the realm of foreign policy." ROA.1807. Despite Petitioner's insistence otherwise (OB.28, 30), it is undisputed that the Government has legitimate national-security and foreign-policy interests in countering support for terrorist groups and addressing antisemitism. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 31-32 (2010) ("*HLP*") (affirming restrictions on speech in criminal material support for terrorism bar).

**4. Heightened review**

Even applying intermediate (or strict) scrutiny, the provision would survive. Under the intermediate-scrutiny standard, "a law will survive review if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Free Speech Coal.*, 606 U.S. at 471 (citation omitted).

The applications of the statutes here further the Government's legitimate national-security and foreign-policy interests, including countering support for terrorist groups and addressing antisemitism; the decisions regarding admissibility, foreign policy, and national security by their nature serve compelling government interests. Specifically, the statutes regulate who comes to and lives or resides in the United States, which is, itself, a compelling government interest. *See Harisiades*, 342 U.S. at 588-89

(immigration policies are "intricately interwoven" with foreign affairs and "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference"); *Negusie v. Holder*, 555 U.S. 511, 526-27 (2009) ("in the context of immigration law, 'culpability' as a relevant factor in determining admissibility is only one facet of a more general consideration: desirability"). Congress has granted the Secretary of State broad authority in §§1182 and 1227 to find aliens inadmissible and deportable, even when it may burden their speech. *See LIA Network*, 163 F.4th at 166 ("[The Government's] justification must be genuine, not hypothesized or invented post hoc in response to litigation."). Indeed, the Government's authority over aliens has no comparator to citizens, as "[t]he exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry." *Mathews*, 426 U.S. at 80. Accordingly, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Kim*, 538 U.S. at 521 (cleaned up).

The foreign-policy provision authorizes government officials to take immigration-enforcement actions when they determine that an alien's continued presence in the United States "would have potentially serious adverse foreign policy consequences" or, most relevant here, "would compromise a compelling United States foreign policy interest" if enforcement is "because of the alien's past, current, or expected beliefs, statements" that "would be lawful within the United States." 8 U.S.C.

§§1182(a)(3)(C), 1227(a)(4)(C)(i)-(ii). Under the statutes here, the same speech may or may not compromise foreign-policy interests based on changed international circumstances and the Government's priorities; this is not view-point-based discrimination. To be sure, the statutes plainly allow government officials to consider the content of the speech at issue to evaluate whether it compromises the United States' foreign-policy interests. But that is a far cry from a statute that expressly burdens certain kinds of speech. And indeed, it could not be otherwise. *See, e.g.*, 1987 Hearing. Given the inherently uncertain and rapidly changing nature of foreign affairs and national security, Congress could not have drafted a narrower law while still preserving the Government's ability to remove foreign nationals for foreign-policy reasons. *See, e.g.*, *HLP*, 561 U.S. at 35-36; *Palestine Info. Off. v. Shultz*, 853 F.2d 932, 944 (D.C. Cir. 1988).

Here, therefore, Petitioner challenges executive and congressional conduct where their authority is at its zenith and entitled to the most deference from the courts: decisions concerning the presence of aliens, national security, and foreign affairs. *See Kim*, 538 U.S. at 522 ("any policy toward aliens is … interwoven with … policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government"). For example, even LPRs can be held under a no-bail provision of the INA during the pendency of civil immigration proceedings. *See id.* at 521-23. And, under state law, LPRs can be prohibited from contributing to political campaigns. *See OPAWL*, 118 F.4th at 777. Of course, they cannot vote. 18 U.S.C. §611. So too here, the statutes allowing for immigration-related enforcement actions

for pro-terrorist and antisemitic speech rely on both congressional and executive authority over foreign affairs, and, hence, would satisfy any standard of review.

### C. The foreign-policy statute does not violate the Fifth Amendment.

Petitioner also argues that the foreign-policy statute is vague facially and as applied (OB.32-36).

1. As an initial matter, the void-for-vagueness doctrine cannot apply to the statute because it does not regulate conduct or "purport to define the lawfulness of conduct or speech." *Nyeholt v. Sec'y of Veterans Affs.*, 298 F.3d 1350, 1356 (Fed. Cir. 2002). The Supreme Court "has steadfastly applied the void-for-vagueness doctrine only to statutes or regulations that purport to define the *lawfulness* of conduct or speech," *id.* (collecting cases), including "laws that define crimes … laws that fix sentences … laws that restrict speech … and laws that regulate businesses." *United States v. Matchett*, 837 F.3d 1118, 1122 (11th Cir. 2016) (collecting cases) (Pryor, J., and Carnes, J., respecting the denial of rehearing en banc). As a result, courts have consistently rejected vagueness challenges to laws that do not regulate primary conduct. *See Nyeholt*, 298 F.3d at 1351, 1355-57 (rejecting vagueness challenge to regulatory amendment to veterans' compensation schedule); *Woodruff v. U.S. Dep't of Lab., Off. of Workers Comp. Program*, 954 F.2d 634, 642 (11th Cir. 1992) (rejecting application of vagueness doctrine to interpretive rule because "[i]t is a basic principle of due process that an enactment is void for vagueness if its *prohibitions* are not clearly defined").

Section 1182(a)(3)(C)(iii) does not regulate primary conduct or "purport to define the lawfulness of conduct or speech." *Nyeholt*, 298 F.3d at 1356. Rather, the law delegates authority to the Secretary to render an alien deportable because his "presence or activities" "would compromise a compelling United States foreign policy interest." 8 U.S.C. §§1182(a)(3)(C)(iii), 1227(a)(4)(C)(i). To be sure, the alien's "activities" are relevant to the Secretary's determination, but the statute itself does not purport to control the alien's conduct or make it unlawful. Instead, if an alien who is a citizen of a foreign country wants to engage in actions that are damaging to U.S. foreign policy, he needs to leave the United States. In fact, the statute applies only to conduct that is "lawful within the United States." 8 U.S.C. §1182(a)(3)(C)(iii). That delegation is not a regulation of primary conduct.

In reality, Petitioner's challenge is not a vagueness challenge to the clarity of the statute, but a *non-delegation* challenge to the breadth of authority given to the Secretary (OB.34-35). But that only confirms that Petitioner's challenge must fail. The Supreme Court has consistently held that "very broad delegations" provide the "intelligible principle" necessary to avoid a non-delegation violation. *Gundy v. United States*, 588 U.S. 128, 135, 146 (2019) (plurality opinion). Those include delegations that are equally (if not far more) expansive than §1182(a)(3)(C)(iii), including delegations to regulate "in the public interest," *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943), to set "fair and equitable" rates, *Yakus v. United States*, 321 U.S. 414, 422, 427 (1944), or to set air quality standards that are "requisite to protect the public health," *Whitman v. Am.*

*Trucking Ass'n*, 531 U.S. 457, 472 (2001). And the standard is even more relaxed when applied to statutes implicating the entitlement of aliens to be in the United States or foreign-policy issues. *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (holding that §1182's predecessor statute did not raise delegation issues because Congress and the President share constitutional authority "to control the foreign affairs of the nation"); *Palestine Info. Off.*, 853 F.2d at 944 ("The Supreme Court has long recognized that the special exigencies of foreign policy require Congress to draft statutes that 'provide a standard far more general than that which has always been considered requisite with regard to domestic affairs.'") (citing *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 324 (1936)). Petitioner cannot repackage a doomed-to-fail non-delegation claim into a vagueness claim.

2. Even if the void-for-vagueness doctrine did apply, the statute easily survives a vagueness challenge. The vagueness doctrine is meant to avoid "arbitrary and discriminatory enforcement" by providing "fair warning[s]" that are "clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The Court considers whether the statute "grants too much enforcement discretion to the Government," or fails to provide "a person of ordinary intelligence fair notice of what is prohibited." *HLP*, 561 U.S. at 20 (citation omitted). Here, Congress appropriately delegated broad authority to the Executive to make foreign-policy determinations, and the foreign-policy provision contains a careful framework. Contrary to Petitioner's claim of its lack of notice and arbitrary application (OB.33-35), Congress specifically and clearly stated

that "[a]n alien whose presence or activities … the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable." 8 U.S.C. §1227(a)(4)(C)(i). That removability ground is subject to limited exceptions, such that the alien would not be removable based on his "past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States." 8 U.S.C. §1182(a)(3)(C)(iii). However, Congress created an exception to that exception: the Secretary can override that consideration if he "personally determines that the alien's admission would compromise a compelling United States foreign policy interest." *Id.* That Congress did not define what constitutes "potentially serious adverse foreign policy consequences" is telling. Expecting Congress to do so would be problematic when the issue of "foreign policy" is specifically within the Executive's bailiwick. *See Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (reiterating that Congress must "paint with a brush broader" in this area).

3. Moreover, the Secretary executed his authority as required to Petitioner. The statute applies only when an alien's presence or activities "compromise" a "compelling" "United States foreign policy interest," which encompasses all issues of concern to the United States that are of a foreign-policy nature and which undoubtedly includes combatting anti-Semitism. Accordingly, contrary to Petitioner's claim otherwise (OB.36), the Secretary determined that Petitioner engaged in "antisemitic protests and disruptive activities" that "foster[ed] a hostile environment for Jewish

students in the United States" and that "condoning anti-Semitic conduct and disruptive protests in the United States" would "undermine[] U.S. policy to combat anti-Semitism around the world and in the United States." ROA.9769.

A final note, the Supreme Court has expressly held that aliens are categorically prohibited from raising retaliation claims to challenge their removal. *AADC*, 525 U.S. at 488 ("[A]n alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation"). Petitioner thus cannot circumvent that by alleging a First Amendment violation. His vagueness challenge fails.

**D. Petitioner cannot bring a retaliation claim for the fraud charge.**

Petitioner argues that DHS pursuing the fraud charge was retaliatory for his speech and him filing his habeas suit because it occurred after he filed the suit (OB.37-38). But *AADC* again precludes this kind of retaliatory-enforcement-theory claim. *See* 525 U.S. at 487-92 (holding that §1252(g) deprived district court of jurisdiction over claim that aliens were targeted for deportation in violation of the First Amendment). Further, although Petitioner attempts to attribute a nefarious plot when DHS added the fraud charge based on an alleged "pattern of hostility" (OB.43), DHS is presumed to have properly discharged its duty of reviewing documents relating to Petitioner when preparing for his removal case. *See Diaz-Soto v. INS*, 797 F.2d 262, 264 (5th Cir. 1986) ("Formal actions by agency officials are entitled to a presumption of regularity."); *Nicholson v. Brown*, 599 F.2d 639, 649 (5th Cir. 1979) ("Administrative action ... comes before the courts clothed with a presumption of regularity."). And

upon review of those documents, DHS identified the fraud charge based on notable omissions in Petitioner's I-485 and accordingly added that charge and the relevant factual allegations. ROA.9826-27. Nothing is improper with bringing another charge given Petitioner's efforts to challenge the existing charge. Petitioner's reliance on timing to establish causation fails to rebut this presumption (OB.36-38). *Cf. Bakare v. INS*, 19 F.3d 15 (5th Cir. 1994) (concluding that presumption not rebutted where the record was conflicting and substantial evidence supported the Board's decision). Indeed, it is undisputed that Petitioner omitted his involvement with UNRWA on his barebones I-485. *See* ROA.2064-75, 6975-78.

Although Petitioner asserts that his retaliation claim is analyzed under the test set forth in *Mt. Healthy City School District Board of Education v. Doyle*, he fails to cite any cases permitting retaliation claims in the immigration context, let alone explain the reasons why the *Mt. Healthy* test relating to civil rights actions is the appropriate framework (OB.36-44). In *Mt. Healthy*, a public employee sued his former employer under 42 U.S.C. §1983, which authorizes victims of constitutional violations to sue for damages or injunctive relief, following his termination, alleging that First Amendment-protected conduct motivated his firing. 429 U.S. 274, 276 (1977). The Supreme Court recognized that even if the teacher's protected conduct played a part in his termination, the teacher could have been fired for legitimate reasons. *Id.* at 285. The Court thus established a two-part test for causation in mixed motive cases to "distinguish[] between a result caused by a constitutional violation and one not so caused." *Id.* at 286.

The Government is unaware of any case where this Court (or any other Circuit) has recognized potential retaliation for protected political speech as a cognizable ground for relief in the immigration context. *See, e.g.*, *Thompson v. McGehee*, 183 F.4th 353 (5th Cir. 2026) (applying *Mt. Healthy* when a councilwoman the City and city officials under §1983 asserting violations of her First, Fourth, and Fourteenth Amendment rights); *Lambert v. City of Onalaska,* 2026 WL 2020982 (5th Cir. July 13, 2026) (parent sued school resource officer and the city under §1983 alleging that the officer arrested her for complaining to the school about the officer). Accordingly, because a retaliation claim cannot be brought in the immigration context and Petitioner has not explained the reasons why *Mt. Healthy* should be extended to this context, the Court should decline to consider the issue and conclude that Petitioner cannot bring a retaliation claim under any framing.

## III. Petitioner is removable as charged.

The Court should deny the aspect of the petition challenging the removal charges as the Secretary's determination is conclusive evidence of Petitioner's removability and substantial evidence supports the fraud charge.

### A. The agency properly relied on the Secretary's determination.

As an initial matter, Petitioner argues that the Board lacked authority to sustain the foreign-policy charge because the *AAUP* court vacated the alleged government policy resulting in the Secretary's determination, and the court enjoined the Secretary's determination and the IJ vacated the charge (OB.22-26). Both arguments fail.

1. The *AAUP* decision has no effect on Petitioner's removal proceedings. The *AAUP* court declared that Secretary Rubio and then-Secretary Noem implemented Executive Orders 14161 and 14188 via a viewpoint-discriminatory "policy" that chilled protected speech, thereby violating the First Amendment, and ordered the "enforcement policy and the implementation thereof to be of no effect, void, illegal, set aside, and vacated" under the APA. *AAUP v. Rubio*, 2026 WL 524753, at *1 (D. Mass. Jan. 22, 2026) (cleaned up). But no injunctive relief was entered; instead, the court only entered a "sanction order" relating to members of organizational plaintiffs. *See id.* Moreover, the district court repeatedly emphasized during litigation that it took no position on the pending cases of non-parties, including Petitioner's, and was not making factual findings as to those non-parties. *See AAUP*, 802 F. Supp. 3d at 143-44 & n.19, 199 n.64; *AAUP*, No. 1:25-cv-10685, ECF 115 at 7-8, 23-24 (June 2, 2025 hearing transcript). Applying the vacatur of a non-existent policy to Petitioner's removal proceedings would thus contravene the district court's order. Finally, the district court's order is on appeal with the First Circuit, where the Government is vehemently contesting the organizational plaintiffs' standing, the court's jurisdiction to consider the claims, as well as the merits ruling and remedy ordered. *See* No. 26-1141 (1st Cir.) (June 17, 2026 Government's Principal Brief).

2. The foreign-policy charge was a live issue before the Board. As an initial matter, the Third Circuit concluded that the district court's injunction was entered by a court without jurisdiction; accordingly, the district court had no authority to issue the injunction Petitioner now relies. *See Khalil*, 164 F.4th at 273.

Moreover, as the Board concluded (ROA.1806 n.3), although the IJ vacated her April 11 oral decision per the district court's order, she sustained the foreign-policy charge in her June 20 decision, which she later incorporated into her September 12 decision. *See* ROA.5149 ("The Court's June 20th decision and its findings, in its entirety, are hereby incorporated by reference."). And although the district court preliminarily enjoined the Government "from seeking to remove the Petitioner from the United States based on the Secretary of State's determination," ROA.6739, the court clarified that, where the agency rendered an alternative determination that is independent of the Secretary's determination, even if it *also* relies on the Secretary's determination for another ground, the agency's decision "is not at odds" with the preliminary injunction. ROA.6742 & n.2. In doing so, the court rejected Petitioner's argument that the Board could affirm an IJ finding based on the Secretary's determination and ignore the IJ's independent, factual analysis on the other ground. ROA.6742 n.2. The court recognized that "federal immigration law aims to preserve a wide swath of Executive branch discretion and autonomy," ROA.6742 n.2, and indeed, for every issue, including removability, asylum relief, and the fraud waiver, the Board *also* affirmed the IJ on an alternative, independent ground. ROA.1807-09, 1811-16.

### B. Petitioner is removable under the foreign-policy charge.

The agency properly concluded that Petitioner is removable under the foreign-policy charge. ROA.1807, 6897-98. In a removal proceeding, DHS bears the burden to prove by "clear and convincing evidence" that an alien admitted to the United States is removable. 8 U.S.C. §1229a(c)(3)(A). An alien is removable under §1227(a)(4)(C)(i) if "the Secretary of State has reasonable ground to believe [the alien's presence or activities] would have potentially serious adverse foreign policy consequences for the United States." "Congress' decision to require a specific determination by the Secretary of State, based on foreign policy interests, to establish deportability [§1227(a)(4)(C)(i)], coupled with the division of authority … between the Attorney General and the Secretary of State, make it clear that the Secretary of State's reasonable determination in this case should be treated as conclusive evidence of [an alien's] deportability." *Ruiz-Massieu*, 22 I&N Dec. at 842.

Because DHS filed the Secretary's memorandum, which concluded that Petitioner's "activities and presence … would have potentially seriously adverse foreign policy consequences and would compromise a compelling U.S. foreign policy interest," ROA.9768, substantial evidence supports the agency's removability finding. *See Ming Dai*, 593 U.S. at 365. Although Petitioner urges this Court to looks behind the Secretary's determination by challenging the statute and various aspects of the Secretary's memorandum (OB.48-54), as the agency reasonably found, the Secretary's determination is "equivalent to a duly-certified record of criminal conviction by a state

or federal court." ROA.1807; *see* ROA.6897-98. Such a "record of conviction is determinative," and Petitioner cannot force the agency to establish that the conviction was "proper" or "reasonable." *Ruiz-Massieu*, 22 I&N Dec. at 844; *see Popescu-Mateffy v. Holder*, 678 F.3d 612, 616-17 (8th Cir. 2012) ("[R]emoval proceedings are not a venue for the relitigation of criminal prosecutions."). Accordingly, "the requirement that [DHS] demonstrate that [an alien] is deportable by clear, unequivocal, and convincing evidence, is met by the Secretary's facially reasonable and bona fide determination that [the alien's] presence here would cause potentially serious adverse foreign policy consequences for the United States." *Ruiz-Massieu*, 22 I&N Dec. at 842 (citations omitted). Petitioner is thus removable under the foreign-policy charge.

### C. Petitioner is also removable under the fraud charge.

The agency properly concluded that Petitioner is also removable under the fraud charge. ROA.1808-09, 6898-902. Among other requirements, the NTA (or I-261) must include the "nature of proceedings against the alien," "legal authority under which the proceedings are conducted," "acts or conduct alleged to be in violation of law," and "charges against the alien and the statutory provisions alleged to have been violated." 8 U.S.C. §1229(a)(1)(A)-(D); 8 C.F.R. §1003.15(b); *Hernandez-Castillo v. Sessions*, 875 F.3d 199, 204 (5th Cir. 2017); *see* 8 C.F.R. §1003.30 (permitting additional charges and factual allegations). Petitioner's I-261 charged him with removability under §1227(a)(1)(A) for being inadmissible under §1182(a)(6)(C)(i) as an alien who procured an immigration

benefit "by fraud or willfully misrepresenting a material fact." ROA.9826. The relevant factual allegation provides:

> On your Form I-485, Application to Register Permanent Residence or Adjust Status, signed on March 26, 2024 and mailed on March 29, 2024, in response to the question at part 8, page 9, you failed to disclose that you were a member of the United Nations Relief and Works Agency for Palestine Refugees (UNRWA) from June through November 2023, as a political affairs officer.

ROA.9826.

Petitioner's assertion that the IJ erred in sustaining the fraud charge when DHS used "member" in the I-261, but the IJ did not find him to be a "member" (OB.54-56), lacks merit; "[t]here is no deep philosophical chicken-or-egg quandary here as to whether" DHS provided sufficient notice of the "acts or conduct alleged to be in violation of law." *Hernandez-Castillo*, 875 F.3d at 205. Although the I-261 alleged that Petitioner failed to disclose that he was a "member" of UNRWA, it referenced Part 8, Page 9 of the I-485, which asked: "Have you **EVER** been a member of, involved in, or in any way associated with any organization, association, fund … or similar group in the United States or in any other location in the world including any military service?" ROA.9683, 9826. Given the breadth of this question, Petitioner received sufficient notice that the "acts or conduct alleged to be in violation of law" was his failure to disclose *his involvement* with UNRWA, regardless of whether he was a "member" of that organization. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them

cannot be clearly erroneous."). That Petitioner argued and submitted evidence asserting that his UNRWA position was an internship through Columbia supports the agency's finding that Petitioner was aware of the acts and conduct at issue with regards to this charge—i.e., that he was "involved in or in any way associated with" UNRWA. ROA.6979-82, 9532-43, 9522.

Moreover, the agency properly concluded that Petitioner's non-disclosure of his UNRWA involvement on his I-485 was a willful misrepresentation of a material fact. *See* ROA.1808, 6899; *Parlak v. Holder*, 578 F.3d 457, 465 (6th Cir. 2009) ("Omissions of material facts can be material misrepresentations."). For DHS to establish that Petitioner is removable under §1227(a)(1)(A) for making a willful misrepresentation of a material fact under §1182(a)(6)(C)(i), DHS bore the burden to prove by clear and convincing evidence that Petitioner "by fraud or willfully misrepresenting a material fact" procured a visa, other documentation, or admission into the United States. 8 U.S.C. §1229a(c)(3)(A); 8 C.F.R. §1240.8(a); *Matter of Bosuego*, 17 I&N Dec. 125, 131 (BIA 1980). An alien's misrepresentation is "willful" if the statement was deliberate and the alien had knowledge of the statement's falsity. *Matter of Healy & Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979); *Matter of S & B-C-*, 9 I&N Dec. 436, 445 (BIA 1960, A.G. 1961). A misrepresentation is "material" "when it tends to shut off a line of inquiry that is relevant to the alien's admissibility and that would predictably have disclosed other facts relevant to his eligibility for a visa, or other documentation, or admission to the United States." *Matter of D-R-* ("*D-R- II*"), 27 I&N Dec. 105, 113 (BIA

2017); *Matter of M-C-C-*, 29 I&N Dec. 401, 404 (BIA 2026) (reaffirming the "natural tendency" test from *Kungys v. United States*, 485 U.S. 759 (1988)). The burden then shifts to Petitioner to establish that no proper finding of ineligibility could have been made. *D-R- II*, 27 I&N Dec. at 113. To prevail before this Court, Petitioner must identify evidence compelling reversal of the agency's findings. *See Ming Dai*, 593 U.S. at 365.

It is undisputed that Petitioner was an intern for UNRWA from June to November 2023, and that he failed to disclose his involvement with UNRWA on his I-485. ROA.9522, 9533, 9675-94; OB.56-61. Yet Petitioner argues that the agency erred because he testified that he believed that, by disclosing his employment with Columbia, the UNRWA internship was necessarily included, that he never hid his UNRWA internship, and that the IJ found him credible (OB.57-58). But the Supreme Court has rejected the deemed-true-or-credible rule. *See Ming Dai*, 593 U.S. at 363-73 (holding that the deemed-true-or-credible rule cannot be reconciled with the Act's terms). It also made clear that credible testimony does not equate to an alien meeting his burden of persuasion or proof. *See id.* at 371 ("When determining whether an alien has met his burden of the proof, the INA further provides that the agency may weigh 'the credibility testimony along with other evidence of record.'"). Thus, while the agency accepted Petitioner's testimony as credible, it "need not [and did not here] find [his] evidence persuasive." *Id.* Additionally, the fact that Petitioner failed to disclose the information based on his own belief is unavailing, as there is no requirement that the misrepresentation be made with an intent to deceive. *See Witter v. INS*, 113 F.3d

549, 554 (5th Cir. 1997) ("Proof of an intent to deceive is not required; rather, knowledge of the falsity of the representation is sufficient.").

Turning to materiality, the agency reasonably concluded that, given Petitioner's work and education history, he knew of potential immigration consequences by being involved in protests organized by varying organizations on campus before submitting his application. ROA.6901, 9705. And applying a commonsense approach to the breadth of the question, Petitioner should have disclosed his six-month involvement with UNRWA. *See* ROA.9683 ("Have you **EVER** been a member of, involved in, or in any way associated with any organization … ?"). Because Petitioner failed to do so, he shut off a line of inquiry relevant to his inadmissibility and that would have predictably disclosed other facts relevant to his qualification. *D-R- II*, 27 I&N Dec. at 113; *see Witter*, 113 F.3d at 554.

Petitioner counters that his internship was not a potential basis to deny his I-485 (OB.60), but the record shows that "UNRWA lost hundreds of millions of dollars in funding … when an Israeli dossier suggested that the agency workers were linked to the Oct. 7 terror attack." ROA.9706, 9719. Given this information, if an adjudicator was in possession of all the facts, it would have appeared probable that Petitioner was inadmissible and would have certainly led to further inquiry regarding Petitioner's activities with UNRWA. *See Bosuego,* 17 I&N Dec. at 128; *Asentic v. Sessions*, 873 F.3d 974, 981 (7th Cir. 2017) (recognizing that if "a truthful statement would have resulted

in further investigation by an immigration official, then the misrepresentation is certainly material") (citation omitted).

To be clear: DHS need not show that Petitioner *would be* inadmissible if the adjudicator was in possession of all the facts—just that his lies cut off a line of inquiry that could have led to such facts. *See Bosuego,* 17 I&N Dec. at 127 (stating that misrepresentation is material if "either (1) the alien is excludable on the true facts or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which *might* well have resulted in a proper determination that he be excluded.") (emphasis added); *cf. Sevane v. Sec'y D.H.S.*, 164 F.4th 93, 100 (3d Cir. 2026) (emphasizing that "[t]here is no requirement that the petitioner *would have been inadmissible* had the omitted information been included," and that "finding that a misrepresentation is material does not require concluding that it *necessarily* would have changed the relevant decision") (citation omitted).

Notwithstanding the above, Petitioner argues that the agency erred in failing to shift the burden to assess whether the internship would render him inadmissible (OB.61-62). But this argument is unexhausted, and the Court should decline to consider it. Section 1252(d) provides that "[a] court may review a final order of removal only if … the alien has exhausted all administrative remedies available." 8 U.S.C. §1252(d)(1); *see Santos-Zacaria v. Garland*, 598 U.S. 411, 416-23 (2023) (holding that, subject to principles of waiver and forfeiture, a court may review a final order only if all administrative remedies have been exhausted); *Linares-Rivas v. Bondi*, 139 F.4th 454,

457-58 (5th Cir. 2025) (declining to consider unexhausted arguments); *Munoz-de Zalaya v. Garland*, 80 F.4th 689, 694 (5th Cir. 2023) (same). Nowhere in Petitioner's 45-page brief did he raise this issue to the Board. *See* ROA.2044-92, 1943-65. Exhaustion is a mandatory claims-processing rule that the Court will enforce when, as here, the Government properly raises it. *See Fort Bend Cnty., Texas v. Davis*, 587 U.S. 541, 549 (2019) ("A claim-processing rule may be mandatory in the sense that a court must enforce the rule if a party properly raises it.") (cleaned up); *Alejos-Perez v. Garland*, 93 F.4th 800, 806 (5th Cir. 2024) ("[I]f an issue merely overlaps with one raised before the BIA, that is insufficient to provide the BIA with notice. Put another way, 'effective exhaustion' is not enough.") (cleaned up); *Carreon v. Garland*, 71 F.4th 247, 257 (5th Cir. 2023) (issues are unexhausted if not raised to BIA and Government raises exhaustion).

In any event, Petitioner cannot sustain his burden before this Court based on an ambiguous or inconclusive record. *See Pereida v. Wilkinson,* 592 U.S. 224, 235-39 (2021) (stating that where the alien bears the burden of proving the absence of a disqualifying fact, an ambiguous record means he has failed to do so). The record is at best ambiguous as to whether Petitioner's involvement with UNRWA would have properly disqualified him from the immigration benefit he obtained. UNRWA lost funding when its agency workers were linked to the October 7 attacks. ROA.9706, 9719. Considering this backdrop, the evidence explaining Petitioner's work contains only broad descriptions of the duties the position entails, ROA.9533—it does not describe any specific work Petitioner performed to show that he did not engage in any potentially

objectionable activity, ROA.9522, 9535. Given that the record is at best ambiguous, Petitioner cannot identify evidence compelling a reasonably adjudicator to conclude that he could not have been properly found ineligible for an immigration benefit. *See Urias-Orellana*, 607 U.S. at 544 (emphasizing that substantial evidence means only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"); *Ruiz v. U.S. Att'y Gen.,* 440 F.3d 1247, 1254-55 (11th Cir. 2006) (explaining that the mere fact that the record may support a contrary conclusion is not enough to justify reversal of the agency's findings).

Accordingly, Petitioner is also removable under the fraud charge.

## IV. Petitioner has waived review of the agency's asylum, withholding-of-removal, and CAT-protection denial.

The Court should deny the aspect of the petition challenging the agency's denial of Petitioner's applications for relief and related protection because Petitioner has forfeited review. ROA.1813-16, 6912-25. The Federal Rules of Appellate Procedure require that the argument section of an appellant's brief include the "contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R. App. P. 28(a)(8)(A). Indeed, "[a]ppellate courts frequently refuse to address issues that appellants fail to develop in their briefs." *United States v. Alonso*, 48 F.3d 1536, 1544 (9th Cir. 1995) (declining to address an issue "adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation");

*see, e.g.*, *Singh v. Sessions*, 898 F.3d 518, 521 (5th Cir. 2018); *United States v. Griffith*, 522 F.3d 607, 610 (5th Cir. 2008).

Petitioner's bare assertions, without developed argument or record citation, that the agency erred in (1) barring him from asylum based on the Secretary's determination, and (2) its "merits denial" (OB.67-68) wholly fails to challenge the agency's basis for denying asylum, withholding, and CAT protection. *See Nichols v. Enterasys Networks, Inc.*, 495 F.3d 185, 190 (5th Cir. 2007) (deeming issue waived for inadequate briefing where the appellant failed to provide any legal argument beyond bare assertions). This Court should thus deem forfeited the agency's determinations that (1) Petitioner is barred from asylum under the national-security bar, 8 U.S.C. §1158(b)(2)(A)(iv); (2) he failed to establish eligibility for asylum and withholding because he did not show past persecution, or an objectively reasonable fear of future persecution, in Algeria and Syria; and (3) he failed to establish eligibility for CAT protection because he did not show that he is more likely than not to be tortured with the requisite state action upon his return to either country. ROA.1813-16.

## V. This Court lacks jurisdiction to review the agency's discretionary denial of the fraud waiver.

The Court should dismiss the aspect of the petition challenging the agency's fraud-waiver denial. ROA.1811-12, 5152-55. The INA provides that "no court shall have jurisdiction to review … any … decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified … to be in the

discretion" of those officials. 8 U.S.C. §1252(a)(2)(B)(ii). The decision whether to grant a waiver of removability is specified to be in the Attorney General's discretion. *See* 8 U.S.C. §1227(a)(1)(H); *Silos v. Holder*, 538 F. App'x 426, 433 (5th Cir. 2013); *accord Asentic v. Sessions*, 873 F.3d 974, 982 (7th Cir. 2017) (collecting cases holding that the court of appeals lacks jurisdiction to review agency's discretionary fraud-waiver denial). However, this Court retains jurisdiction over constitutional claims and legal questions. *Nastase v. Barr*, 964 F.3d 313, 318 (5th Cir. 2020).

Petitioner alleges that the agency erred by not holding a hearing on his fraud-waiver application as required by statute, regulation, and due process (OB.66-67). But none of the sources Petitioner cites actually requires an evidentiary hearing specifically for a fraud waiver: 8 U.S.C. §1229a(b)(4)(B) provides for Petitioner's rights to have a reasonable opportunity to examine evidence against him and to present evidence on his own behalf; and 8 C.F.R. §1240.11(a)(2) provides him "an opportunity to make [the fraud-waiver application] during the hearing." No statutory or regulatory error occurred. Petitioner was afforded a reasonable opportunity to make his applications and to present evidence (and object to evidence) in support of his claims.

Notably, the IJ held a hearing regarding the merits of Petitioner's applications where he presented testimony and argument in support of his claims. *See* ROA.5270-588. Indeed, no error occurred, as nothing required the IJ to conduct another hearing, especially when Petitioner filed hundreds of pages in support of his fraud-waiver application. *See* ROA.5590-6651. Although Petitioner claims that the IJ prevented him

from presenting his wife's testimony regarding the family's hardship (OB.67), Petitioner *supplied* hardship evidence and the agency *considered* that evidence in its discretionary decision. ROA.1811-12, 5153-54. Indeed, Petitioner fails to explain how this evidence would not be cumulative with that already considered by the agency. *See Matter of Figueroa*, 25 I&N Dec. 596, 596 (BIA 2011) (emphasizing that in deciding cases, an IJ must exercise independent judgment and discretion and may take any action consistent with the Act and regulations that is appropriate and necessary for the disposition of such cases). Petitioner's complaints with the agency's decision boil down to the agency giving less weight to the factors favorable to him—regardless of whether the Secretary's determination is considered—but that is "an abuse of discretion argument cloaked in constitutional garb, and as such, it must be rejected." *Hadwani v. Gonzales*, 445 F.3d 798, 801 (5th Cir. 2006) (cleaned up); *see Assaad v. Ashcroft,* 378 F.3d 471, 475 (5th Cir. 2004) ("[T]he failure to receive relief that is purely discretionary in nature does not amount to a deprivation of a liberty interest."); *Delgado-Reynua v. Gonzales,* 450 F.3d 596, 599-600 (5th Cir. 2006) (concluding that challenge to the BIA's reweighing of factors to deny discretionary relief not reviewable). Accordingly, the Court should dismiss this part of the petition.

## VI. The Board acted within the bounds of its discretion in denying Petitioner's remand request.

This Court should deny the aspect of the petition challenging the Board's denial of Petitioner's remand motion and his challenge to the IJ's denial of his pretrial motions.

In ruling on a remand motion, the Board should consider whether the new evidence would likely change the result in the case. *Suate-Orellana*, 979 F.3d at 1062; *Matter of Coelho*, 20 I&N Dec. 464, 471 (BIA 1992). "The Board's decision will not be disturbed unless it is capricious, racially invidious, utterly without foundation in the evidence, or otherwise so irrational that it is arbitrary rather than the result of any perceptible rational approach." *Suate-Orellana*, 979 F.3d at 1062 (cleaned up).

In his remand motion, Petitioner argued that the foreign-policy charge is invalid because DHS brought it in retaliation for his speech and submitted evidence from *AAUP* to support his claim. ROA.2115-81, 2186-4980, 4981-5006. Along the same line, Petitioner contended that the IJ erred in denying his motions to terminate, for discovery, and for continuances. ROA.2060-64. The Board reasonably rejected all these claims and denied remand. ROA.1809-10.

### A. Petitioner fails to challenge the Board's reasons for denying his remand motion and instead complains about needing more factfinding.

Before this Court, Petitioner does not challenge the Board's determinations that (1) he did not comply with the regulations to seek a subpoena, (2) he failed to show prejudice where DHS filed evidence supporting the removal charges, and (3) he failed to show that it is reasonably likely that the new evidence would change the IJ's rulings regarding his removability or relief applications (OB.64-66). ROA.1810-11. Petitioner also presents no argument regarding (4) the IJ's continuance denial (OB.64-66). Accordingly, the Court should deem these issues waived. *See Chambers v. Mukasey*,

520 F.3d 445, 448 n.1 (5th Cir. 2008) (ruling issues not briefed are waived on appeal); Fed. R. App. P. 28(a)(8)(A).

Instead, Petitioner argues that the IJ erred in concluding that she lacked authority to order discovery, and then complains about the IJ's deadlines, the need for additional factfinding, and that his petition is not an adequate substitute for habeas (OB.64-66).[5] But this Court has denied his transfer motion, and Petitioner has shown through his opening brief that he is able to brief the relevant issues without further factfinding. Moreover, "the Federal Rules of Civil Procedure are not applicable in deportation proceedings, and there is no requirement that a request for discovery be honored." *Matter of Benitez*, 19 I&N Dec. 173, 174 (BIA 1984). The regulations governing immigration courts do not provide for discovery, only for depositions and subpoenas, yet as the Board concluded (ROA.1810), Petitioner wholly failed to even attempt to comply with the regulations. *See* 8 C.F.R. §§1003.35 (providing for depositions and subpoenas), 1208.12(b) ("Nothing in this part shall be construed to entitle the applicant to conduct discovery directed toward the records, officers, agents, or employees of the Service, the Department of Justice, or the Department of State."). Indeed, Petitioner

[5] Petitioner's argument that his due-process rights were violated because he did not receive a full and fair hearing is not before this Court (OB.62-63), as the issue is presented in the Board's September 25, 2026 decision denying his reopening motion on that basis. *See* 8 U.S.C. §1252(b)(6) ("When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.").

cites no authority to support his claim that an IJ has authority to order discovery (OB.65 (citing only the IJ's orders at ROA.9628, 9642)). As the Board noted (ROA.1810), Petitioner did not even attempt to litigate his immigration proceedings within the rules of the Immigration Court; rather, he asserted a due-process claim and completely ignored immigration-court rules. At bottom, the Board did not abuse its discretion in denying Petitioner's remand motion.

**B. Termination of the proceedings was not warranted.**

Regarding the termination motion, before the agency Petitioner argued that his arrest without a warrant inside his apartment lobby was an egregious violation of the Fourth Amendment warranting termination; however, he did not dispute that none of the evidence offered against him stemmed from the arrest. *See* ROA.7808-19, 9609-16. Before this Court, he argues error because the Board did not address this argument (OB.63-64). But the Board affirmed the IJ's denial of the termination motion, and therefore rejected Petitioner's arguments. ROA.1809-10, 9830-31. In any event, remand by this Court would be "futile," *Lopez-Perez v. Garland*, 35 F.4th 953, 956 (5th Cir. 2022), and there is "no realistic possibility" that the Board would have reached a different conclusion, *Luna-Garcia v. Barr*, 932 F.3d 285, 291 (5th Cir. 2019).

Where an alien opposes immigration proceedings based on an allegedly illegal arrest but does not contest any of the evidence offered against him, "the mere fact of an illegal arrest has no bearing on a subsequent deportation proceeding." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1040 (1984). "Regardless of how the arrest is effected," the

removal of an individual could still be supported by otherwise admissible "evidence not derived directly from," but rather "gathered independently of, or sufficiently attenuated from," the arrest. *Id.* at 1043. In *Lopez-Mendoza*, the Supreme Court held that the exclusionary rule, which bars the admission of certain evidence in criminal proceedings, did not apply in civil removal proceedings to alleged Fourth Amendment violations. *Id.* at 1034, 1050. The Court in *Lopez-Mendoza* left open whether the exclusionary rule might apply in cases of "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." *Id.* at 1050-51.

The Supreme Court also considered the challenge of an alien who moved to terminate his proceedings based on an allegedly illegal arrest, but who had "entered no objection to the evidence offered against him." *Id.* at 1040. Instead, the alien only contested being summoned to a deportation proceeding following his purportedly illegal arrest. *Id.* The Court observed that "[t]he body or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." *Id.* at 1039-40 (cleaned up). It thus upheld the agency's denial of the termination motion based on the agency's finding that, because the evidence of removability was not contested, "the legality of the arrest was not relevant to the deportation proceeding." *Id.* at 1035. In so holding, the Court stressed that the purpose of immigration proceedings "is not to punish past transgressions but rather to put an

end to a continuing violation of the immigration laws." *Id.* at 1039 ("[A] deportation hearing is intended to provide a streamlined determination of eligibility to remain in this country, nothing more.").

Here, like there, the legality of Petitioner's arrest was irrelevant to his removal proceedings because DHS's evidence of removability pre-dated his arrest and Petitioner did not contest any evidence in his motions (or show that any evidence was obtained during his arrest (ROA.9754)). *See* ROA.7808-19, 9609-16.

Moreover, the record does not show that the agent's conduct was egregious. *See Lopez-Mendoza*, 468 U.S. at 1050-51; *Rochin v. California*, 342 U.S. 165, 166-67 (1952). DHS agents effectuated Petitioner's arrest after the Secretary rendered his determination that Petitioner's presence and activities in the United States would have potentially serious adverse foreign-policy consequences; Petitioner was served a warrant for his arrest with his NTA on March 9, within 24 hours of his detention; and even if he had been arrested without a warrant, nothing in the record shows that he was interrogated without being advised of his rights. *See* ROA.9754-56, 9768-69, 9879-81; *cf. Ali v. Gonzalez*, 440 F.3d 678, 682 (5th Cir. 2006) (holding that a violation of 8 C.F.R. §287.3 (disposition of cases of aliens arrested without warrant) does not create any enforceable rights or remedies). The Board therefore acted within the bounds of its discretion in affirming the IJ's denial of Petitioner's termination motion.

### C. Petitioner's voluntary-departure argument fails.

Petitioner argues that the Board engaged in improper factfinding and erred in denying his voluntary-departure request (OB.68). Contrary to Petitioner's argument (OB.68), although Petitioner briefly raised the voluntary-departure request in his written closing, ROA.7032, and in a footnote "reserve[ing] the right to seek voluntary departure only as a last resort," ROA.9263 n.2, nowhere during his immigration proceedings did he file evidence to support his request or attempt to qualify himself for voluntary departure. *See* ROA.1816-17, 5270-588. The Board accordingly construed Petitioner's voluntary-departure request as a remand request and reasonably concluded that Petitioner failed to make a prima facie showing that he was entitled to discretionary relief, including that he merited a favorable exercise of discretion. ROA.1816 (citing 8 U.S.C. §1229c(b), 8 C.F.R. §1240.26(c)(1)). And indeed, given that Petitioner failed to show that he warranted a favorable exercise of discretion for the fraud waiver, it is unlikely that Petitioner could have shown that the outcome here would be different. *See Coelho*, 20 I&N Dec. at 471.

Aside from his bare assertion of error (OB.68), Petitioner supplied no developed argument that the Board abused its discretion in denying his remand request. Petitioner also fails to challenge the Board's determination that he failed to show that he had the intent to depart. ROA.1817. The Court should thus deem both issues waived. *See Chambers*, 520 F.3d at 448 n.1. To the extent Petitioner's assertion is construed as a challenge to the agency's denial, this Court lacks jurisdiction to consider the propriety

of a discretionary voluntary-departure denial. *See* 8 U.S.C. §1229c(f) ("No court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure."); *Eyoum v. INS*, 125 F.3d 889, 891 (5th Cir. 1997) (concluding 8 U.S.C. §1252(a)(2)(B) precluded consideration of voluntary-departure denial). A final note: even if the agency had granted Petitioner voluntary departure, the grant would have "automatically terminated upon [Petitioner's] filing the present petition." *Munoz-Granados v. Barr*, 958 F.3d 402, 408-09 (5th Cir. 2020) (citing 8 C.F.R. §1240.26(i)).

## CONCLUSION

The Court should dismiss the petition in part and deny the petition in part.

Respectfully submitted,

*/s/ Alanna T. Duong*

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October 14, 2026

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fifth Circuit Rule 32.2 and 32.3, as modified by the Court's September 9, 2026 Order (ECF 143), I certify that the attached brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and was scanned by a virus scanning software. The brief contains 14949/15000 words, exclusive of the captions and tables of contents and authorities, was prepared using Microsoft Word 365, Garamond 14-point font, and is proportionally spaced. I understand that a material misrepresentation in completing this certificate, or circumvention of the limits in Rule 32(a)(7), may result in the Court striking the brief and imposing sanctions against the person signing the brief.

## CERTIFICATE OF SERVICE

I certify that on October 14, 2026, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished through that system.

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