Case 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 of an Order of the Board of Immigration Appeals

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INTRODUCTION

The IJ and BIA raced to find Petitioner removable to effectuate the government's politically-motivated policy of punishing Petitioner in order to suppress the expression of viewpoints it disfavors. In its haste to rubber-stamp the government's unconstitutionally retributive plan, the agency ignored binding federal court orders and then ran roughshod over statutory and constitutional requirements, including basic due process protections. This Court, undertaking its obligation to conduct meaningful review of agency action, should not sanction the agency's grave procedural errors and should rule that Petitioner's removal order is invalid. If the Court reaches the constitutional violations raised here, those also require finding the removal order invalid.

ARGUMENT[1]

I. THE BIA'S NUMEROUS MATERIAL ERRORS REQUIRE REVERSAL.

A. The BIA Lacked Legal Authority to Sustain the FPG.

The BIA defied two federal court orders precluding reliance on the Foreign Policy Ground ("FPG").

[1] Petitioner and amici previously corrected Respondent's recycled mischaracterizations of Petitioner's political viewpoints and the factual record. *See, e.g.*, Dkt.85 at 2-3; Br. Am. Cur. Columbia Faculty, Dkt.132.

1. *AAUP*'s Vacatur Renders the Rubio Determination Null and Void as to Petitioner.

Respondent's buried and dismissive treatment of the dispositive effect of *AAUP*'s vacatur is confused. Respondent's Brief, Dkt.171 ("Opp.") 40. First, Respondent fails to contend with *AAUP*'s actual language demonstrating the vacatur's scope. As detailed in Petitioner's Opening Brief, Dkt.77, ("Br.") 22-24, *AAUP* found the government's action targeting *Petitioner specifically* (via the Rubio Determination) was the means to broadly chill speech in a viewpoint discriminatory way and was a final agency action under APA §706(2), and it vacated the final agency action, *i.e.*, the Rubio Determination. *See Am. Ass'n of Univ. Professors v. Rubio ("AAUP")*, 802 F.Supp.3d 120, 141-50, 173, 191 (D.Mass. 2025); Br. Am. Cur. Federal Courts Scholars, Dkt.129 at 10-15.

Second, Respondent stresses that, in *AAUP*, "no injunctive relief was entered" and the court took no position on Petitioner's removal proceedings. But that is exactly the point. An injunction—an equitable remedy that only operates *in personam*—was not available because AAUP was not a party to the final agency action (the Rubio Determination). Because AAUP was "adversely affected or aggrieved," §706(2), by the Determination made against Petitioner, vacatur was the only available remedy. *See* Dkt.129 at 3-10 (collecting cases). The vacatur of the final agency action rendered that Determination *universally* null and void (revoked, as if it never happened) and proscribed the BIA from relying upon it in ordering

Petitioner's removal. *Texas v. United States*, 40 F.4th 205, 220 (5th Cir. 2022) (vacatur "re-establish[es] the status quo").

Respondent says *nothing* about the overwhelming weight of authority Petitioner and *amici* cite substantiating this black-letter administrative-law principle. Br.22-25. Respondent's default is clear. The BIA's removability finding must be reversed.

Finally, that Respondent disagrees with and is appealing *AAUP* is irrelevant. Because there is no stay, the vacatur of the Determination is in effect unless and until a higher court vacates the district court's decision.

2. The BIA Ignored the Federal Court's Injunction.

Ignoring elementary appellate procedure, Respondent argues the FPG was live at the BIA because the Third Circuit ordered the district court injunction vacated. Opp.41. But, because the Circuit stayed issuance of the mandate, *Khalil v. President*, Case No. 25-2162 (3d Cir.), Dkt.171, "the original district court judgment remain[s] in effect," *United States v. Jackson*, 549 F.3d 963, 980 (5th Cir. 2008). Thus, the BIA was enjoined from relying on the FPG. *See Finberg v. Sullivan*, 658 F.2d 93, 99 (3d Cir. 1980).

Despite this plain error, Respondent suggests the BIA could rely on the FPG as an alternative holding. Opp.41. But that is based on *counsel's* recharacterization of the injunction; the BIA simply refused to recognize the injunction. *See Louisiana*

v. United States Dep't of Energy, 90 F.4th 461, 469 (5th Cir. 2024) ("[T]he grounds upon which an administrative order must be judged are those upon which the record discloses its action was based.") (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)).

Regardless, Respondent's recharacterization is wrong—the district court barred the FPG's use to pursue Petitioner's removal, full stop. *See Khalil v. Trump*, Dkt.350 at 2 (D.N.J. July 16, 2025) (explaining injunction's "plain meaning"); Dkt.355 at 2, 4 n.2 (D.N.J. July 17, 2025). The IJ had *herself* properly vacated the FPG charge pursuant to the injunction, recognizing the injunction barred sustaining the FPG, regardless of the separate post-hoc charge. ROA.6667. That the injunction did not also require vacatur of the asylum decision is irrelevant to the injunction's effect on the FPG charge. The BIA understood that the injunction precluded reliance on the FPG, but "affirmed" the vacated charge based on the erroneous conclusion that the injunction no longer applied. This error mandates reversal.

B. The BIA Erred in Sustaining the FPG Given the Determination's Statutory Deficiencies.

Respondent fails to address, and thereby forfeits, any argument against the Determination's statutory failings, Br.48-50, each of which require the FPG charge

be dismissed.[2]

First, Secretary Rubio failed to notify Congress, a requirement mandated by statute and BIA precedent. Br.49-50; *Ruiz-Massieu*, 22 I&N Dec. 833, 838 (BIA 1999). Congress imposed this safeguard to check the very executive overreach and misuse of the statute exhibited here.[3] Second, Respondent does not contest that the FPG's text precludes its application to protected speech like Petitioner's occurring *inside* the U.S. Br.48-49. Finally, Respondent ignores that the Determination—which "says nothing about foreign countries" or even "U.S. relations with other countries [that] have been impacted," *Khalil v. Trump*, 784 F.Supp.3d 705, 705 (D.N.J. 2025), *vacated and remanded sub nom. Khalil v. President, United States*, 164 F.4th 259 (3d Cir. 2026)—fails to make the statutorily required *determination* that Petitioner's protected speech on a university campus somehow "compromise[d] a compelling [U.S.] foreign policy interest." Br.32, 35-36, 49. These errors mandate dismissal.

C. The BIA Failed to Evaluate Whether the Determination is Facially Legitimate and Bona Fide.

The BIA failed to conduct the analysis required by its own *Ruiz-Massieu*

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[2] Respondent fails to address several entire claims, as well as other discrete arguments. For each identified failure, *infra*, Respondent effectively conceded and, at minimum, waived any arguments in response. *See Vela v. City of Houston*, 276 F.3d 659, 678-79 (5th Cir. 2001).

[3] H.R. Conf. Rep. 101-955 at 35417 (1990).

precedent. *Ruiz-Massieu*'s standard did not involve and does not apply to a case involving protected speech. Br.50-51.[4] Even if *Ruiz-Massieu* did apply, the Determination fails to meet its lesser standard, and the BIA erred by failing to assess whether the Determination is facially legitimate and bona fide, as its own framework requires. ROA.1807 (finding document "facially valid" only because it was issued by the Secretary but never assessing whether it was bona fide); Br.51-54. These errors, at minimum, require remand. "The BIA acts arbitrarily when it disregards its own precedents and policies without giving a reasonable explanation[.]" *Galvez-Vergara v. Gonzales*, 484 F.3d 798, 801 (5th Cir. 2007) (citation omitted); *Iruegas-Valdez v. Yates*, 846 F.3d 806, 811-13 (5th Cir. 2017) (vacatur and remand appropriate where agency applied inappropriate standard or neglected necessary findings).

Under *Ruiz-Massieu*, the BIA had to apply the test in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), which requires it to assess if the Determination was "legitimate and bona fide"—limited to a facial assessment *unless* there is "an affirmative showing of bad faith." *Kerry v. Din*, 576 U.S. 86, 104-05 (2015) (Kennedy, J., concurring); Br.53-54. Petitioner presented evidence to the BIA that the

[4] *Ruiz-Massieu* explicitly did not address cases involving the exception for beliefs, statements, or associations. 22 I&N Dec. at 838. Remand is also warranted because the BIA does not explain why it extended *Ruiz-Massieu* to the speech context. *Ali v. Lynch*, 814 F.3d 306, 311-12 (5th Cir. 2016); *Negusie v. Holder*, 555 U.S. 511, 523-25 (2009).

Determination is not legitimate and bona fide on its face, while also supplying evidence of bad faith. *See, e.g.*, ROA.2146-49, 2211-14, 2235-39, 2248-2395, 3577-737, 4269-73, 4302-06, 5462, 9029-60, 9512-20, 9531.

Both on its face and considering Petitioner's affirmative showing of bad faith, the Determination is not "legitimate and bona fide." It explicitly relies on Petitioner's protected speech and expressive activities in the U.S. This sets it apart from *Mandel*, where a visa waiver denial was based on "previous abuses by Mandel"—*not* because of Mandel's speech or political beliefs. 408 U.S. at 769.

Respondent asserts that the Determination should be treated as a "duly-certified record of criminal conviction." Opp.42-43. But a conviction record is predicated on a constitutionally valid adversarial process that made a deliberative judgment based on contested evidence. The Determination, in contrast, is a conclusory say-so, lacking any adversarial process, or reliable supporting evidence (instead based on tabloid reporting, ROA.4269-73). *See Ezeagwuna v. Ashcroft*, 325 F.3d 396, 407 (3d Cir. 2003) (judicial review "would be destroyed if the Board could justify its decisions simply by invoking assertions by the State Department that themselves provide no means for evaluating their validity").

This is particularly problematic because the Determination's conclusion regarding "adverse foreign policy" consequences is based exclusively on constitutionally protected expression. It is never a legitimate government objective

to suppress or punish protected domestic political speech based on viewpoint, *see NRA v. Vullo*, 602 U.S. 175, 187 (2024),[5] but the agency made no effort to explain how the Determination's *conceded* speech-based rationale is a legitimate reason for removing an LPR. *Compare* Br.51-54, Opp.42-43. Even in the exclusion context, which offers far fewer procedural protections than afforded to an LPR like Petitioner, Br.50-51, courts must "ensure that no other applicable constitutional limitations are violated." *Hazama v. Tillerson*, 851 F.3d 706, 709 (7th Cir. 2017).

Furthermore, the BIA failed to consider the evidence of bad faith central to the bona fide determination. Respondent fails to contest that affirmative evidence of bad faith authorized the BIA (and this Court) to look behind any asserted "foreign policy" ground and examine the underlying reasons for the Determination. Br.53-54; *see also Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 137 (2d Cir. 2009) ("well supported allegation of bad faith…would render the decision not bona fide").

Evidence before the BIA demonstrated that the invocation of "adverse foreign policy" consequences was pretextual cover for an unconstitutional policy to suppress protected speech of citizens and noncitizens alike throughout the U.S. *See, e.g.*, ROA.2399-4979; *AAUP*, 802 F.Supp.3d at 187-88 (government officials "have done what they have repeatedly said they were doing: intentionally targeted political

[5] *See also* Memorandum from Secretary Mayorkas, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021), www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf.

speech in order to stop campus protests"); Br.39-43.[6] Bad faith charges include those "brought to retaliate for or deter the exercise of constitutionally protected rights." *Netflix, Inc. v. Babin*, 88 F.4th 1080, 1091 (5th Cir. 2023). *See also* Br.53 n.17 (record replete with undisputed evidence contradicting the Determination's mischaracterizations).

The Court should find the Determination was in bad faith and not bona fide and the agency erred in sustaining the charge. At minimum, because the BIA failed to apply *Ruiz-Massieu*'s "legitimate and bona fide" standard, remand is warranted.

D. DHS Failed to Establish the Post-Hoc Charge, and Respondent's Counsel's Justifications Cannot Cure the BIA's Errors.

1. The IJ's Sustaining of the Post-Hoc Charge on Her Own After-the-fact Allegation Was Clear Error.

DHS alleged only that Petitioner was "a member" of UNRWA, ROA.9826; the IJ found he was *not*. ROA.6899. The end.

But Respondent urges the Court to permit Petitioner's removal pursuant to a new allegation that the IJ—not DHS—created when she rendered her decision, one month *after* Petitioner's sole evidentiary hearing. Br.54-56; Br. Am. Cur. National Immigration Project, Dkt.79. Just like an IJ cannot cure DHS's failure to provide the date and time of the initial removal hearing in its NTA, *Niz-Chavez v. Garland*, 593

[6] *See also Stanford Daily Publ'g Corp. v. Rubio*, No. 25-CV-06618-NW, 2026 WL 2549090, at *32 (N.D. Cal. Aug. 28, 2026) (same).

U.S. 155, 163-164 (2021), the IJ cannot cure DHS's failure to adequately plead its charge.

Respondent tries to reverse engineer notice by claiming that, because Petitioner submitted evidence and argument establishing that he interned at UNRWA through Columbia, he had notice of the IJ's allegation that he was "involved and associated with" UNRWA, ROA.6899; Opp.45. This is not how notice works. The record demonstrates Petitioner defended against the allegation DHS actually presented—all he was required to do—and showed he was *not a member* of UNRWA. *See* Dkt.79 at 13. The BIA's affirmance, based on impermissible fact-finding that Petitioner received adequate notice of allegations DHS never presented, eviscerates removal proceedings' most basic procedural safeguards, *id.* at 16-21, and violates 8 U.S.C. §1229(a)(1)(C) and 8 C.F.R. §§1003.15(b), 1003.30, 1003.1(d)(3)(iv). DHS conclusively failed to prove its actual allegation. The Court should dismiss the charge.

If the Court declines to dismiss, it should, at minimum, remand with instructions to provide Petitioner a new hearing. When "facts on which the BIA relied were neither undisputed nor found by the IJ," the BIA violates its own regulations and remand is required, *even if* the BIA's decision is "substantially reasonable." *Santos-Zacaria v. Garland*, 126 F.4th 363, 369-70 (5th Cir. 2025).

2. Petitioner Did Not Have the Requisite "Knowledge of Falsity" to Sustain a Willfulness Determination.

Respondent does not dispute that Petitioner credibly testified he did not *know* he made any false statement; it cites zero evidence to the contrary. DHS thus did not establish willfulness. *Witter v. INS*, 113 F.3d 549, 554 (5th Cir. 1997). That should end this Court's inquiry.

DHS declined to cross-examine Petitioner on his *mens rea* or submit any evidence or argument disputing it. And, because the IJ found Petitioner's testimony regarding his state-of-mind credible, and also "*consistent with the evidentiary record*," ROA.6910, DHS could not possibly have carried its burden to prove willfulness by "clear and convincing evidence." §1229a(c)(3)(A); *Woodby v. INS*, 385 U.S. 276, 286 (1966); 8 C.F.R. §1240.8(a).

Respondent's reliance on *Garland v. Ming Dai*, 593 U.S. 357 (2021), Opp.46, is misplaced. In *Ming Dai*, the *noncitizen* (not the government) bore the burden of proof on his asylum application. *Compare* §1229a(c)(4)(A)-(C) *with* §1229a(c)(3)(A). Even if the Court were to apply *Ming Dai*, it does not permit the agency to discount credible testimony without referring to any contrary evidence. 593 U.S. at 372 (testimony can be "outweighed *by other evidence* and thus unpersuasive or insufficient" to meet burden) (emphasis added). The record here

contains no contrary evidence, nor does Respondent or the BIA cite any.[7] The BIA's rationale is not discernible from the record and cannot be supplied by counsel. *See Chenery*, 318 U.S. at 87.

Finally, the relevant I-485 question does not ask about internships. It is understandable that Petitioner would not view his school-sponsored internship as responsive to a question about "membership" or "involvement in" any organization, etc., particularly because the I-485 separately covers employment.

3. Respondent's Litigation Position Cannot Sustain the Agency's Baseless Materiality Finding.

Respondent fails to contest that the BIA engaged in impermissible fact-finding in assessing materiality, and completely sidesteps *Kungys v. U.S.*, 485 U.S. 759, 772-76 (1988), and *Gonzalez-Maldonado v. Gonzales*, 487 F.3d 975, 977-78 (5th Cir. 2007).

The agency's decisions show that (1) the IJ did not explain what line of inquiry was shut off by the perceived omission of UNRWA from the I-485, ROA.6899, and (2) the BIA then attempted to obscure this clear error by asserting, without explanation or support, that Petitioner's internship could have led to inquiry

[7] Respondent seemingly blurs its willfulness and materiality arguments. Petitioner's supposed awareness of "potential immigration consequences by being involved in protests organized by varying organizations on campus," Opp.47, has no relevance to any perceived omission of his publicly-disclosed internship at a United Nations agency. Neither Respondent nor the BIA explain how that could be relevant to the sole allegation at issue.

regarding "security-related grounds of inadmissibility," ROA.1809. But the BIA could not substitute its own factual finding for the IJ's deficient one. §1003.1(d)(3)(iv); *Santos-Zacaria*, 126 F.4th at 369-70. Further, the BIA's post-hoc factual finding does not "announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted." *Inestroza-Antonelli v. Barr*, 954 F.3d 813, 818 (5th Cir. 2020) (citations omitted). The BIA should have vacated the IJ's materiality finding and dismissed the charge. Or, at minimum, remanded to the IJ for a new finding, rather than inventing its own.

Recognizing this infirmity, Respondent now argues that record evidence nevertheless supports the BIA's baseless determination, Opp.47, citing two articles—from the *New York Post* and *Times of India*—that the agency *never discussed*. This Court cannot "accept appellate counsel's post hoc rationalizations for agency action." *Fed. Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 397 (1974) (citation omitted).

Even if this argument could be considered, this newly proposed hearsay evidence amounts to two sentences in two tabloid articles referring to an unspecified Israeli dossier that "suggested" allegations against unidentified individuals working in Israel. These wildly-speculative allegations are irrelevant to Petitioner's school-sponsored internship in Manhattan, Br.61-62 (explaining Petitioner's internship duties), and otherwise do not satisfy DHS's clear-and-convincing burden. *Compare*

D-R-, 27 I&N Dec. 105, 114 (BIA 2017) (DHS met burden based on officials' testimony that disclosing wartime military service would have triggered further review and inquiry into whether noncitizen was a persecutor barred from refugee status) *with Bosuego*, 17 I&N Dec. 125, 125 (BIA 1979; 1980) (DHS cannot meet burden where record undeterminable whether knowledge of facts would have led to inadmissibility finding); *Hassan v. Holder*, 604 F.3d 915, 927 (6th Cir. 2010) (hearsay "may not form the sole basis of a removal finding").

4. The Agency Failed to Conduct the Required Burden-Shifting.

Sensing the shortcomings of its meritless waiver argument,[8] Respondent asserts that, even if the agency had shifted the burden—as it was required to do, but didn't, Br.61-62—Petitioner could not carry his burden "on an ambiguous or inconclusive record," Opp.49-50 (citing same tabloid articles). Appellate counsel cannot cure the agency's failure to assess whether Petitioner would have been inadmissible if the true facts had been known. *D-R-*, 27 I&N Dec. at 113 (citing *Maslenjak v. United States*, 582 U.S. 335 (2017)). Thus, there is no factual finding

[8] Petitioner clearly exhausted this issue. *See* ROA.2077 ("[t]he IJ also failed to conduct the required analysis—nor dispute—[Petitioner's] extensive evidence" demonstrating he would not have been inadmissible, including "with respect to UNRWA.") (citing *D-R-*, 27 I&N at 113); ROA.1957 (burden never shifted to Petitioner, but nevertheless he rebutted presumption). Petitioner need only "ma[ke] some concrete statement before the BIA to which [he] could reasonably tie [his] claims before this court," *Dale v. Holder*, 610 F.3d 294, 299 (5th Cir. 2010), which he did.

for the Court to even defer to, nor can the Court conduct this analysis in the first instance. *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006). At minimum, were the Court to find DHS met its burden to show a willful, material misrepresentation, remand would be required so Petitioner could finally be afforded his right of rebuttal.

Further, even if the Court could assess evidence the agency ignored in *de novo* review of an issue the agency failed to reach, the record is not "ambiguous." Undisputed evidence and testimony demonstrate that Petitioner's role was limited to administrative tasks at the UNRWA office in Manhattan, that his internship was overseen by Columbia, and that the State Department was notified of the internship. Br.61-62. Respondent fails to explain how the vague tabloid allegations it cites could be relevant to *Petitioner*'s admissibility. It is purely "speculative" whether "further inquiry" "might have resulted in the proper denial of the [I-485]." *Bosuego*, 17 I&N Dec. at 131; *Jones v. United States*, 936 F.3d 318, 321 (5th Cir. 2019) ("speculation, improbable inferences, or unsubstantiated assertions" do not create genuine factual issues). Respondent's assertion that an UNRWA internship meant it "would have appeared probable that Petitioner was inadmissible,"[9] Opp.47, is unfounded in the record and inconsistent with DHS's decision *not* to cross-examine Petitioner regarding his internship duties.

[9] Respondent's counsel, like the agency, does not suggest what ground of inadmissibility could theoretically apply. Additionally, State Department guidance provides visas specifically for UNRWA employees. 9 FAM 402.3-7(D)(3).

Because Petitioner made no misrepresentation, let alone a willful, material one, the Court should find DHS did not meet its burden to establish the 8 U.S.C. §1227(a)(1)(A) charge. At minimum, the agency's numerous legal errors require remand.

II. THE FPG AND POST-HOC CHARGE ARE UNCONSTITUTIONAL

A. Neither §1252(g) Nor *AADC* Bar Petitioner's Constitutional Claims.

Having consistently argued that Petitioner's constitutional claims could not be heard in habeas *because* they must be channeled to a PFR, Respondent now takes the remarkable position that 8 U.S.C. §1252(g) also entirely bars consideration of Petitioner's constitutional challenges to the removal charges on a PFR. Respondent's sweeping interpretation runs contrary to Supreme Court precedent, and undermines the congressionally-established PFR structure. If Petitioner cannot raise his constitutional claims here, he is currently foreclosed from raising them *anywhere*, creating a serious constitutional question under the Suspension Clause and the First and Fifth Amendment that this Court should avoid. *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

1. Section 1252(g) Is Inapplicable in this PFR.

Section 1252(g) is inapplicable because Petitioner's claims *are* raised in a PFR. Respondent does not cite a single case where this Court has applied §1252(g)

to constitutional challenges raised in a PFR. Opp.16-19.[10] To the contrary, this Court and the Supreme Court have permitted review of such claims in a PFR. *See Sessions v. Dimaya*, 584 U.S. 148 (2018) (reviewing due process vagueness claim decided on a PFR); *Danso v. Gonzales*, 489 F.3d 709 (5th Cir. 2007) (equal protection claim and challenge to 8 U.S.C. §1182(a)(2)(A)(i)).

This is consistent with §1252(g)'s text, which expressly conditions whatever limitation it imposes on jurisdiction with the phrase "[e]xcept as provided in this section." And Congress provided for direct review of final removal orders, §1252(a)(1), and did not exempt constitutional claims from the "questions of law and fact" "arising from" removal into that review, §1252(b)(9). It then expressly preserved review of constitutional claims and questions of law in a PFR through §1252(a)(2)(D). *See Flores-Ledezma v. Gonzales*, 415 F.3d 375, 380 (5th Cir. 2005). Respondent's sweeping position is also foreclosed by the text and structure of congressionally-enacted channeling provisions.

[10] In fact, none of Respondent's cases involve review of constitutional claims on a PFR. Opp.17-19. The cases that applied (g) in a PFR were reviewing challenges to the exercise of prosecutorial discretion. Indeed, many support Petitioner's position that (g) does not bar review of nondiscretionary constitutional challenges. *See, e.g.*, *Garcia v. Holder*, 557 F.App'x 378 (5th Cir. 2014) (applying (g) to the "exercise of DHS's prosecutorial discretion to terminate or defer his removal" but not due process claim).

2. Petitioner's Constitutional Claims Do Not Fall Within §1252(g)'s Scope.

Even if §1252(g) applied, Petitioner's constitutional claims fall outside its scope. They do not, as Respondent contends, challenge the Attorney General's discretionary decision to "commence" removal proceedings. Opp.19-20.

Section 1252(g) "narrow[ly]" "applies only to three discrete actions" by the Attorney General "to 'commence proceedings, adjudicate cases, or execute removal orders.'" *Reno v. American-Arab Anti-Discrimination Committee ("AADC")*, 525 U.S. 471, 482 (1999). *AADC* expressly rejected an expansive interpretation of §1252(g) to encompass the "universe of deportation claims" that may arise from the three specified actions. *Id*. The Supreme Court has continued to emphasize §1252(g)'s narrow ambit. *See Jennings v. Rodriguez*, 583 U.S. 281, 294 (2018) (§1252(g) does not "sweep in any claim that can technically be said to 'arise from' the three listed actions"); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 19 (2020) (similar).

First, §1252(g) only applies to the three actions taken by the Attorney General. Petitioner challenges actions by the *Secretary of State* to target him via a viewpoint discriminatory policy operationalized by the Determination and is thus plainly outside of §1252(g). Because Congress was concerned with the "particular evil" of interference with *prosecutorial* discretion, *AADC*, 525 U.S. at 485 n.9, it makes

obvious sense that §1252(g) has no effect on actions by the Secretary of State, who has no prosecutorial role.

Second, §1252(g) "applies only to the three discrete actions" specified in the statute. *AADC*, 525 U.S. at 482. "There are of course many other decisions or actions that may be part of the deportation process" not encompassed by (g). *Id*. The Determination, which *preceded* the commencement of proceedings and was a statutory prerequisite to the Attorney General's decision to commence proceedings, is not covered by the plain terms of §1252(g). Nor is Petitioner's challenge to the unconstitutionally retaliatory post-hoc charge, which challenges an action—also pursuant to the Administration's speech-chilling policy—that occurred *subsequent* to and is distinct in timing and substance from the Attorney General's commencement of proceedings.[11] The Supreme Court rejected as "implausible" Respondent's argument that §1252(g)'s "mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings." *AADC*, 525 U.S. at 482.

Third, Petitioner does not challenge any discretionary decision. Instead, he challenges the government's constitutional *authority* to remove him via the FPG facially and as-applied on First and Fifth Amendment grounds, as well as via the

[11] The I-261—issued nine days later—is not itself a charging document that "commence[s]" proceedings. 8 C.F.R. §§1003.14, 1003.13.

post-hoc charge as-applied on Fifth Amendment grounds—claims that do not implicate prosecutorial discretion. This Court has repeatedly held that such challenges are not barred by §1252(g). *See Duarte v. Mayorkas*, 27 F.4th 1044, 1055 (5th Cir. 2022) ("This discretion is not implicated...where the Appellants seek review of [a] determination that no discretion existed as a matter of law."); *Flores-Ledezma*, 415 F.3d at 380 (§1252(g) inapplicable where petitioner was not "challenging the discretionary decision...but rather...the constitutionality of the statutory scheme allowing for such discretion"); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 303–05 (5th Cir. 1999) (§1252(g) did not bar constitutional and statutory challenge to deportation order). Other Circuits confirm that legal challenges to nondiscretionary action do "not implicate[]" §1252(g)). *Garcia v. Att'y Gen. of the U.S.*, 553 F.3d 724, 729 (3d Cir. 2009); *Ali v. Mukasey*, 524 F.3d 145, 150 (2d Cir. 2008); *Madu v. U.S. Att'y Gen.*, 470 F.3d 1362, 1368 (11th Cir. 2006).

3. *AADC*'s Bar on Selective Prosecution Claims Is Not Implicated, and if it Were, the Outrageousness of the Government's Conduct Permits Petitioner's Claims to Proceed.

a. Petitioner does not raise a selective prosecution claim.

Respondent misreads *AADC* as categorically prohibiting any First Amendment challenge to the use of immigration enforcement authority. Opp.20. *AADC* did not sweep so broadly: it involved selective enforcement claims based on

plaintiffs' membership in a group alleged to advocate in support of terrorist activity. 525 U.S. at 489.[12]

Petitioner's claim is fundamentally different. His facial and as-applied First Amendment challenge to the FPG as operationalized by the Determination, as well as his Fifth Amendment facial and as-applied challenge to the FPG, do not implicate selective enforcement at all because they challenge the government's very authority to act, rather than the government's choice against whom to enforce a law it actually has the authority to enforce. *See AADC*, 525 U.S. at 488-91; *Dimaya*, 584 U.S. at 148.

Petitioner's First Amendment unlawful retaliation challenge and Fifth Amendment void-for-vagueness as-applied challenge to the post-hoc charge are also doctrinally distinct from selective enforcement. *See Villarreal v. City of Laredo*, 94 F.4th 374, 397-398 (5th Cir. 2024) ("selective enforcement" claims subject to different test than "retaliation"), *cert. granted, judgment vacated on unrelated grounds sub nom. Villarreal v. Alaniz*, 145 S. Ct. 368 (2024); *see also Karns v. Shanahan*, 879 F.3d 504, 520-21 (3d Cir. 2018). The *AADC* plaintiffs did not allege,

[12] That two *AADC* petitioners were LPRs is beside the point. *Cf*. Opp.20. The *AADC* Court expressly framed its selective enforcement analysis in terms of an "alien unlawfully in this country," emphasizing that deportation ordinarily ends an "ongoing violation of United States law." 525 U.S. at 488, 491. Here, Petitioner is an LPR whose only alleged wrongdoing rests on unlawful retaliation for constitutionally protected speech.

as Petitioner does, that the government affirmatively used an additional, unconstitutionally-vague-as-applied and baseless charge to punish their protected political expression pursuant to a broader unconstitutional *policy* "designed to retaliate against and chill political expression," which "strikes at the heart of the First Amendment." *See Rolf v. City of San Antonio*, 77 F.3d 823, 827 (5th Cir. 1996); *Lozman v. Riviera Beach*, 585 U.S. 87, 99-100 (2018).

The distinction is substantive. Selective enforcement concerns the government's discretionary choice of whom to prosecute under otherwise *lawful* authority, whereas retaliation concerns lack of extant governmental authority—here, to unconstitutionally punish for exercising protected rights. *See Vullo*, 602 U.S. at 187 (government may not use otherwise lawful regulatory authority to suppress protected expression); *Lozman*, 585 U.S. at 100 (recognizing distinct constitutional concerns raised by retaliation pursuant to an official policy).

Here, the government did not select Petitioner for enforcement of a conceded immigration violation. It sought, in advancing its broader unconstitutional speech-chilling policy, to create an alternative basis for removal after recognizing the constitutional vulnerability of using the FPG to punish constitutionally protected speech in the U.S. *See* Br.13-14.

Furthermore, Petitioner's First Amendment retaliation claim does not render his independent Fifth Amendment vagueness challenge to the post-hoc charge

unreviewable under *AADC*. *See, e.g.*, *Suri v. Trump*, 184 F.4th 260, 288–89 (4th Cir. 2026) (§1252(g) does not foreclose review of independent due process claims merely because they overlap with retaliation allegations), *petition for cert. filed sub nom. Trump v. Suri*, No. 26-380 (U.S. Sept. 21, 2026).

b. This case meets *AADC*'s exception for outrageous government conduct.

Respondent circularly suggests that *AADC*'s outrageousness exception is "not viable" here because it does not apply to selective prosecution claims. Opp.20. This is plainly incorrect. Even within the category of claims that could be characterized as selective prosecution, *AADC* expressly recognizes an exception for cases of "outrageous" discrimination. 525 U.S. at 491; *Ragbir v. Homan*, 923 F.3d 53, 69 (2d Cir. 2019) (setting forth *AADC* exception multifactor test), *cert. granted, vacated on other grounds, and remanded sub nom. Pham v. Ragbir*, 592 U.S. 901 (2020). Again, Respondent defaults on this argument, likely because there could not be a clearer documented case of outrageous government weaponization of the immigration laws to widely censor and suppress disfavored viewpoints.[13]

All the *Ragbir* factors are present: (1) Petitioner's speech implicates the "apex" of constitutional protections because it is political speech on a matter of

[13] Respondent's cases are wholly distinguishable. *Duron v. Johnson*,898 F.3d 644, 648 (5th Cir. 2018), and *Cooper Butt ex rel. Q.T.R. v. Barr*, 954 F.3d 901, 909 (6th Cir. 2020), involved selective enforcement claims, not First Amendment retaliation pursuant to a broader policy to censor speech.

public interest and involves criticism of the government; (2) the retaliation is egregious because, as in *Ragbir*, it was based on "disapproval" of his message and pursuant to a concerted policy to suppress its future expression by him and others, *see AAUP,* 802 F.Supp.3d at 173, and because it was viewpoint- and speaker-discriminatory; (3) the government publicized Petitioner's arrest and threatened similar actions against others, using his case to amplify the policy's chilling effect; and (4) federal officials were aware of—and sought to produce—the broader chilling effect of their actions against Petitioner. The subsequent addition of a contested charge immediately after Petitioner filed a lawsuit, exercising his First Amendment right to petition—and which Respondent states was added "given" Petitioner's challenge to the FPG, *see* Opp.38—forms part of that same retaliatory course of conduct. *Id*.; *see also* Br. Am. Cur. Knight Institute, Dkt.113 at 19-28. The outrageousness exception is clear and uncontested.

B. The FPG, When Used to Punish Protected Speech in the U.S., is Unconstitutional.

1. Noncitizens in the U.S. Have First Amendment Rights.

"It is well settled that freedom of speech and of press is accorded aliens residing in this country," *AADC*, 525 U.S. at 497 (Ginsburg, J., concurring) (citing *Bridges v. Wixon,* 326 U.S. 135, 148 (1945)); that the Speech Clause "acknowledges [no] distinction between citizens and resident aliens," *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953); and that these First Amendment protections apply "in

the context of deportation." *Bluman v. Fed. Election Comm'n*, 800 F.Supp.2d 281, 286 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012). Because the FPG authorizes the government to deport certain noncitizens[14] based on their constitutionally protected "beliefs, statements, or associations," §§1227(a)(4)(C), 1182(a)(3)(C)(iii), it violates the bedrock First Amendment principle that "the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys," *Matal v. Tam*, 582 U.S. 218, 248 (2017) (Kennedy, J., concurring in part).

Respondent's opposition to the First Amendment facial challenge[15] ignores fundamental First Amendment principles and recycles jurisdictional arguments,[16] urges this Court to recognize a speaker-based First Amendment exception, and contends that the statute survives the inapplicable *Mandel* standard or an amorphous "heightened review." Opp.23-33. None are availing. And Respondent fails to address Petitioner's as-applied challenges to the FPG under the First and Fifth Amendments. Br.31-32, 35-36.

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[14] Foreign-government officials and candidates are exempt.

[15] Petitioner's facial challenge to the speech-based FPG provision (§§ 1227(a)(4)(C)(i)-(ii); 1182(a)(3)(C)(iii)), what Respondent describes as the "exception to [the] exception," Opp.36, can also be considered a challenge to all of the Statute's applications against protected speech. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). "The label is not what matters." *Id*; *see also Stanford Daily*, 2026 WL 2549090, at *33-36. Regardless of how the challenge is labeled, it is not an overbreadth challenge. Petitioner contends that the law violates *his* First Amendment rights. *Cf. Moody v. NetChoice, LLC*, 603 U.S. 707 (2024).

[16] As set forth *supra* II.A.3, *AADC* is plainly inapplicable to constitutional challenges to the statute.

Respondent's cited cases do not support the idea that noncitizens in the U.S. have diminished First Amendment rights to free speech, or that anything *other* than traditional First Amendment scrutiny applies. In *Harisiades* and *Turner*, Opp.26, the Supreme Court applied then-current First Amendment doctrine, which did not protect "membership" in the Communist Party or "anarchists," for citizens and noncitizens alike. *See AAUP*, 802 F.Supp.3d at 182-84; *see also American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1064 (9th Cir. 1995); Adam Cox, *The Invention of Immigration Exceptionalism*, 134 Yale L.J. 329, 363-64 n.122 (2024). That is no longer the law. *Id.* (citing *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952)). *Bluman* and *OPAWL - Bldg. AAPI Feminist Leadership*, *see* Opp.27, also do not support Respondent's contention. After applying strict scrutiny, the courts upheld restrictions on noncitizens' ability to donate to political campaigns under a distinct line of authority allowing exclusion of noncitizens from activities "intimately related to the process of democratic self-government." *Stanford Daily*, 2026 WL 2549090, at *33-35 n. 352, 354 (quotations omitted). And in *Bluman*, then-Judge Kavanaugh warned that the holding should not be read to support bans on noncitizens' ability to engage in "issue advocacy," or "speak[] out on issues of public policy." 800 F.Supp.2d at 292.

Respondent also relies on inapposite cases dealing with exclusion; due process immigration detention challenges; and cases differentiating between

domestic and extraterritorial rights. *See Stanford Daily*, 2026 WL 2549090, at *35 (rejecting the same arguments).

That the FPG implicates Congress's and the executive's authority over foreign policy interests does not warrant a lower standard of review. Such powers, "like every other governmental power, must be exercised in subordination to" the Constitution and the judiciary must ensure that the "means chosen are [not] contrary to the letter and spirit of the First Amendment." *Haig v. Agee*, 453 U.S. 280, 289 n.17 (1981); *United States v. Robel*, 389 U.S. 258, 268 n.20 (1967).

2. The FPG Violates the First and Fifth Amendments.

As to the First Amendment, Respondent admits the FPG "plainly allow[s] government officials to consider [and evaluate] the content" of noncitizens' lawful speech. Opp.32. The statute is therefore content-based[17] and subject to strict, not intermediate, scrutiny. *See* Br.28. And it fails. *Id.* at 29-31. The government lacks a "valid, let alone substantial" interest in suppressing free expression that triggers the FPG's application, *see Moody*, 603 U.S. at 740; *Schacht v. United States*, 398 U.S. 58, 63 (1970), and the statute lacks any elements of tailoring, Opp.36 (foreign policy "encompasses all issues of concern to the [U.S] that are of a foreign-policy nature"); *see also Khalil*, 784 F.Supp.3d at 761.

[17] The FPG is also viewpoint- and speaker-based discrimination, arguments Respondent does not address. *See* Br.28-29.

As to the Fifth Amendment, the vagueness doctrine applies. The FPG can render noncitizens removable—a severe penalty—for "beliefs, statements, or associations." §§1227(a)(4)(C), 1182(a)(3)(C)(iii). That is a classic, direct, and intentional regulation of speech requiring the "most exacting vagueness standard." *Khalil*, 784 F.Supp.3d at 717-18 (collecting cases); *see also Dimaya*, 584 U.S. at 156.[18] And it fails. Respondent untenably asserts both that the text—which encompasses "*past, current, or expected*" speech, Opp.31-32—provides requisite notice and that "the same speech *may or may not* compromise foreign-policy interests based on changed international circumstances and the Government's priorities." *Id.*32 (emphasis added). This is textbook vagueness, as no reasonable person could apprehend what speech is proscribed. Moreover, notwithstanding Respondent's contentions, "'[f]oreign policy' cannot serve as the talisman behind which Congress may abdicate its responsibility to pass only sufficiently clear and definite laws[.]" *Massieu v. Reno*, 915 F.Supp.681, 702 (D.N.J.), *rev'd on other grounds*, 91 F.3d 416 (3d Cir. 1996); *see also* Br.32-35.

[18] Respondent's inapposite cases involve statutes governing access to entitlements and privileges, or to merely advisory guidelines. Every federal court that has analyzed the FPG and its application to Petitioner has found it unconstitutionally vague. *Massieu*, 915 F.Supp at 707-11; *Stanford Daily*, 2026 WL 2549090, at *41-44; *Khalil*, 784 F.Supp.3d at 767 (finding it likely unconstitutional).

C. The Post-hoc Charge is Unconstitutional.

Respondent fails to address several of Petitioner's challenges to the post-hoc charge. First, Respondent does not address Petitioner's Fifth Amendment vagueness challenges. Br.47-48. Second, under the First Amendment, Petitioner challenges the addition of the post-hoc charge as substantially motivated by: (1) the unlawful censorship policy; (2) Petitioner's protected pro-Palestinian advocacy; and (3) his lawsuit challenging the FPG and the policy. Br.36-44. Respondent does not address the first two motivations, and appears to concede the third motivation is true, arguing that "[n]othing is improper with bringing another charge *given* Petitioner's effort to challenge the existing charge." Opp.38 (emphasis added). Wrong. "An action motivated by retaliation for the exercise of a constitutionally protected right is actionable, even if the act, when taken for a different reason, might have been legitimate." *Woods v. Smith*, 60 F.3d 1161, 1165 (5th Cir. 1995).

Given the wholly undisputed record evidence "on timing, hostility and admissions relating to motivation," as well as the post-hoc charge's highly unusual nature, Br.5-15, 37-43; ROA.2192-2202, 2224-44, 5908-21, Petitioner has established the "motivating factor inquiry" for prima facie retaliation such that "any other conclusion would be clearly erroneous," *N. Miss. Commc'ns, Inc. v. Jones*, 951 F.2d 652, 655 (5th Cir. 1992). And because Respondent makes no effort to satisfy their burden of showing that, absent Petitioner's exercise of either protected speech

or the "official policy motivated by retaliation," *Griggs v. Chickasaw Cnty.*, 930 F.3d 696, 704 (5th Cir. 2019), the government would have added this baseless charge, *see Jones*, 951 F.2d at 656-57 (nor could it), Petitioner prevails on his retaliation claim.

Respondent is wrong that Petitioner "cannot bring a retaliation claim,"[19] Opp.37-39, that the *Mt. Healthy* standard is inapplicable, and that the "presumption of regularity" applies.

Mt. Healthy City School District Board of Education v. Doyle, does not only apply in "civil rights" or employment actions, nor is applying it in the "immigration context" in any way novel. 429 U.S. 274 (1977). Several courts have applied the *Mt. Healthy* standard to First Amendment claims brought by noncitizens threatened with immigration enforcement. *See Ragbir*, 923 F.3d at 71-72; *Bello-Reyes v. Gaynor*, 985 F.3d 696, 702 (9th Cir. 2021) (bond revocation); *Gutierrez-Soto v. Sessions*, 317 F.Supp.3d 917, 921 (W.D. Tex. 2018) (parole revocation); *Rueda Vidal v. U.S. Dep't of Homeland Sec.*, 536 F.Supp.3d 604, 619-623 (C.D. Cal. 2021) (denial of DACA); *Ercelik v. Hyde*, No. 1:25-CV-11007-AK, 2025 WL 1361543, at *6 (D. Mass. May 8, 2025).

And Respondent's "presumption of regularity" argument does not apply, either. There is no conflicting evidence that Petitioner must overcome; there is only

[19] *See supra* II.A.

Respondent's argument that DHS added the charge "upon review" of "documents relating to Petitioner when preparing for his removal case." Opp.37-38. But Respondent cites only the I-261, which does not support this inference, and ignores that DHS reached the *opposite* conclusion when reviewing the *same* documents days prior to Petitioner's lawsuit. *See Khalil v. Joyce*, 771 F.Supp.3d 268, 284 n.5 (S.D.N.Y. 2025) (presumption only "requires a court to treat the Government's record as accurate") (quotations omitted). Moreover, because the record demonstrates that the addition of the post-hoc charge was "so unusual and therefore irregular on its face," the presumption cannot apply. *President & Fellows of Harvard Coll. v. U.S. Dep't of Homeland Sec.*, 788 F.Supp.3d 182, 205 (D. Mass.), *appeal docketed*, No. 25-1627 (1st Cir. July 1, 2025). Even if it does, it cannot shield Respondent's actions "from a thorough, probing, in-depth review," and on the existing facts, it has been "amply rebutted." *See United States v. New Orleans Pub. Serv., Inc.*, 723 F.2d 422, 428 (5th Cir. 1984) (citation modified).[20]

[20] Whether this presumption and *AADC*'s outrageousness exception apply are fact-intensive inquiries. It would be unjust to deny Petitioner the opportunity to obtain relevant evidence and simultaneously resolve both issues against Petitioner, particularly where the existing record already raises, at minimum, genuine issues of material fact as to each. *See Bailey v. KS Mgmt. Servs., L.L.C.*, 35 F.4th 397, 403 (5th Cir. 2022); *Mooney v. Lafayette Cnty. Sch. Dist.*, 538 F. App'x 447 (5th Cir. 2013). While Petitioner can *succeed* on his PFR without fact-finding, it would be wrong to deny his PFR while denying Petitioner the opportunity to develop the record. Br.64-66.

III. RESPONDENT'S ATTEMPTS TO JUSTIFY THE AGENCY'S OTHER PROCEDURAL ERRORS ALSO FAIL.

A. The BIA's Remand, Discovery, and Termination Denials are Unjustified.

Contrary to Respondent's assertions, Opp.54, Petitioner challenged the BIA's illogical and unlawful conclusion that the evidence he attempted to present on remand would not be "reasonably likely to change" the IJ's rulings. Br.23 n.10, 36-47. Because the *AAUP* court's vacatur invalidated the FPG charge, and addressed DHS's ongoing violation of its binding guidelines prohibiting enforcement actions based on protected speech, Br.9, and because the evidence Petitioner intended to present demonstrated the Determination is not bona fide, and that addition of the post-hoc charge was motivated both by continued pursuit of an unconstitutional, arbitrary policy *and* Petitioner's protected speech, *see supra* I.A, II.C, neither charge could be sustained.

As to discovery, the IJ did not find Petitioner failed to satisfy §1003.35—that was the BIA's (improper) post-hoc justification. Respondent does not address this error. Opp.54-56. IJs have some limited authority to order depositions and issue subpoenas, which is what Petitioner sought below. ROA.7054-63, 9630-37, 9644-57, 9783-92. If the Court does not grant Petitioner's PFR outright, it should order discovery pursuant to the Hobbs Act, or, at minimum, through the agency, to comply with the Suspension Clause. Br.64-66.

Respondent next mischaracterizes Petitioner's termination challenge as solely a Fourth Amendment one, rather than regulatory. Opp.56-58. Respondent's deflection is obvious. Where, as here, DHS egregiously violates its own regulations (and a binding settlement agreement, Br.63-64), no showing of prejudice is required to terminate proceedings. *Sanchez v. Sessions*, 904 F.3d 643, 655 (9th Cir. 2018).

B. The Agency's Procedural Errors in Denying Relief Similarly Require Remand.[21]

Petitioner challenges the IJ's non-discretionary decision to deny him a §1227(a)(1)(H) waiver *without a hearing*. Respondent concedes the IJ "shall afford the alien an opportunity to make application during the hearing," 8 C.F.R §1240.11(a)(2), Opp.52, yet asserts that Petitioner's hearing one month *before* the IJ had sustained the post-hoc charge sufficed. It did not—Petitioner could not present critical testimony. Br.67. Were prejudice required, "exclusion of live testimony *is* prejudicial when the testimony would have added something that was otherwise missing from the record." *Atemnkeng v. Barr*, 948 F.3d 231, 242 n.7 (4th Cir. 2020); *see also A-V-O-*, 30 I&N Dec. 44, 57 (BIA 2026) (full and fair hearing on waiver includes "opportunity to present [noncitizen's] testimony and that of...witnesses in full[.]").

[21] The record demonstrates Petitioner was denied a fair hearing, *see* Br.62-63. If the Court disagrees, it should not address this point until discovery is conducted on this issue.

As to fear-based relief, Petitioner challenges the denial of asylum, withholding of removal, and CAT protection for the reasons set forth in his BIA briefing. *See* ROA.2084-92; Br.67-68.

CONCLUSION

The Court should find that DHS did not meet its burden to establish removability on either charge, grant the PFR and vacate the removal order, remanding to the agency with instructions to terminate proceedings. At minimum, further fact-finding is required. And each of the agency's myriad legal errors independently require remand.

November 4, 2026 */s/ Johnny Sinodis*

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CERTIFICATE OF SERVICE

I certify that on November 4, 2026, I electronically 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 this case, including Respondent's counsel, are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

November 4, 2026

/s/ Johnny Sinodis
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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), as modified by Dkt. 182, because it contains 7,496 words, excluding the parts exempted by Rule 32(f); and (2) the typeface and type style requirements of Rule 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman using Microsoft Word (the same program used for the word count).

November 4, 2026

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