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

BRIEF OF *AMICUS CURIAE* THE KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY IN SUPPORT OF PETITIONER

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Certificate of Interested Persons and Corporate Disclosure Statement

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

1. The Knight First Amendment Institute at Columbia University, Amicus Curiae.
2. Xiangnong (George) Wang, Counsel for Amicus Curiae Knight First Amendment Institute at Columbia University.
3. Raya Koreh, Counsel for Amicus Curiae Knight First Amendment Institute at Columbia University.
4. Alex Abdo, Counsel for Amicus Curiae Knight First Amendment Institute at Columbia University.

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel certifies that *amicus curiae* the Knight First Amendment Institute has no parent corporation and that no publicly held corporation owns 10 percent or more of its stock.

Dated: August 21, 2026

/s/ Xiangnong Wang
Xiangnong Wang

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Interest of Amicus Curiae

The Knight First Amendment Institute at Columbia University is a non-partisan, not-for-profit organization that works to defend the freedoms of speech and the press in the digital age through strategic litigation, research, and public education. The Institute's aim is to promote a system of free expression that is open and inclusive, that broadens and elevates public discourse, and that fosters creativity, accountability, and effective self-government. The Institute represents the plaintiffs in *American Association of University Professors v. Rubio* ("*AAUP*"), No. 25-CV-10685-WGY (D. Mass. 2025), a lawsuit challenging the government's policy of arresting, detaining, revoking the visas of, and deporting noncitizen students and faculty based on their lawful political speech and advocacy. The district court in that case heard testimony from government officials involved in Petitioner's attempted deportation, issued substantial findings of fact relevant to Petitioner, and vacated and declared unconstitutional the policy under which Petitioner and others were targeted for arrest and deportation.[1]

[1] No counsel for a party authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. The parties have consented to the filing of this amicus brief.

Introduction

This case concerns the government's abuse of its immigration authority to target and retaliate against petitioner Mahmoud Khalil, a lawful permanent resident, for engaging in constitutionally protected speech and association. Khalil was detained and put into deportation proceedings following Secretary Rubio's determination under 8 U.S.C. § 1227(a)(4)(C) (the "foreign policy ground") that Khalil's "presence or activities in the United States would have potentially serious adverse foreign policy consequences" and "compromise a compelling U.S. foreign policy interest." ROA.9768.[2] Secretary Rubio's determination was based solely on Khalil's lawful advocacy in support of Palestinian rights and his criticism of Israel's conduct in Gaza. After Khalil filed a habeas petition in federal court challenging his detention, the government added a pretextual, post-hoc charge, alleging that Khalil failed to disclose certain information on his application for permanent residency. For the reasons Khalil recounts in his petition for review, the government's targeting of and retaliation against Khalil violates the First Amendment. Pet.'s Br. 27–44.

The Knight Institute submits this brief to emphasize two points. First, the court in *AAUP v. Rubio*, following a nine-day bench trial, found that the government

[2] Under the foreign policy ground, a noncitizen may not be deported based on "past, current, or expected beliefs, statements, or associations [that] would be lawful in the United States unless the Secretary of State personally determines that the [noncitizen]'s [presence or activities] would compromise a compelling United States foreign policy interest." 8 U.S.C. § 1182(a)(3)(C)(iii); *id.* § 1227(a)(4)(C)(ii) (incorporating this provision into the foreign policy ground for removal).

targeted Khalil and others based solely on their constitutionally protected advocacy. Khalil was targeted as part of a government policy of arresting, detaining, revoking the visas of, and deporting noncitizens who engage in pro-Palestinian advocacy. Evidence from the trial, including the government's decisional documents and testimony from key officials involved in Khalil's attempted deportation, and the district court's subsequent findings confirm that the government deliberately targeted Khalil and other pro-Palestinian speakers on the basis of their core political speech and associations, and did so in order to silence views the government disfavors. On that basis, the court set aside the policy under which Khalil was targeted and declared it unconstitutional. Amicus writes to elaborate on the evidence and findings in *AAUP* that led the court to this conclusion, and to explain why the natural inference based on that record is that the post-hoc charge is a pretext to continue the unconstitutional targeting of Khalil and others.[3]

Second, the Supreme Court's decision in *Reno v. American–Arab Anti-Discrimination Committee* ("*AADC*"), 525 U.S. 471 (1999), does not bar Khalil's claims. In that case, the Supreme Court suggested that the plaintiffs, whose presence in the country was unlawful but who alleged that they were targeted for removal due to their membership in a foreign terrorist group, did not have viable selective

[3] This evidence, and the district court's decision in *AAUP*, was put before the Board of Immigration Appeals ("BIA") and considered in its decision. *See* Pet.'s Br. 8 n.2, 23 n.10.

enforcement claims absent proof of "outrageous" government conduct. *Id.* at 491. Amicus agrees with Khalil that his case falls outside the narrow category of challenges that *AADC* addressed. But even if it did not, the evidence from *AAUP* demonstrates that the government conduct here is patently outrageous and falls within *AADC*'s exception. The record shows that the government used its immigration authority in shocking and unprecedented ways to target Khalil and other pro-Palestinian advocates based solely on their lawful speech and associations, and the government did so to terrify others into silence on issues of manifest public importance. As the *AAUP* court found, this brazen assault on First Amendment rights was "truly scandalous" and "a thing virtually unknown to our constitutional tradition." *AAUP v. Rubio*, 802 F. Supp. 3d 120, 173, 184 (D. Mass. 2025). Whatever the outer bounds of *AADC*'s exception for outrageous government conduct, this case falls well within it.

I. The record and findings in *AAUP v. Rubio* demonstrate that the government targeted and retaliated against Khalil and others on the basis of their constitutionally protected political speech.

As detailed in his petition for review, Khalil has been punished by the government for engaging in constitutionally protected speech. Amicus writes to further detail how the evidence and findings in *AAUP* confirm that Khalil was targeted pursuant to a policy of arresting, detaining, revoking the visas of, and deporting noncitizens who engage in pro-Palestinian advocacy (the "Policy").

Following a nine-day bench trial that featured hundreds of exhibits and testimony from key government officials involved in Khalil's attempted deportation, the court in *AAUP* found by "clear and convincing evidence" that the Secretaries of State and of Homeland Security "intentionally and in concert" enforced two executive orders in "a viewpoint-discriminatory way to chill protected speech." 802 F. Supp. 3d 120, 175 (D. Mass. 2025); *see also id.* at 131 n.4. As the court explained, in adopting this Policy, the government's "invidious" aim was "to target a few for speaking out [including Khalil] and then use the full rigor of the Immigration and Nationality Act (in ways it had never been used before) to have them publicly deported with the goal of tamping down pro-Palestinian student protests and terrorizing similarly situated non-citizen (and other) pro-Palestinians into silence because their views were unwelcome." *Id.* at 173.

On this basis, the district court vacated the Policy and declared it unlawful and unconstitutional. *See AAUP v. Rubio*, No. CV 25-10685-WGY, 2026 WL 524753, at *1 (D. Mass. Jan. 22, 2026).

Khalil was one of the individuals targeted under the Policy. *AAUP*, 802 F. Supp. 3d 120 at 142–45. Indeed, he is perhaps the exemplar of the government's censorial efforts. *See id.* at 145–50. The evidence and findings in *AAUP* demonstrate a concerted effort to punish Khalil for his speech, and supports the natural inference

that the government's decision to add the additional, post-hoc charge was a pretextual continuation of that broader goal.

A. The *AAUP* court found that the government pursued a policy of arresting, detaining, revoking the visas of, and deporting noncitizens on the basis of their pro-Palestinian speech.

In early 2025, President Trump issued two executive orders—one of them ostensibly addressed to protecting citizens from noncitizens who "espouse hateful ideology," Exec. Order No. 14161, 90 Fed. Reg. 8451 (Jan. 30, 2025); and the other to combatting antisemitism, Exec. Order No. 14188, 90 Fed. Reg. 8847 (Jan. 29, 2025). To enforce the executive orders, the Department of Homeland Security ("DHS") and the Department of State ("DOS") adopted the Policy and publicly targeted Khalil and other pro-Palestinian advocates pursuant to it. The Policy, as established by the record and the district court's findings in *AAUP*, operated as follows.

1. DHS identifies pro-Palestinian protesters for potential deportation.

In early March 2025, DHS's Homeland Security Investigations ("HSI") launched an operation to identify pro-Palestinian protesters on college campuses for potential referral to DOS. *AAUP*, 802 F. Supp. 3d at 133–34, 138–40. As part of this effort, HSI instructed its Office of Intelligence to scour lists of suspected protesters, and to prepare dossiers called "reports of analysis" (also referred to as "subject

profiles") on noncitizen protesters from among those lists. *Id.* at 138–39. As Peter Hatch, the head of HSI's Office of Intelligence, testified, this effort was not limited to students suspected of having committed a crime; the focus was on students who had engaged in protests. Transcript of Bench Trial Day 4, Vol. 2 at 110:15–111:15, *AAUP v. Rubio*, No. 25-CV-10685-WGY (D. Mass. 2025), ECF No. 239.

The largest source of potential targets—more than 5,000 names—came from the website of Canary Mission. *AAUP*, 802 F. Supp. 3d at 139–40. As Hatch understood it, that website identifies individuals whom Canary Mission deems to be anti-American, anti-Israel, or antisemitic, including those who have criticized the actions of the Israeli government. Transcript of Bench Trial Day 4, Vol. 1 at 17:15–19:4, *AAUP v. Rubio*, No. 25-CV-10685-WGY (D. Mass. 2025), ECF No. 238. In addition to Canary Mission, some of the names of potential targets came from Betar U.S. *AAUP*, 802 F. Supp. 3d at 140; Transcript of Bench Trial Day 4, Vol. 1 at 19:7–16 (Hatch). This process, including review of protest activity, was new for Hatch. *AAUP*, 802 F. Supp. 3d at 140.

To investigate these many potential targets quickly, the Office of Intelligence formed a specialized "Tiger Team." *Id.* at 139–40. The Tiger Team produced reports of analysis on approximately 200 protesters, Transcript of Bench Trial Day 4, Vol. 2 at 83:21–25 (Hatch), including Khalil and other individuals who publicly advocated in support of Palestinian rights or criticized Israel's conduct in Gaza, *see,*

e.g., ROA.4269–73. These reports of analysis focused on the subject's expressive and associational activities, and included unvetted third-party allegations made by Canary Mission and others that those activities were antisemitic or pro-Hamas. *See AAUP*, 802 F. Supp. 3d at 188 (noting the "selection of anonymously sourced lists of campus protestors to supply the thousands of names initially subject to investigation"); *id.* at 189 n.44 (describing the fallibility of "allegations from the Canary Mission list" and sources "making anonymous accusations" that were considered "relevant"); *see also* Transcript of Bench Trial Day 4, Vol. 2 at 84:2–85:16 (Hatch). Indeed, the report of analysis prepared about Khalil includes a link to information from Canary Mission. ROA.4270–71.

2. DHS and DOS develop and employ an ends-driven process to fast-track deportations.

As part of the Policy, DHS and DOS established a new ends-driven referral process to fast-track targeted individuals for deportation. At a high-level, the new process called for the reports of analysis developed by the Office of Intelligence to be sent to HSI's National Security Division ("NSD") for review and referral to DOS for potential action. *AAUP*, 802 F. Supp. 3d at 134.

NSD personnel prepared referral letters for Andre Watson, the seniormost official in the division, to approve and submit to DOS. *See, e.g.*, ROA.4291–300; *see also AAUP*, 802 F. Supp. 3d at 141–42. Relying only on the reports of analysis, the referral letters purported to provide summaries of actions by the subject

individuals "that violate President Trump's executive orders on anti-Semitism." *See, e.g.*, ROA.4291, 4293. Some of the letters noted that the subject's actions "align[] with the executive orders' focus on deporting 'Hamas sympathizers.'" ROA.4291, 4293. The referral letters adopted as fact the unverified third-party allegations reproduced in the reports of analysis that the subject's activities were antisemitic, anti-Israel, or pro-Hamas. *See AAUP*, 802 F. Supp. 3d at 187–88 & n.44 (noting the "frictionless" nature of the process such that "one was potentially subject to adverse action so long as, it seems, there was any online mention of one's pro-Palestine activities"); *see also id.* at 142 (noting that some allegations in the letters about Khalil and Yunseo Chung, another target of the Policy, were not based on evidence). Watson testified at trial that he approved every referral he received through this process. Transcript of Bench Trial Day 8 at 78:16–19, *AAUP v. Rubio*, No. 25-CV-10685-WGY (D. Mass. 2025), ECF No. 245.

Upon receiving a referral, officials in DOS's Bureau of Consular Affairs reviewed the referral letter and determined whether to revoke the individual's visa or find them removable. *AAUP*, 802 F. Supp. 3d at 134. John Armstrong, the seniormost official in the Bureau, testified that he and other personnel evaluated whether individuals' expressive and associational activities were antisemitic or supported terrorism. Transcript of Bench Trial Day 9, Vol. 1 at 24:20–25:23, 32:3–20, *AAUP v. Rubio*, No. 25-CV-10685-WGY (D. Mass. 2025), ECF No. 246. For

referrals involving lawful permanent residents like Khalil, Armstrong prepared action memos for Secretary Rubio, which included the relevant referral letters and reports of analysis, proposing that the Secretary make determinations of removability. *See, e.g.*, ROA.4302–16.

If a recommendation from an action memo was approved, DOS prepared a memo for DHS memorializing the determination. *AAUP*, 802 F. Supp. 3d at 134. In cases involving lawful permanent residents, Secretary Rubio issued memos incorporating the reasoning from the relevant action memos, finding individuals deportable based on "beliefs, statements, or associations that are otherwise lawful," *see, e.g.*, ROA.9768–69, and explaining that the bases for these determinations were information provided by DHS on the individuals' pro-Palestinian advocacy. *See AAUP*, 802 F. Supp. 3d at 144–45, 154–55. If detention was sought, DHS quickly moved to arrest the targeted noncitizen. *See, e.g.*, *id.* at 145, 160.

In carrying out this process, Armstrong and other government officials systematically conflated pro-Palestinian advocacy with antisemitism and support for terrorism, and constitutionally protected speech with unprotected conduct. *See id.* at 187–89. As the *AAUP* court found, "decisionmakers at every step of the challenged implementation interpreted the 'support' for terrorists (a key term from Executive Order 14161) that they construed as potentially subject to the penalty of detention, deportation, and visa revocation to encompass, and indeed to be centered on, core

First Amendment speech and expressive conduct." *Id.* at 187. Officials "consistently referred to campus protests related to Palestine as per se 'pro-Hamas,'" and treated "Hamas sympathizers" as if it were "a self-interpreting term." *Id.* They treated "antisemitism," as something that "one simply knows when one sees it." *Id.* at 188.

Armstrong, for instance, did not receive formal training or guidance on how he should interpret those terms. *AAUP*, 802 F. Supp. 3d at 142. As a result, he decided for himself how they should be understood. *Id.* at 142–43. He treated opposition to Israel as antisemitic per se, and he understood a wide range of criticism of Israel and support for Palestinians to be grounds for deportation. He testified that, in his view, a statement denouncing Zionism was a potential ground for deportation because Zionism is "Jewish patriotism or Israeli patriotism." Transcript of Bench Trial Day 9, Vol. 1 at 34:9–12. So too statements calling Israel an "apartheid state," *id.* at 35:13–16; criticizing Israel's actions in Gaza, *id.* at 34:13–23; and calling for limiting military aid to Israel, *id.* at 34:24–35:7. According to Armstrong, criticism of the Trump administration's policies toward Israel was relevant to removability. *Id.* at 42:12–43:11. He also conflated constitutionally protected expression and association with unprotected conduct. *AAUP*, 802 F. Supp. 3d at 159–60.

3. DHS and DOS target noncitizens based on their speech and associations and publicize their attempted deportations in order to terrify others into silence.

Pursuant to the Policy, the government targeted numerous pro-Palestinian protestors and advocates, including Khalil. *AAUP*, 802 F. Supp. 3d at 141–45, 147–62. And it did so solely on the basis of their speech and associations. *Id.* at 173, 187–89. The government's "invidious" intent with the Policy was "to target a few for speaking out" and make an example of them in order to terrorize other noncitizens who wished to engage in similar advocacy into silence. *Id.* at 173. This aim was manifest from the "tasking of HSI with investigating protestors for violations of laws based on anonymous website lists targeted at protesters," like Canary Mission; from the "frictionless quality" of the Policy's implementation, such that "one was potentially subject to adverse action so long as, it seems, there was any online mention of one's pro-Palestine activities"; and from the Policy's focus on "core First Amendment speech and expressive conduct." *Id.* at 187–89.

Indeed, from the Policy's very beginnings, government officials repeatedly proclaimed their intent to target noncitizens based on speech they deemed to be pro-Hamas or antisemitic—frequently referencing Khalil. For instance, on March 6, 2025, just two days before Khalil was arrested, Secretary Rubio wrote on X that the U.S. has "zero tolerance for foreign visitors who support terrorists" and that "international students" would "face visa denial or revocation, and deportation."

Secretary Marco Rubio (@SecRubio), X (Mar. 6, 2025, 5:30 PM), https://perma.cc/KD9R-BNV3. Secretary Rubio returned to X on a few days later, after Khalil's arrest, linking to an article about the arrest and promising: "We will be revoking the visas and/or green cards of Hamas supporters in America so they can be deported." Marco Rubio (@marcorubio), X (Mar. 9, 2025, 6:10 PM), https://perma.cc/Q7EH-M4LW. The next day, President Trump announced on Truth Social that Khalil's was "the first arrest of many to come." Donald J. Trump (@realDonaldTrump), Truth Social (Mar. 10, 2025, 1:05 PM), https://perma.cc/Z5PU-7MZT.

Government officials' public statements also evince the Policy's routine conflation of pro-Palestinian advocacy with antisemitism and support for terrorism. *AAUP*, 802 F. Supp. 3d at 187–89; *see, e.g.*, Michel Martin & Destinee Adams, *DHS official defends Mahmoud Khalil arrest, but offers few details on why it happened*, NPR (Mar. 13, 2025), https://perma.cc/Q45C-6B9A (Deputy Secretary of Homeland Security Troy Edgar suggesting that Khalil had supported Hamas by "put[ting] himself in the middle of the process of basically pro-Palestinian activity"); Secretary of State Marco Rubio Remarks to the Press, U.S. Dep't of State (Mar. 28, 2025), https://perma.cc/5YPB-GBGX (Secretary Rubio intimating that most of the administration's first three hundred or so visa revocations were "related to pro-Palestinian protests"). As the court in *AAUP* explained, officials made "many public

statements" indicating that they "wished to staunch public protest related to Israel's treatment of Palestinians." *AAUP*, 802 F. Supp. 3d at 187; *see, e.g.*, *id.* at 140–41, 145–46, 147–50, 155–56, 164–72 (cataloging statements by officials touting the Policy).

B. Khalil was targeted under this policy.

Khalil was among the first student protestors targeted pursuant to the Policy, and he remains the chief example of the government's efforts to use the full force of its immigration authority to punish individuals for engaging in lawful pro-Palestinian advocacy.

On March 6, 2025, HSI's Office of Intelligence created a report of analysis about Khalil. *AAUP*, 802 F. Supp. 3d at 142; *see* ROA.4269–73. The report of analysis did not note any criminal history; instead, it consisted almost entirely of accounts of Khalil's expressive and associational activities, as well as unsubstantiated third-party allegations about those activities. *AAUP*, 802 F. Supp. 3d at 142. For instance, the report provided a link to Canary Mission's profile of Khalil and a Canary Mission Instagram post about Khalil, which included characterizations of his protest and associational activities. *Id.* Hatch confirmed in his testimony that the only articles included in the report of analysis on Khalil were those "that relate to protests of Israel and Palestine." Transcript of Bench Trial Day 4, Vol. 1 at 50:22–51:1.

On March 7, Watson sent a referral letter to DOS identifying Khalil for potential action. *AAUP*, 802 F. Supp. 3d at 142; *see* ROA.4291–92. The letter attached the report of analysis prepared by the Office of Intelligence, and purported to "provide a summary of the actions by Mahmoud Khalil that violate President Trump's executive orders on anti-Semitism." ROA.4291. It again focused on Khalil's expressive and associational activities. The letter identified Khalil as "a prominent pro-Palestinian activist involved in antisemitic activities," asserting that he was a "key figure" in a March protest at Barnard College where "protesters distributed Hamas-authored flyers" and that he held "leadership roles" in other "disruptive protests." *Id.* It made these assertions even though, as the court in *AAUP* observed, "there [was] neither an allegation nor evidence of Khalil actually distributing flyers." 802 F. Supp. 3d at 142.

Once DOS received the referral letter, Armstrong and Secretary Rubio acted quickly to issue a determination that Khalil was removable. On March 8, one day after Watson transmitted his letter, Armstrong sent an action memo recommending that Secretary Rubio determine Khalil to be removable under the foreign policy ground due to Khalil's "participation and role[] in antisemitic protests." *AAUP*, 802 F. Supp. 3d at 142–43; *see* ROA.4302–06. Armstrong "relied solely" on information provided in the referral letter and the report of analysis in making his recommendation. *AAUP*, 802 F. Supp. 3d at 142. Explaining the basis for a potential

Rubio determination, the action memo cited "social media and open-source articles" in the report of analysis, including Canary Mission's profile of Khalil, and highlighted Khalil's involvement in "numerous pro-Palestinian protests." ROA.4303. The action memo acknowledged "the lack of alternative grounds" for deporting Khalil beyond his expressive and associational activities, as well as "the unprecedented nature of the reliance on [the INA's foreign policy ground]." *AAUP*, 802 F. Supp. 3d at 143–44; *see* ROA.4304.

Secretary Rubio approved Armstrong's recommendation that same day, and sent a memo to then-Secretary Noem, notifying her of his determination that Khalil was removable under the foreign policy ground. *AAUP*, 802 F. Supp. 3d at 144–45; *see* ROA.9768–69. The memo invoked the exception within the foreign policy ground for "beliefs, statements, or associations that are otherwise lawful." ROA.9768. And in the memo, Rubio made clear that his determination was based on information provided by HSI regarding Khalil's participation in "antisemitic protests and disruptive activities," attaching the report of analysis and referral letter pertaining to Khalil. ROA.9769.

DHS acted on Secretary Rubio's determination that very evening, arresting and detaining Khalil in the lobby of his apartment building. *AAUP*, 802 F. Supp. 3d at 145. And beginning the next day, the government repeatedly and publicly touted Khalil's arrest, characterizing his expressive and associational activities as pro-

Hamas, confirming that he was targeted for lawful political expression, and warning others that they could be next. *See id.* at 145–50, 155–56, 169, 172 (describing numerous statements publicizing Khalil's attempted deportation from early March through August of 2025).

The unmistakable conclusion of the above-described evidence is that—as the *AAUP* court found, *see* 802 F. Supp. 3d at 194—the government engaged in a deliberate and concerted effort to punish Khalil with the cudgel of arrest, detention, and deportation based solely on his constitutionally protected advocacy. This evidence also supports the natural inference that the government's decision to add the additional, post-hoc charge was a pretextual continuation of the effort to punish Khalil for his political views.

II. The Supreme Court's decision in *AADC* does not bar Khalil's First Amendment retaliation claim.

As Khalil explains in his opening brief, the reasoning that led the Supreme Court in *AADC* to question the viability of the selective enforcement claim at issue in that case has no bearing here because Khalil's retaliation claim is doctrinally distinct; because Khalil's claims arise in a petition for review instead of, as in *AADC*, a collateral challenge to which 8 U.S.C. § 1252(g) could arguably apply; and because Khalil is a lawful permanent resident, unlike the plaintiffs in *AADC*, whose presence in the country was unlawful. Pet.'s Br. 44–46.

In *AADC*, the plaintiffs filed suit in district court alleging that the government selectively commenced removal proceedings against them due to their membership in a foreign terrorist group, in violation of the First Amendment. 525 U.S. at 473–74. The Court held that 8 U.S.C. § 1252(g) deprived the district court of jurisdiction to entertain the plaintiffs' collateral challenge to the commencement of removal proceedings based on claims of selective enforcement, at least absent proof of "outrageous" government conduct. *Id.* at 491–92. In rejecting the plaintiffs' argument that the Court should, as a matter of constitutional avoidance, interpret § 1252(g) to permit immediate judicial review of their constitutional claims, the Court noted that "[a]s a general matter" a noncitizen "unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." *Id.* at 488.

In so reasoning, the Court focused on "the context" of the plaintiffs' claims, *AADC*, 525 U.S. at 488, emphasizing that each of the plaintiffs was unlawfully in the country—because, for example, they had overstayed a visa or failed to maintain their student status—and thus that "deportation [was] necessary in order to bring to an end *an ongoing violation* of United States law." *Id.* at 491 (emphasis in original). On that basis, the Court held that the plaintiffs' interest in "avoiding 'selective' treatment" in deportation proceedings was not compelling because, in such circumstances, deportation was not being imposed "as a punishment." *Id.* The

Supreme Court also made clear that its "general rule" might not extend to a case where "the alleged basis of discrimination [against a noncitizen] is so outrageous" that a claim of improper prosecutorial discretion could demand judicial consideration. *Id.*

Amicus agrees that Khalil's claims do not fall within the narrow scope of *AADC*'s reasoning, *see* Pet.'s Br. 44–46, but writes to elaborate on the argument that, even if *AADC* applied here, the record in *AAUP* demonstrates that the government's retaliation against Khalil and its targeting of Khalil and other vocal proponents of Palestinian rights on the basis of their core political speech would fall within the exception preserved in *AADC* for "outrageous" government conduct.

C. Khalil's case falls within *AADC*'s carve-out for outrageous government conduct.

As just noted, *AADC* left open "the possibility of a rare case in which the alleged basis of discrimination [against a noncitizen] is so outrageous" that a claim of improper prosecutorial selection could be recognized. 525 U.S. at 491. In that case, the Supreme Court clarified only that it is not outrageous when the government deports a noncitizen who is unlawfully present and who the government believes to "be a member of an organization that supports terrorist activity." *Id.* at 492.

In the leading case applying *AADC*'s outrageousness carve-out, *Ragbir v. Homan*, the Second Circuit further expounded on the exception. 923 F.3d 53 (2d Cir. 2019), *cert. granted, judgment vacated on other grounds sub nom. Pham v. Ragbir*,

592 U.S. 901 (2020). There, a noncitizen subject to a final order of removal sought to enjoin the government from deporting him based on his advocacy for immigrants' rights and criticism of the government's immigration policies. *Id.* at 57. The Second Circuit held that *AADC* did not foreclose his claim because the government's conduct was "outrageous." *Id.* at 69. In so doing, the court laid out four relevant considerations, explaining that "*AADC* compels courts to evaluate [1] the gravity of the constitutional right affected; [2] the extent to which the plaintiff's conduct or status that forms the basis for the alleged discrimination is actually protected; [3] the egregiousness of the Government's alleged conduct; and [4] the plaintiff's interest in avoiding selective treatment, as balanced against the Government's discretionary prerogative," *id.*, that is, "the Government's interest in having unchallenged discretion to deport [the plaintiff]," *id.* at 72.

Applying that framework, the Second Circuit found that the noncitizen plaintiff established that the government's conduct was "outrageous" because the government had targeted him for removal based on his public advocacy for immigrants' rights. *Ragbir*, 923 F.3d at 69–73. In explaining how egregious the government's alleged conduct was, the court emphasized that permitting the government to publicly deport the plaintiff for his advocacy "would be a particularly effective deterrent to other aliens who would also challenge the agency and its immigration policies," and "would broadly chill protected speech, among not only

activists subject to final orders of deportation but also those citizens and other residents who would fear retaliation against others." *Id.* at 71. Other courts have since followed the Second Circuit's approach in *Ragbir*. *See, e.g.*, *Rueda Vidal v. DHS*, 536 F. Supp. 3d 604, 618–19 (C.D. Cal. 2021) (noncitizen plaintiff "asserted sufficiently outrageous conduct" where she plausibly alleged that her DACA application was denied in retaliation for her political speech); *Ercelik v. Hyde*, No. 1:25-CV-11007-AK, 2025 WL 1361543, at *6 (D. Mass. May 8, 2025) (citing *Ragbir* framework).

All of these considerations demonstrate that the government's targeting of Khalil for core political speech is "outrageous."

1. Khalil's public advocacy implicates constitutional interests of the highest order.

The government targeted and retaliated against Khalil for engaging in core political speech on matters of manifest public interest. The activities the government has taken aim at—Khalil's advocacy in support of Palestinian rights and his criticism of Israel's conduct in Gaza and of the U.S. government's policies relating to the Middle East—is public discourse "at the core of what the First Amendment is designed to protect." *Virginia v. Black*, 538 U.S. 343, 365 (2003); *see also AAUP*, 802 F. Supp. 3d at 187 (referring to these activities as "pure political speech"). Accordingly, the government's conduct here "trenches upon an area in which the importance of First Amendment protections *is at its zenith*," *Ragbir*, 923 F.3d at 70

(quoting *Meyer v. Grant*, 486 U.S. 414, 421–22, 425 (1988)). These are constitutional interests of the highest order, notwithstanding that Khalil is a noncitizen. *See Bridges v. Wixon*, 326 U.S. 135, 148 (1945) ("Freedom of speech and of press is accorded aliens residing in this country."); *AADC*, 525 U.S. at 497 (Ginsburg, J., concurring in part) (characterizing *Bridges*'s holding as "well settled," including in the context of immigration enforcement); *accord Parcham v. INS*, 769 F.2d 1001, 1004 (4th Cir. 1985); *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1063–66 (9th Cir. 1995).

2. The government's conduct in this case is particularly egregious.

"[I]t is a fundamental principle of the First Amendment 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); *see also Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 188 (2024) (emphasizing that government officials cannot "use the power of the State to punish or suppress disfavored expression"). And it is egregious for the government to imprison and attempt to expel individuals for expressing views that the government disfavors. The government's targeting of Khalil is outrageous for that reason alone. But the government's targeting of and retaliation against Khalil is particularly egregious for several additional reasons.

First, as in *Ragbir*, Khalil was targeted "for deportation based not only on the viewpoint of his political speech, but on the public attention it received." *Ragbir*, 923 F.3d at 70–71. The record is replete with evidence that Khalil was targeted precisely because he was a key figure in pro-Palestinian protests and advocacy. As the *AAUP* court found, the whole point of the Policy, and the government's pursuit of Khalil, was "to target a few for speaking out" and "to have them publicly deported with the goal of tamping down pro-Palestinian student protests and terrorizing similarly situated non-citizen (and other) pro-Palestinians into silence because their views were unwelcome." 802 F. Supp. 3d at 173; *cf. Ragbir*, 923 F.3d at 71 (explaining that the noncitizen plaintiff's deportation would "draw considerable media attention and thus would be a particularly effective deterrent to other aliens who would also challenge the agency and its immigration policies").

Second, the government has carried out its unconstitutional targeting of Khalil and others in reliance on unsubstantiated accusations from third parties, and on a routine conflation of pro-Palestinian advocacy with antisemitism and support for terrorism. As explained above, in carrying out the Policy, government officials sourced thousands of potential targets from the website of Canary Mission, adopted as fact unsubstantiated third-party accusations about individuals' expressive and associational activities, and treated a broad swath of pro-Palestinian advocacy as per se antisemitic or pro-Hamas and thus a potential ground for deportation. *See supra*

Part I.A. The *AAUP* court referred to this process as "frictionless," meaning that "once one was on the lists [of potential targets sourced from Canary Mission and others], one was potentially subject to adverse action so long as, it seems, there was any online mention of one's pro-Palestine activities." 802 F. Supp. 3d at 188; *see also id.* at 188–89 (explaining that "names that were passed up the chain of command by the investigating subordinates were almost universally approved for adverse action" and "the reasons for being passed up the chain of command included any form of online suggestion that one was 'pro-Hamas,' including Canary Mission's own anonymous articles"). This is a dramatic departure from principles of due process and fundamental fairness.

Third, the Policy, and the government's targeting of Khalil and others, represents an abrupt and extraordinary shift in focus for the government to using the full force of its immigration authority to punish pro-Palestinian student protesters and other advocates for their political speech. Indeed, the government's actions represent a sharp break with its prior immigration enforcement policy, which explicitly stated: "A noncitizen's exercise of their First Amendment rights . . . should never be a factor in deciding to take enforcement action." Memorandum from Alejandro Mayorkas, Sec'y of Homeland Sec., to Tae Johnson, Acting Dir. of U.S. Immigr. & Customs Enf't, *Guidelines for the Enforcement of Civil Immigration Law* 5 (Sept. 30, 2021), https://perma.cc/Z7CL-NV5D. As the court in *AAUP* explained,

the Policy represents "an abrupt reversal of course, using statutes in new and constitutionally suspect ways, with no explanation." 802 F. Supp. 3d at 192; *see also* Transcript of Bench Trial Day 3, Vol. 1 at 66:4–67:3, 67:13–15, *AAUP v. Rubio*, No. 25-CV-10685-WGY (D. Mass. 2025), ECF No. 236 (Hatch testifying that prior to March 2025, the Office of Intelligence had never been asked to prepare reports of analysis on student protesters based on their protest activity); *AAUP*, 802 F. Supp. 3d at 144 n.20 (noting "only **four** instances of the Secretary of State's exercising this extraordinary [(4)(C)] authority before 2025 . . . none of which concerned domestic speech" (emphasis in original)).

Finally, there is overwhelming evidence that the government lodged the post-hoc misrepresentation charge against Khalil for pretextual reasons—in order to continue its campaign to punish Khalil for his speech, and in retaliation for his legal challenge to his detention. As the court in *AAUP* observed, DHS had previously determined that the foreign policy ground was the only applicable basis for his removal. *See AAUP*, 802 F. Supp. 3d at 143–44; *see also* ROA.4304. Yet, after Khalil filed his lawsuit, government officials recognized that Rubio's determination with respect to Khalil was constitutionally vulnerable and lodged the post-hoc charge against him. Pet.'s Br. at 13, 43 (citing ROA.4310, 4314–15). That addition, mere days after Khalil filed his lawsuit, carries with it the "taint of the unconstitutional conduct," *Ragbir*, 923 F.3d at 79, and makes clear that it was part-

and-parcel of the government's efforts to punish Khalil for his speech. Indeed, even after the post-hoc charge, government officials made numerous public statements demonstrating that Khalil's speech remained their target. *See, e.g.*, *AAUP*, 802 F. Supp. 3d at 164–72.

As the district court in *AAUP* stated, the government's targeting of pro-Palestinian speakers like Khalil on the basis of their political speech "is not only unconstitutional, but a thing virtually unknown to our constitutional tradition." 802 F. Supp. 3d at 184. That is, by definition, egregious government conduct.

3. Khalil's interest in avoiding targeted deportation outweighs any government interest in having unchallenged discretion to deport him.

Khalil has a substantial interest in avoiding deportation based on his protected speech. Although the Supreme Court in *AADC* denied that the government's effort to deport the plaintiffs was a form of "punishment," the Court rested this conclusion on the fact that the plaintiffs there were unlawfully in the country and thus that "deportation [was] necessary in order to bring to an end *an ongoing violation* of United States law." 525 U.S. at 491 (emphasis in original). Khalil, on the other hand, is a lawful permanent resident and is not, independent of the government's retaliatory actions against him, unlawfully in the country. The record in his case makes clear that the government has pursued deportation as a form of punishment, with the specific intent that the punishment would deter constitutionally protected

speech. *See Ragbir*, 923 F.3d at 71–72 ("Ragbir has a substantial interest in avoiding deportation based on his speech."); *see also Bridges*, 326 U.S. at 154 ("That deportation is a penalty—at times a most serious one—cannot be doubted.").

The government's interest in having unchallenged discretion to deport Khalil is far less substantial than in *AADC*. To begin, the government simply has no legitimate interest in using its immigration authority to suppress pro-Palestinian advocacy. *See Moody v. NetChoice, LLC*, 603 U.S. 707, 740 (2024) (explaining that "suppression of free expression" is not a "valid, let alone substantial" governmental interest). Additionally, in *AADC*, the plaintiffs belonged to a group that the government characterized as "an international terrorist and communist organization," and the *AADC* Court expressed concern that a court proceeding allowing inquiry into the "'real' reasons" behind the government's attempt to deport those affiliated with the group would compromise intelligence sources and foreign relations. 525 U.S. at 473, 491. Khalil, by contrast, is not a member of any terrorist group, and there is no argument that his challenge would force the government to reveal sensitive national security information. Indeed, Rubio's determination makes plain that the motivation here was viewpoint-based. *See supra* p. 21; *cf. D.V.D. v. DHS*, 821 F. Supp. 3d 102, 129 n.27 (D. Mass. 2026). Finally, while *AADC* recognized that the government may have an interest in ending an ongoing violation of the law with respect to noncitizens who entered the country unlawfully or

overstayed a visa, 525 U.S. at 491, that logic simply does not apply to a lawful permanent resident whose presence in the country was unquestionably lawful until the government began to pursue him on the basis of transparently retaliatory and pretextual charges.

Conclusion

This Court should vacate the BIA's decision and terminate the proceedings against Khalil.

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Respectfully submitted,

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Certificate of Service

I, Xiangnong Wang, certify that on August 21, 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 the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 21, 2026

/s/ Xiangnong Wang
Xiangnong Wang

Certificate of Compliance

This brief complies with the type-volume limit of the Court of Appeals for the Fifth Circuit Local Rules 32.2 and 32.3 because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), it contains 6,458 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it was prepared using Microsoft Word in 14-point Times New Roman font, a proportionally spaced typeface.

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