

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

PETITIONER'S OPENING BRIEF

NEW YORK CIVIL LIBERTIES UNION
FOUNDATION
Veronica Salama
Robert Hodgson
Amy Belsher
Molly Biklen
125 Broad Street, 19th Floor
New York, N.Y. 10004
Tel: (212) 607-3300

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
Omar Jadwat
Noor Zafar

VAN DER HOUT LLP
Marc Van Der Hout
Johnny Sinodis
Oona Cahill
360 Post St., Suite 800
San Francisco, CA 94108
Tel: (415) 981-3000

CENTER FOR CONSTITUTIONAL RIGHTS
Baher Azmy
Samah Sisay
666 Broadway, 7th Floor
New York, NY 10012
Tel: (212) 614-6464

Michael K.T. Tan
Sidra Mahfooz
Brian Hauss
Esha Bhandari
Brett Max Kaufman
Lauren Yu
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2500

CLEAR PROJECT
MAIN STREET LEGAL SERVICES, INC.
Naz Ahmad
Mudassar Hayat Toppa
Shezza Abboushi Dallal
CUNY School of Law
2 Court Square
Long Island City, NY 11101
Tel: (718) 340-4558

WASHINGTON SQUARE LEGAL SERVICES,
INC.
Alina Das
Immigrant Rights Clinic
245 Sullivan Street, 5th Floor
New York, New York 10012
Tel: (212) 998-6430

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Fifth Circuit 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 disqualifications or recusal:

Petitioner Mr. Mahmoud Khalil is represented in these proceedings by the following counsel on a *pro bono* basis:

Van Der Hout LLP: Marc Van Der Hout, Johnny Sinodis, and Oona Cahill¹

American Civil Liberties Union Foundation: Omar Jadwat, Noor Zafar, Michael K.T. Tan, Sidra Mahfooz, Brian Hauss, Esha Bhandari, Brett Max Kaufman, Lauren Yu

Center for Constitutional Rights: Baher Azmy, Samah Sisay

CLEAR Project, Main Street Legal Services, Inc: Naz Ahmad, Mudassar Hayat Toppa, Shezza Abboushi Dallal

New York Civil Liberties Union Foundation: Veronica Salama, Robert Hodgson, Amy Belsher, Molly Biklen

Washington Square Legal Services, Inc.: Alina Das

¹ Mr. Van Der Hout, Mr. Sinodis, and Ms. Cahill represented Petitioner in the underlying agency proceedings before the Board of Immigration Appeals and the Immigration Court.

Mr. Khalil's counsel listed herein also represent him in habeas proceedings before the U.S. District Court for the District of New Jersey and the U.S. Court of Appeals for the Third Circuit.

Chief Appellate Immigration Judge Garry D. Malphrus and Appellate Immigration Judges Keith E. Hunsucker and Marcos Gemoets, of the Board of Immigration Appeals ("BIA"), rendered the decision on Petitioner's appeal. Former Immigration Judge ("IJ") Jamee Comans (current Acting Assistant Director of the Office of Policy at the Executive Office for Immigration Review ("EOIR")) rendered the decision in proceedings at the Immigration Court.

The following remaining counsel and other entities also have an interest in the outcome of this case:

Department of Homeland Security

David Venturella

Acting Director of U.S. Immigration and Customs Enforcement

Mellissa B. Harper

Field Officer Director of the New Orleans Field Office,

U.S. Immigration and Customs Enforcement

Board of Immigration Appeals

Todd Blanche

U.S. Attorney General

Drew Ensign

U.S. Department of Justice, Office of Immigration Litigation

/s/ Johnny Sinodis

Johnny Sinodis

Attorney for Mr. Khalil

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 5th Cir. R. 28.2.3, Petitioner respectfully requests oral argument for this Petition for Review because this is a case of national importance which raises novel and significant questions of law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	v
STATEMENT OF JURISDICTION.....	1
INTRODUCTION	2
STATEMENT OF THE ISSUES.....	4
STATEMENT OF THE CASE.....	5
<i>Petitioner’s Speech and Political Viewpoints</i>	6
<i>The Government’s Policy to Punish Petitioner for His Pro-Palestinian Advocacy</i>	7
<i>The Government Effectuates the Policy by Arresting Petitioner for His Speech</i>	9
<i>To Effectuate the Government’s Goal of Chilling Speech, Top Government Officials Publicize Petitioner’s Arrest</i>	12
<i>In Response to Petitioner’s Lawsuit, the Government Adds a New, Pretextual Removability Charge</i>	13
<i>Federal Court Enjoins the FPG and Orders Petitioner’s Release, and a Separate Federal Court Vacates the Censorship Policy</i>	14
<i>The IJ and BIA Ignore Federal Court Orders, Refuse to Consider Petitioner’s Constitutional Claims, and Order Him Removed in Highly Irregular Proceedings</i>	16
STANDARD OF REVIEW	22
ARGUMENT	22
I. TWO FEDERAL COURT ORDERS PROSCRIBED THE BIA'S RELIANCE ON THE FPG	22
A. The BIA Lacked Authority to Sustain the FPG Because it is Predicated on a Vacated Government Policy.....	22

B. The BIA Lacked Authority to Sustain the FPG Because its Use Was and Is Enjoined and the IJ Had Vacated the Charge.	25
II. THE FPG AND THE POST-HOC CHARGE CANNOT SUPPORT PETITIONER'S REMOVAL BECAUSE THEY ARE UNCONSTITUTIONAL.....	27
A. The FPG Violates the First Amendment, Facially and As Applied.	27
1. The FPG Facially Violates the First Amendment.	27
2. The FPG Violates the First Amendment As Applied.	31
B. The FPG is Unconstitutionally Vague, Facially and As Applied.	32
1. The FPG is Facially Void for Vagueness.	33
2. The FPG is Unconstitutionally Vague As Applied Through the Rubio Determination.	35
C. The Post-Hoc Charge Is in Furtherance of the Government's Censorship Policy and Constitutes First Amendment Retaliation.	36
1. Petitioner Satisfies the First Amendment Retaliation Factors.	36
a. Mt. Healthy factors 1 and 2: Petitioner engaged in protected activity and the government took retaliatory action.	38
b. Mt. Healthy factor 3: Petitioner's protected expression was a substantial or motivating factor for the government's actions.	39
c. The government has not and cannot meet its burden.	44
2. <i>AADC</i> Does Not Bar Petitioner's Retaliation Claim.	44

3. The Post-Hoc Statute Is Unconstitutionally Vague As Applied.....	47
III.THE BIA ERRED IN SUSTAINING BOTH CHARGES BECAUSE THEY FAIL TO MEET THEIR LEGAL REQUIREMENTS	48
A. The Rubio Determination Is Legally Deficient and Cannot Support the FPG.....	48
1. The Rubio Determination Failed to Fulfill Statutory Requirements.	48
2. The BIA Unconstitutionally Applied the “Facially Legitimate and Bona Fide” Standard to Petitioner.....	50
3. Even if the “Facially Reasonable and Bona Fide” Standard Applied, the Rubio Determination is Still Defective.....	51
B. The BIA Erred In Sustaining The Post-Hoc Charge.....	54
1. The BIA Violated the INA, Regulations, and Due Process by Sustaining the Post-Hoc Charge Based on Allegations That Do Not Appear in the I-261.	54
2. The Agency Erred In Finding Petitioner Committed A Willful and Material Misrepresentation.....	56
a. Any perceived omission was not willful.	57
b. Any perceived omission was immaterial.	59
c. The IJ and BIA failed to assess whether the internship placement would render Petitioner inadmissible.....	61
IV. THE BIA COMMITTED OTHER REVERSIBLE ERRORS.....	62
A. The BIA Violated Its Own Rules By Failing To Provide Petitioner A Fair Hearing.....	62

B. The BIA Erred in Failing to Address Petitioner’s Argument
That Proceedings Must Be Terminated Based on DHS’s
Warrantless Arrest.....63

C. The BIA Erred in Denying Discovery and Refusing to
Remand.....64

D. The BIA Erred in Denying Relief.....66

CONCLUSION68

CERTIFICATE OF SERVICE70

CERTIFICATE OF COMPLIANCE.....71

TABLE OF AUTHORITIES

Cases

<i>Abourezk v. Reagan</i> , 592 F. Supp. 880 (D.D.C. 1984), <i>vacated and remanded on other grounds by</i> 785 F.2d 1043 (D.C. Cir. 1986).....	53
<i>Abusamhadaneh v. Taylor</i> , 873 F. Supp. 2d 682 (E.D.Va. 2012).....	59
<i>Allende v. Shultz</i> , 605 F. Supp. 1220 (D.Mass. 1985).....	52
<i>Am. Acad. of Religion v. Chertoff</i> , 463 F. Supp. 2d 400 (S.D.N.Y. 2006)	52
<i>Am. As’n of Univ. Professors v. Rubio</i> , 802 F. Supp. 3d 120 (D.Mass. 2025), <i>appeal pending</i> , No. 26-1195 (1st Cir.).....	<i>passim</i>
<i>Am. As’n of Univ. Professors v. Rubio</i> , No. 25-10685-WGY, 2026 WL 524753 (D. Mass. Jan. 22, 2026).....	23
<i>Arzanipour v. INS</i> , 866 F.2d 743 (5th Cir. 1989)	55, 62, 67
<i>Bautista v. Santacruz</i> , 820 F. Supp. 3d 1016 (C.D.Cal. 2026).....	24
<i>Boos v. Barry</i> , 485 U.S. 312 (1988).....	30
<i>Bouie v. City of Columbia</i> , 378 U.S. 347 (1964).....	35
<i>Braidwood Mgmt., Inc. v. Becerra</i> , 104 F.4th 930 (5th Cir. 2024), <i>rev’d on other grounds</i> , <i>Kennedy v. Braidwood Mgmt., Inc.</i> , 606 U.S. 748 (2025)	24
<i>Bridges v. Wixon</i> , 326 U.S. 135 (1945).....	27

<i>Chiles v. Salazar</i> , 146 S. Ct. 1010 (2026).....	28
<i>Citizens United v. Fed. Election Comm’n</i> , 558 U.S. 310 (2010).....	29
<i>City of Chicago v. Morales</i> , 527 U.S. 41 (1999).....	32-33, 48
<i>Coal. for Indep. Tech. Rsch. v. Rubio</i> , No. 26-815, 2026 WL 2030770 (D.D.C. July 14, 2026).....	50-51, 53
<i>Coates v. City of Cincinnati</i> , 402 U.S. 611 (1971).....	34
<i>Corner Post, Inc. v. Bd. of Governors of Fed. Rsv. Sys.</i> , 603 U.S. 799 (2024).....	24
<i>Cox v. State of Louisiana</i> , 379 U.S. 536 (1965).....	35
<i>Dargahifadaei v. Kerry</i> , No. 3-12-CV-01942-K, 2013 WL 1627887 (N.D.Tex. Apr. 15, 2013)	53
<i>Data Mktg. P’ship, LP v. Dep’t of Labor</i> , 45 F.4th 846 (5th Cir. 2022).....	24
<i>Diahn v. Blanche</i> , 175 F.4th 291 (4th Cir. 2026).....	65
<i>Emokah v. Mukasey</i> , 523 F.3d 110 (2d Cir. 2008)	57
<i>Evans v. City of Houston</i> , 246 F.3d 344 (5th Cir. 2001)	42
<i>FCC v. Fox Television Stations, Inc.</i> , 567 U.S. 239 (2012).....	33
<i>Francois v. Garland</i> , 120 F.4th 459 (5th Cir. 2024)	22, 67

<i>Matter of Garcia-Flores</i> , 17 I&N Dec. 325 (B.I.A 1980).....	64
<i>Gonzalez-Maldonado v. Gonzales</i> , 487 F.3d 975 (5th Cir. 2007)	60
<i>Gov’t of Canal Zone v. Brooks</i> , 427 F.2d 346 (5th Cir. 1970)	55
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972).....	32, 35
<i>Guerrero-Lasprilla v. Barr</i> , 589 U.S. 221 (2020).....	22
<i>Gulf States Mfrs., Inc. v. NLRB</i> , 579 F.2d 1298 (5th Cir. 1978), <i>on reh’g</i> , 598 F.2d 896 (5th Cir. 1979)	63
<i>Gutierrez-Soto v. Sessions</i> , 317 F. Supp. 3d 917 (W.D.Tex. 2018)	41
<i>Hamdi v. USCIS</i> , No. EDCV1000894VAPDTBX, 2012 WL 13135302 (C.D.Cal. Aug. 29, 2012).....	47
<i>Hill v. City of Scranton</i> , 411 F.3d 118 (3d Cir. 2005)	43
<i>Holder v. Humanitarian L. Project</i> , 561 U.S. 1 (2010).....	30
<i>Honeyfund.com Inc. v. Governor</i> , 94 F.4th 1272 (11th Cir. 2024)	28
<i>Iancu v. Brunetti</i> , 588 U.S. 388 (2019).....	28
<i>In re Clarke</i> , 94 F.4th 502 (5th Cir. 2024)	24
<i>Inestroza-Antonelli v. Barr</i> , 954 F.3d 813 (5th Cir. 2020)	63

<i>Janus v. Am. Fed’n of State, Cnty., and Mun. Emps., Council 31</i> , 585 U.S. 878 (2018).....	27
<i>Jordan v. De George</i> , 341 U.S. 223 (1951).....	34
<i>Jordan v. Ector Cnty.</i> , 516 F.3d 290 (5th Cir. 2008)	40, 41, 43
<i>Keenan v. Tejeda</i> , 290 F.3d 252 (5th Cir. 2002)	37
<i>Kerry v. Din</i> , 576 U.S. 86 (2015).....	53
<i>Khalil v. President, United States</i> , 164 F.4th 259 (3d Cir. 2026)	15, 64, 65, 66
<i>Khalil v. Trump</i> , 784 F. Supp. 3d 705 (D.N.J. 2025), <i>vacated and remanded sub nom. Khalil</i> , 164 F.4th 259	<i>passim</i>
<i>Kleindienst v. Mandel</i> , 408 U.S. 753 (1972).....	50, 52
<i>Kolender v. Lawson</i> , 461 U.S. 352 (1983).....	34
<i>Kungys v. United States</i> , 485 U.S. 759 (1988).....	56, 60
<i>Kwong Hai Chew v. Colding</i> , 344 U.S. 590 (1953).....	54
<i>Landon v. Plasencia</i> , 459 U.S. 21 (1982).....	51
<i>Lozman v. Riviera Beach</i> , 585 U.S. 87 (2018).....	38, 45
<i>Maslenjak v. United States</i> , 582 U.S. 335 (2017).....	56

<i>Massieu v. Reno</i> , 915 F. Supp. 681 (D.N.J.), <i>rev'd on other grounds</i> , 91 F.3d 416 (3d Cir. 1996)	31, 34, 35
<i>Matal v. Tam</i> , 582 U.S. 218 (2017).....	27, 28, 31
<i>Matter of A.J. Valdez and Z. Valdez</i> , 27 I&N Dec. 496 (B.I.A 2018).....	26
<i>Matter of Bosuego</i> , 17 I&N Dec. 125 (B.I.A 1979; 1980).....	56, 60
<i>Matter of D-R-</i> , 27 I&N Dec. 105 (B.I.A 2017).....	56, 60, 61
<i>Matter of Healy and Goodchild</i> , 17 I&N Dec. 22 (B.I.A 1979).....	57, 59
<i>Matter of Martinez-Lopez</i> , 10 I&N Dec. 409 (B.I.A 1962, A.G. 1964).....	61
<i>Matter of Mazar</i> , 10 I&N Dec. 79 (B.I.A 1962).....	61
<i>Matter of R-A-</i> , 22 I&N Dec. 906 (B.I.A 1999; A.G. 2001).....	58
<i>Matter of Ruiz-Massieu</i> , 22 I&N Dec. 833 (B.I.A 1999).....	50, 51, 52
<i>Matter of Tijam</i> , 22 I&N Dec. 408 (B.I.A 1998).....	57
<i>Merriott v. City of Bossier City</i> , 179 F.4th 393 (5th Cir. 2026)	28, 37, 39
<i>Mohammed H. v. Trump</i> , 781 F. Supp. 3d 886 (D.Minn. 2025)	39
<i>Mohammed H. v. Trump</i> , 786 F. Supp. 3d 1149 (D.Minn. 2025)	41, 44

<i>Moody v. NetChoice, LLC</i> , 603 U.S. 707 (2024).....	29
<i>Morton v. Ruiz</i> , 415 U.S. 199 (1974).....	55
<i>Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle</i> , 429 U.S. 274 (1977).....	37, 40
<i>N. Miss. Commc’ns, Inc. v. Jones</i> , 874 F.2d 1064 (5th Cir. 1989)	44
<i>N. Miss. Commc’ns, Inc. v. Jones</i> , 951 F.2d 652 (5th Cir. 1992)	40, 42
<i>Nat’l Rifle Ass’n v. Vullo</i> , 602 U.S. 175 (2024)	3, 45, 47
<i>Niz-Chavez v. Garland</i> , 593 U.S. 155 (2021).....	54
<i>Padilla v. Kentucky</i> , 559 U.S. 356 (2010).....	38
<i>Petzold v. Rostollan</i> , 946 F.3d 242 (5th Cir. 2019)	40, 41
<i>Pro. Ass’n of Coll. Educators, TSTA/NEA v. El Paso Cnty. Cmty. Coll. Dist.</i> , 730 F.2d 258 (5th Cir. 1984)	38, 40, 41
<i>Qatanani v. Att’y Gen. U.S. of Am.</i> , 144 F.4th 485 (3d Cir. 2025)	51
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377 (1992).....	32
<i>Rabe v. Washington</i> , 405 U.S. 313 (1972).....	35
<i>Ragbir v. Homan</i> , 923 F.3d 53 (2d Cir. 2019)	<i>passim</i>

<i>Reed v. Town of Gilbert</i> , 576 U.S. 155 (2015).....	28, 29, 32
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997).....	33
<i>Reno v. American-Arab Anti-Discrimination Committee</i> , 525 U.S. 471(1999)	44, 45, 46, 66
<i>Republican Party of Minn. v. White</i> , 536 U.S. 765 (2002).....	30
<i>Robinson v. Hunt Cnty.</i> , 921 F.3d 440 (1st Cir. 2019).....	31-32
<i>Robinson v. Jackson State Univ.</i> , 714 F. App'x 354 (5th Cir. 2017).....	44
<i>Rolf v. City of San Antonio</i> , 77 F.3d 823 (5th Cir. 1996)	37
<i>Sanchez v. Sessions</i> , 904 F.3d 643 (9th Cir. 2018)	64
<i>Scott v. Flowers</i> , 910 F.2d 201 (5th Cir. 1990)	44
<i>Sessions v. Dimaya</i> , 584 U.S. 148 (2018).....	30, 33, 35
<i>Snyder v. Phelps</i> , 562 U.S. 443 (2011).....	38
<i>Students for Just. in Palestine, at Univ. of Houston v. Abbott</i> , 2024 WL 4631301 (W.D. Tex. Oct. 28, 2024).....	7
<i>Thompson v. McGehee</i> , No. 25-10196, 2026 WL 2069890 (5th Cir. July 17, 2026).....	40
<i>Trump v. CASA, Inc.</i> , 606 U.S. 831 (2025).....	25

<i>Turner Broad. Sys., Inc. v. FCC</i> , 512 U.S. 622 (1994).....	29
<i>United States ex rel. Accardi v. Shaughnessy</i> , 347 U.S. 260 (1954).....	55, 62
<i>United States v. Armstrong</i> , 517 U.S. 456 (1996).....	45
<i>United States v. Hoover</i> , 467 F.3d 496 (5th Cir. 2006)	56
<i>United States v. L. Cohen Grocery Co.</i> , 255 U.S. 81 (1921).....	36
<i>United States v. Playboy Ent. Grp., Inc.</i> , 529 U.S. 803 (2000).....	30
<i>United States v. Williams</i> , 553 U.S. 285 (2008).....	34
<i>Valley v. Rapides Par. Sch. Bd.</i> , 118 F.3d 1047 (5th Cir. 1997)	62
<i>Village of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.</i> , 455 U.S. 489 (1982).....	33
<i>Witter v. INS</i> , 113 F.3d 549 (5th Cir. 1997)	57
<i>Xing Yang Yang v. Holder</i> , 770 F.3d 294 (4th Cir. 2014)	61
<i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001).....	49, 51

Statutes

5 U.S.C. §706(2)	23
8 U.S.C. §1182(a)(3)(C)	27, 31, 49
8 U.S.C. §1182(a)(3)(C)(iii)	14, 49, 51

8 U.S.C. §1182(a)(3)(C)(iv).....	49
8 U.S.C. §1182(a)(6)(A)(i)	46
8 U.S.C. §1182(a)(6)(C)(i).....	47, 56
8 U.S.C. §1182(a)(9)(B)(ii)	46
8 U.S.C. §1227(a)(1)(H)	16, 18, 66
8 U.S.C. §1227(a)(1)(A)	13, 47, 56
8 U.S.C. §1227(a)(4)(C)	<i>passim</i>
8 U.S.C. §1229(a)	54
8 U.S.C. §1229(a)(1)(C)	54, 56
8 U.S.C. §1229a(c)(1)(A)	62
8 U.S.C. §1229a(b)(4).....	16-17, 62, 67
8 U.S.C. §1240.11(a)(2).....	67
8 U.S.C. §1252(a)(2)(D)	22, 46
8 U.S.C. §1252(b)(6).....	63
8 U.S.C. §1252(b)(9).....	15
8 U.S.C. §1252(g)	45, 46

Regulations

8 C.F.R. §287.8(c)(2)(i)	64
8 C.F.R. §1003.1(d)(3)(iv).....	55, 56, 60
8 C.F.R. §1003.10(b)	62
8 C.F.R. §1003.15(b)	54
8 C.F.R. §1003.30	54, 56
8 C.F.R. §1003.35	65

8 C.F.R. §1240.11	17
-------------------------	----

Other Authorities

Exec. Order 13899, <i>Combating Anti-Semitism</i> , 84 Fed. Reg. 68779 (Dec. 11, 2019).....	7
H.R. Conf. Rep. 101-955 (1990), <i>reprinted in</i> 1990 U.S.C.C.A.N. 6784 (Oct. 26, 1990)	49-50
Memorandum from Secretary Mayorkas to Acting Director of U.S. Immigration and Customs Enforcement, <u>Guidelines for the Enforcement of Civil Immigration Law</u> (Sept. 30, 2021), www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf	9
Settlement Agreement, <i>Castanon Nava v. Dep’t of Homeland Sec.</i> , No. 1:18-cv- 03757 (N.D.Ill. Nov. 30, 2021), Dkt. 146-1	64
USCIS Policy Manual, Vol. 8, Part J, Ch. 3, §D.1	57
USCIS Policy Manual, Vol. 8, Part J, Ch. 3, §D.2	57

STATEMENT OF JURISDICTION

Jurisdiction exists under 8 U.S.C. §1252(a) to review the BIA's April 9, 2026, decision. Venue is proper under 8 U.S.C. §1252(b)(2) because the IJ completed proceedings in this circuit. Petitioner timely filed this PFR. 8 U.S.C. §1252(b)(1); Fed. R. App. P. 26(a)(1)(C).

INTRODUCTION

The executive branch deployed the full force of its powers to arrest, detain, and attempt to deport Petitioner, Mahmoud Khalil, a lawful permanent resident (“LPR”)—solely on account of Petitioner’s constitutionally protected advocacy in support of Palestinian human rights and critical of Israel’s conduct in Gaza and U.S. support for it, and to intimidate into silence others in the U.S. who would express similar views the government disfavors. The government does so by making unprecedented use of a provision of the Immigration and Nationality Act (“INA”), the so-called “Foreign Policy Ground” (“FPG”), by which the Secretary of State denominated Petitioner’s presence “adverse to U.S. foreign policy interests,” to censor and suppress Petitioner’s and others’ speech.

The charge is unprecedented because application of the FPG to lawful political expression in the U.S. plainly violates the First Amendment and the Due Process Clause’s vagueness prohibition, as every court reviewing the FPG’s application to speech like Petitioner’s has declared. Government officials themselves, recognizing the legal vulnerability of such a novel use of the FPG, and only after Petitioner filed a federal challenge to the government’s actions, rushed to add a post-hoc, unconstitutionally vague, and patently false “material misrepresentation” charge, to further the government’s unconstitutionally retaliatory deportation scheme.

The evidence showing that the agencies targeted Petitioner to censor and suppress pro-Palestinian advocacy in the U.S. is effectively undisputed. It also separately formed the basis of a federal court decision vacating the relevant agencies' actions to target Petitioner in this way—a vacatur that (independently and apart from his various constitutional and statutory arguments) renders the FPG null and void here.

The government has nevertheless been able to obtain a removal order by leveraging a perfect storm of procedural and prejudicial irregularity by the IJ and BIA, which has at every stage ignored binding precedent, violated controlling statutes and regulations, and bypassed the most elementary principles of adjudicatory fairness in order to implement the executive branch's predetermined outcome.

In our constitutional republic, the government cannot imprison or expel someone lawfully present because he dissents from the government's views, nor can the government weaponize its law enforcement and regulatory power to enforce orthodoxy in political discourse. *See Nat'l Rifle Ass'n v. Vullo*, 602 U.S. 175 (2024). The charges against Petitioner are contrary to federal court orders; violate the First Amendment's prohibitions on content-, viewpoint- and speaker-based discrimination and its proscription on speech-based retaliation; are each void for vagueness on their face or as applied; are incompatible with statute and precedent;

and otherwise seek the impermissible government objective of chilling lawful speech on a matter of immense public debate. This Court should overturn the BIA’s decision and order the termination of Petitioner’s removal proceedings. In the alternative, the Court must remand because the orders are also the product of gross legal and procedural errors by the IJ and BIA—each of which constitutes reversible error.

STATEMENT OF THE ISSUES

1. The BIA erred in sustaining the FPG charge because the Policy under which the FPG charge was issued was vacated by a federal court, and because a separate federal injunction barred reliance on the FPG;

2. The FPG on its face, and as applied to Petitioner via the Rubio Determination, is content-, viewpoint-, and speaker-based discrimination in violation of the First Amendment;

3. The FPG is unconstitutionally vague, facially and as applied to Petitioner, in violation of the Fifth Amendment;

4. The post-hoc “material misrepresentation” charge constitutes unlawful retaliation and outrageous discrimination against Petitioner’s First Amendment-protected expression;

5. The post-hoc charge is unconstitutionally vague as applied to Petitioner through the membership and involvement question on the I-485;

6. Because the Rubio Determination failed to comport with statutory requirements and precedent, the FPG cannot be sustained;

7. The BIA improperly engaged in fact-finding on numerous occasions;

8. The BIA erred in sustaining the post-hoc charge because Petitioner made no willful, material misrepresentation, the agency failed to provide him statutorily required notice of the ultimate (and uncharged) allegation it sustained, and the agency failed to apply the proper legal framework;

9. The BIA otherwise committed reversible errors by: (a) failing to provide Petitioner a fair hearing; (b) failing to address his argument that proceedings should be terminated for an uncontested regulatory violation; (c) refusing to remand proceedings or permit discovery; and (d) denying Petitioner relief.

STATEMENT OF THE CASE

Petitioner, a thirty-one-year-old Palestinian, lawfully entered the U.S. as an international graduate student at Columbia University in 2022 and was granted LPR status in 2024. ROA.6214. His wife and one-year-old son are U.S. citizens. ROA.6215-18. Petitioner has no criminal history. The government, prompted by third-party groups hostile to pro-Palestinian advocacy, has sought to punish Petitioner, via unprecedented use of immigration laws, solely because of his constitutionally-protected advocacy in support of Palestinian human rights and critical of Israel's conduct in Gaza and U.S. support for it, and to make an example

of his punishment to silence others from expressing similar views. *Am. As'n of Univ. Professors v. Rubio* (“AAUP”), 802 F.Supp.3d 120, 132-151, 172-75 (D.Mass. 2025), *appeal pending*, No. 26-1195 (1st Cir.); ROA.2130-36, 8484-89.

Petitioner’s Speech and Political Viewpoints

Petitioner has dedicated his life to advocacy in support of Palestinian human rights. ROA.2125-27, 2214-15. In Fall 2023, Petitioner took a more public role in pro-Palestinian advocacy while a graduate student at Columbia University, which became a national focal point of pro-Palestinian protests. ROA.2125-27. Alongside thousands of students from diverse backgrounds, Petitioner protested what he describes as Israel’s “indiscriminate killing of thousands of innocent Palestinians” in Gaza, and the U.S. government and Columbia for financing and facilitating those harms. ROA.2214. He feels a continuing responsibility to speak out against the “ongoing genocide of the Palestinian people.” *Id.*

Petitioner has consistently denounced antisemitism and hate of all forms, and has emphasized that Jewish students are “an integral part” of the diverse movement for Palestine, and that “the liberation of Palestinians and Jewish people are intertwined.” ROA.9531; *see also* ROA.5462, 9035-60, 9512-20; *Khalil v. Trump*, 2:25-cv-01963-MEF (D.N.J.), Dkt. 345-4.

The Government's Policy to Punish Petitioner for His Pro-Palestinian Advocacy

In January 2025, President Trump signed two executive orders aimed at fulfilling campaign promises to “throw” pro-Palestinian protestors “out of the country.” ROA.2128-30. Executive Order (“EO”) 14161 promises to ensure that noncitizens do not “bear hostile attitudes” toward the U.S. government, or “advocate for” or “support” “foreign terrorists and other threats to our national security.” ROA.3988-90. EO 14188 targets for investigation “post-October 7, 2023, campus anti-Semitism” and promises to target “leftist, anti-American colleges and universities” and to find and deport those noncitizens whom the government views as “ Hamas sympathizers” and who participated in so-called “pro-jihadist protests.” ROA.2293-99. EO 14188 adopts a definition of antisemitism that punishes constitutionally-protected criticism of Israel and its policies.¹ Pursuant to the EOs, federal officials developed a retaliatory policy to publicly deport pro-Palestinian noncitizen students and scholars to punish and suppress constitutionally-protected pro-Palestine speech and advocacy within the U.S. Even though he was an LPR in

¹ See Exec. Order 13899, *Combating Anti-Semitism*, 84 Fed. Reg. 68779 (Dec. 11, 2019); see *Students for Just. in Palestine, at Univ. of Houston v. Abbott*, 2024 WL 4631301, at *10 (W.D.Tex. Oct. 28, 2024) (public universities’ incorporation of this definition of antisemitism in speech policies constitutes impermissible viewpoint discrimination); see also *AAUP*, 802 F.Supp.3d at 186 (agency actions “incorporated a definition of antisemitism that encompassed protected political speech[.]”)

good standing, Petitioner was the first target. *AAUP*, 802 F.Supp.3d at 136-50; ROA.2127-48.

Details of the policy and its application to Petitioner were revealed months after his arrest in a separate federal bench trial—*AAUP*, 1:25-cv-10685 (D.Mass.).² On September 30, 2025, the *AAUP* court found, by clear and convincing evidence, that Secretary Rubio and then-DHS Secretary Noem had “intentionally and in concert implemented” the EOs through a censorship Policy (which that court called the “Enforcement Policy”)—namely, targeting for arrest and deportation, Petitioner specifically and four other noncitizen students in an unconstitutional and “viewpoint-discriminatory way” in order to broadly “chill protected speech” supporting Palestinian rights. 802 F.Supp.3d at 175. The record from that trial demonstrated that the government sought to “target a few [including Petitioner] for speaking out, 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; *see also id.* at 176 n.35 (emphasizing the Policy was driven by retaliation for “any public anti-Israel or pro-Palestine speech or association”).

² The opinion, ROA.3577-37, judgment, ROA.3739-48, and selected supporting evidence of *AAUP*, ROA.2399-3575, 3750-4979, were submitted to the BIA with Petitioner’s Motion to Remand.

The court also found that the Policy conflicts with DHS’s binding guidelines prohibiting enforcement actions based on a noncitizens’ protected speech.³ The court vacated the unlawful Policy under the Administrative Procedure Act (“APA”). *Id.* at 190-91.

The Government Effectuates the Policy by Arresting Petitioner for His Speech

Pursuant to the Policy to target Petitioner,⁴ in March 2025, senior officials within ICE’s Homeland Security Investigations’ (“HSI”) Office of Intelligence investigated a list of campus protestors sourced from anonymous anti-Palestinian blacklisting websites. ROA.2130-32, 4833-4, 4842, 4957-59. From these unvetted sources, HSI produced “Subject Profiles” or “Reports of Analysis” about those noncitizens, without investigating their veracity and even though the materials in question were about constitutionally-protected speech and expressive activities. ROA.2130-33, 4256-89, 4866-68.

HSI’s National Security Division then sent referral letters to the Department of State (“DOS”), which attached and relied entirely on the Subject Profiles, summarized noncitizen protestors’ protected expression as actions that “violate

³ See Memorandum from Secretary Mayorkas to Acting Director of U.S. Immigration and Customs Enforcement, Guidelines for the Enforcement of Civil Immigration Law (Sept. 30, 2021), www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf (“Mayorkas Memo”); see also ROA.2238.

⁴ The details of this Policy are also set forth in the *AAUP* opinion. 802 F.Supp.3d at 135-72.

President Trump’s executive orders on anti-Semitism,” and sought a determination from DOS that the protesters were removable. ROA.2132-33, 4291-300. Some of the referral letters, including Petitioner’s, asserted that the subjects’ political expression “may be sufficient” for Secretary Rubio to render them removable under the FPG, 8 U.S.C. §1227(a)(4)(C). ROA.2134. DOS then created action memos for Secretary Rubio, recommending visa revocations or determinations of removability. ROA.4302-20. “This review process, such as it was, was essentially frictionless,” as well as standardless. *AAUP*, 802 F.Supp.3d at 187-88. The reviewing officials had no guidance on what constituted antisemitism or would compromise U.S. foreign policy, and instead applied their own personal understandings, which included “views” and statements critical of Israel. ROA.4730-33, 4739-40. “In short, if it looked like the Executive Orders might have disapproved of it, that was potential grounds for deportation.” *AAUP*, 802 F.Supp.3d at 188.

On March 7, 2025, HSI completed Petitioner’s Subject Profile, which included a review of his Form I-485 (permanent residency application) and otherwise largely consisted of tabloid articles related to Palestine and protests of Israel, none describing any unlawful behavior by Petitioner. ROA.4269-73. Pursuant to the Policy, HSI then referred Petitioner to DOS. ROA.4291-92. The referral attached Petitioner’s Subject Profile as “supporting factual documentation” and purported to provide a summary of Petitioner’s constitutionally-protected

expression that “violate[d] President Trump’s executive orders on anti-Semitism” and might be sufficient to support removal under §1227(a)(4)(C). *Id.* It described Petitioner as a “prominent pro-Palestinian activist involved in antisemitic activities” and cited his alleged participation in a March 6, 2025, protest as an example of “leadership” in “disruptive protests” that “create[] a hostile environment for Jewish students,”⁵ claiming that such participation aligns with the EOs’ “focus on deporting Hamas sympathizers.” *Id.*

The next day, on March 8, DOS official John Armstrong submitted an action memo to Secretary Rubio recommending Petitioner be found removable under the FPG, based on HSI’s referral. ROA.4302-06. The action memo acknowledged that Petitioner had no criminal history and that “DHS has not identified any alternative grounds of removability that would be applicable” to Petitioner, and warned this unprecedented application of the FPG would be vulnerable to legal scrutiny. ROA.4304.⁶ Secretary Rubio then issued a Determination, listing Petitioner’s Subject Profile and DHS referral letter as attachments⁷ and noting that the determination is based on Petitioner’s “lawful speech” and on “information provided

⁵ Much of this same language, which was based on the unverified third-party materials, later appeared in Secretary Rubio’s determination.

⁶ Prior to March 2025, there is evidence of the Secretary invoking this extraordinary power in only four instances, none of which concerned domestic speech. *AAUP*, 802 F.Supp.3d at 144 n.20.

⁷ DHS did not produce the attachments in Petitioner’s proceedings—they were later released through *AAUP*.

by the DHS/ICE/HSI regarding the participation and role[]” of Petitioner “in antisemitic protests and disruptive activities, which fosters a hostile environment for Jewish students in the United States.” ROA.9768-69.

That evening, DHS officers arrested Petitioner without a warrant in front of his 8-months-pregnant wife in the vestibule of his campus housing and issued him a Notice to Appear (“NTA”) early the next morning, March 9. The NTA asserted Petitioner is removable under the FPG in that “the Secretary of State has reasonable ground to believe that your presence or activities in the United States would have potentially serious adverse foreign policy consequences for the United States.” ROA.9879-81. ICE quickly transferred Petitioner to Louisiana to appear before an IJ there, thousands of miles from his family and lawyers. ROA.2143-45, 2237.

To Effectuate the Government’s Goal of Chilling Speech, Top Government Officials Publicize Petitioner’s Arrest

President Trump and other government officials applauded Petitioner’s arrest, warning that his was “the first of many to come,” and promising to “find, apprehend, and deport” other students engaged in “pro-terrorist, anti-Semitic, anti-American activity.” ROA.7643-45, 2213, 2146-49. Federal officials have continued to make statements deeming all pro-Palestinian advocacy or protest against Israel “pro-jihadist,” “pro-Hamas,” and antisemitic, and publicizing Petitioner as a warning to other noncitizens that they, too, would be deported. *See* ROA.2248-90, 2303-95; *AAUP*, 802 F.Supp.3d at 186 (finding that, “by means of intentionally discriminatory

enforcement procedures [agency actions] led to the singling out of pro-Palestine and anti-Israel speech for a campaign of speech-chilling retribution”).

In Response to Petitioner’s Lawsuit, the Government Adds a New, Pretextual Removability Charge

Within hours of his arrest, Petitioner filed a habeas petition, *Khalil*, 2:25-cv-01963-MEF, which he amended on March 13 to challenge the constitutionality of the Rubio Determination, his detention, and the Policy under which both decisions were made. Soon after, on March 15, Armstrong warned internally that “it is likely that courts will closely scrutinize the basis” of determinations relying on speech. ROA.4310, 4314-15. Armstrong also cautioned that “Khalil intends to seek an injunction of the determination in his case[.]” *Id.*

Two days later, on March 17, DHS issued a Form I-261, Additional Charges of Inadmissibility/Deportability, which asserted an additional, pretextual charge under 8 U.S.C. §1227(a)(1)(A) (the “post-hoc charge”), alleging Petitioner failed to disclose certain information on his I-485. ROA.9826-27. DHS took this action despite its earlier determination that it did “not identif[y] any alternative grounds of removability [other than the FPG] that would be applicable to [Khalil].” ROA.4304. Specifically, DHS alleged, *inter alia*, that Petitioner failed to disclose: “that you were a member of the United Nations Relief and Works Agency for Palestine Refugees (UNRWA) from June through November 2023, as a political affairs

officer.”⁸ Petitioner subsequently amended his lawsuit, challenging the post-hoc charge as part-and-parcel of the government’s retaliation aimed at censoring his and others’ speech. Further supporting the pretextual and retaliatory nature of the post-hoc charge, experienced immigration practitioners, former IJs, and ICE officials attested to the extremely unusual timing and substance of these charges. ROA.2192-2202, 2224-44.

The I-261 also stated that “the Secretary of State has determined that your activities and presence in the United States would have potentially serious adverse foreign policy consequences and would compromise a compelling U.S. foreign policy interest,” confirming Petitioner’s FPG charge is based on his “beliefs, statements or associations” that are protected under the First Amendment. ROA.9826-27; 8 U.S.C. §§1227(a)(4)(C)(ii), 1182(a)(3)(C)(iii).

Federal Court Enjoins the FPG and Orders Petitioner’s Release, and a Separate Federal Court Vacates the Censorship Policy

On June 11, 2025, the District of New Jersey court held that the FPG, as applied to Petitioner through the Rubio Determination, is unconstitutionally vague, and enjoined the government from “seeking to remove [Petitioner] from the United States based on the Secretary of State’s determination[.]” ROA.9841-54. Yet the government continued to detain Petitioner based on the post-hoc charge alone, which

⁸ The other (similarly baseless) allegations underlying this charge are not part of the BIA decision and are therefore not on appeal.

the court recognized was “highly, highly, highly unusual.” *Khalil*, 2:25-cv-01963-MEF (D.N.J.), Dkt. 330 at 57:6. On June 20, the court ordered Petitioner released, finding “there is...something to the underlying claim that there is an effort to use the immigration charge here to punish the petitioner,” which, “of course...would be unconstitutional.” *Id.* at 61:22-62:1.

On appeal, the Third Circuit issued a split-panel decision on January 15, 2026, holding that the district court lacked subject matter jurisdiction to consider Petitioner’s claims, citing 8 U.S.C. §1252(b)(9). *Khalil v. President, United States*, 164 F.4th 259 (3d Cir. 2026). The Third Circuit stayed the mandate pending Supreme Court review. *See* ROA.16. Petitioner’s Petition for a Writ of Certiorari is due September 21, 2026, so the district court orders enjoining reliance on the FPG and Rubio Determination, and ordering Petitioner’s release, were in effect during the IJ and BIA proceedings and remain in effect today. *See id.*; *Khalil v. Trump*, No. 26A90.

On September 30, 2025, as noted *supra*, the *AAUP* court vacated and set aside the censorship Policy that targeted Petitioner for arrest and deportation. 802 F.Supp.3d 120.

The IJ and BIA Ignore Federal Court Orders, Refuse to Consider Petitioner's Constitutional Claims, and Order Him Removed in Highly Irregular Proceedings

Meanwhile, in Petitioner's removal proceedings, the IJ found Petitioner removable and denied all relief. The IJ moved with irregular speed, defied the federal court, and denied Petitioner the opportunity to develop his claims.

Petitioner denied both charges and the allegations in his NTA and I-261. ROA.5178-82. On April 8, the IJ scheduled a contested removability hearing for three days later, told Petitioner's counsel they were in the "wrong court" to conduct discovery, and refused to consider Petitioner's constitutional challenges to his removal on both charges. ROA.5189-90. On April 11, the IJ denied Petitioner's request for time to present evidence and argument and orally sustained the FPG based solely on the Rubio Determination, and held in abeyance the post-hoc charge. ROA.5206-11, 5222-23, 5261-64. The IJ also denied Petitioner's efforts to obtain discovery, finding the immigration court lacked authority to order it. ROA.9642, 9628. The IJ subsequently denied Petitioner's motion to terminate based on an egregious regulatory violation. ROA.9568.

Petitioner applied for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). ROA.9283-94. Petitioner also identified that he would seek a §1227(a)(1)(H) waiver during an evidentiary hearing if the post-hoc charge were sustained, as well as voluntary departure. ROA.9263 8 U.S.C.

§1229a(b)(4)(B); 8 C.F.R. §1240.11.

On May 22, the IJ held an Individual Calendar Hearing. Petitioner testified that he “never engaged in any antisemitic activities” and denied any support for terrorism or Hamas.⁹ ROA.5462. As to his I-485, he testified that he: (1) was never “a member” of UNRWA (nor could a person be, because it is not a membership organization); and (2) completed an internship at UNRWA for course credit and a stipend through Columbia and believed that he had accurately filled out the form by disclosing his student employment at Columbia. ROA.5490-94. DHS did not ask Petitioner a single question about this testimony. The IJ found that Petitioner “was a credible witness, candid and forthright,” and “his testimony was consistent with the evidentiary record.” ROA.6910.

On June 20, the IJ ordered Petitioner removed to Algeria, or alternatively, Syria. ROA.6894. She formally sustained the FPG *and* post-hoc charge and denied all relief (finding the Rubio Determination statutorily barred Petitioner from asylum and any waiver of the post-hoc charge)—despite the June 11 federal court order enjoining the FPG and the Rubio Determination. ROA.6897-6902. On July 17, the federal court issued a clarification order, *Khalil*, 2:25-cv-01963 (D.N.J.), Dkt. 355.

⁹ Notably, despite federal officials’ misleading public statements against Petitioner to this effect, DHS did not charge him with material support for terrorism or any terrorism-related removal grounds, having acknowledged internally that there was no basis for doing so. *See* ROA.4304.

The IJ reopened proceedings, ROA.6750, and subsequently vacated her removability finding on the FPG. ROA.6667. Petitioner sought an evidentiary hearing on his §1227(a)(1)(H) waiver of the post-hoc charge and a change of venue to New York, where he resided, as is standard practice. ROA.6198-201, 6680-84, 6717-18, 6733-37. On September 12, without holding the necessary hearing, the IJ denied the waiver and ordered removal based on the post-hoc charge. ROA.5143-57.

Petitioner appealed. ROA.5082. Petitioner explained that the FPG could not be the basis of a final removal order, both because the IJ's September 12 order did not include the charge and because it remained enjoined. ROA.2048-50, 1944-48. The BIA, as a component agency of a defendant in Petitioner's habeas case, was already aware of the injunction. *See* ROA.1829-32. Petitioner requested the BIA notify Petitioner and order supplemental briefing if it nevertheless intended to rule on the FPG despite it being vacated and enjoined. ROA.2050, 1973-77, 1946.

Petitioner also filed a Motion to Remand, seeking to introduce new evidence of First Amendment retaliation released through *AAUP* in January 2026, and conduct targeted discovery based on this new information. ROA.4981-5006.

On April 9, the BIA dismissed Petitioner's appeal and denied his Motion to Remand. ROA.1928. The BIA upheld the FPG based solely on the Rubio Determination despite still being enjoined from doing so. The BIA erroneously concluded that the injunction was no longer in effect, ignored the IJ's vacatur of the

charge, and denied Petitioner's motion for supplemental briefing on the FPG. ROA.1929-31. The BIA also upheld the post-hoc charge on a different basis than what DHS alleged in the I-261 (concluding the charge could be sustained because Petitioner allegedly failed to disclose that he was "involved and associated" with UNRWA). ROA.1932-33. The BIA also upheld the IJ's denial of all relief. ROA.1934-39. The BIA refused to consider Petitioner's constitutional claims or remand to the IJ, and affirmed the IJ's denial of discovery. ROA.1933-34. The BIA held Petitioner could pursue all his constitutional claims and develop the factual record through his PFR. ROA.1934.

On April 15, Petitioner submitted a Motion to Reconsider, explaining that the injunction was still in effect and the BIA erred in ordering removal on the FPG. ROA.1828-36. Despite the remarkable speed with which the BIA issued its April 9 decision—nine days after briefing completed—and its clear error on this issue, Petitioner's Motion to Reconsider remains unadjudicated four months after its filing. *Id.*; *Khalil*, 2:25-cv-01963 (D.N.J.), Dkt. 427.

In May 2026, news broke that federal officials engaged in actions indicative of interference and predetermination in Petitioner's removal proceedings, and several members of the BIA had to recuse themselves from the case. ROA.19-23. On May 18, Petitioner filed a Motion to Reopen with the BIA because the new information showed he was deprived of a fair hearing before a neutral adjudicator.

ROA.1740-83. Former long-time EOIR employees attested that the highly unusual treatment of Petitioner's case and abnormal recusals strongly suggest that current BIA members were involved in the underlying IJ decisions, in violation of the IJ's regulatory duty to adjudicate cases independently, their own regulatory and ethical obligations, and Petitioner's due process rights. ROA.687-733. Despite its alacrity in finding Petitioner removable, the BIA has not addressed Petitioner's Motion to Reopen.

SUMMARY OF ARGUMENT

Prohibition on BIA's Reliance on FPG. The BIA lacked authority to find Petitioner removable under the FPG. First, the *AAUP* court vacated and set aside the agency Policy, including the Rubio Determination, that specifically targeted Petitioner, as unconstitutionally viewpoint discriminatory and an arbitrary and capricious abandonment of settled agency policy against speech-based removals; that vacatur renders the Rubio Determination null and void against Petitioner before the BIA and this Court. Second, the District of New Jersey's preliminary injunction is, pending final appellate adjudication, in effect, and separately proscribed the agency's reliance on the FPG, which was thereby vacated by the IJ and not on appeal to the BIA.

Unconstitutionality of the Agency's Actions. First, the FPG on its face, and in its application to Petitioner via the Rubio Determination, is impermissible content-

, viewpoint-, and speaker-based discrimination by seeking to punish and suppress only particular viewpoints about Palestine and Israel, and only those expressed by noncitizens in the United States. Second, the FPG's application to Petitioner is void for vagueness, as it fails to give a person the required notice of proscribed conduct and permits the type of standardless and impermissible discretion deployed by the Secretary in this case. Third, the pretextual addition of a post-hoc (and false) misrepresentation charge, issued in furtherance of the government's unlawful Policy, reflects impermissible retaliation against Petitioner for exercising his speech rights and for challenging his detention and the FPG via his habeas case. Fourth, the misrepresentation statute is unconstitutionally vague as applied to Petitioner.

BIA Legal Errors In Sustaining the Charges. The Secretary failed to meet the statutory mandates necessary to invoke the FPG, so the BIA erred in sustaining the charge. Nor did the BIA follow its own precedent in assessing the Rubio Determination. The BIA further erred in upholding the pretextual post-hoc charge based on an uncharged allegation, thereby violating Petitioner's statutory, regulatory, and due process rights to notice. Additionally, the post-hoc charge cannot be sustained because Petitioner, whom the IJ found credible, believed he accurately completed his I-485 by disclosing his employment at Columbia, and any perceived omission on the I-485 was not willful, or material to his admissibility.

Other BIA Reversible Errors: The BIA also erred by: (i) denying Petitioner

a fair or neutral adjudication; (ii) failing to terminate proceedings in light of Petitioner’s undisputedly unlawful arrest (or even address the argument); (iii) failing to permit Petitioner to conduct discovery; and (iv) violating its own rules in denying relief, in the face of undisputed evidence favoring Petitioner.

STANDARD OF REVIEW

This Court reviews the BIA’s decision and considers the IJ’s decision only to the extent it influenced the BIA. *Francois v. Garland*, 120 F.4th 459, 464 (5th Cir. 2024). Questions of law are reviewed de novo. *Id.* Factual findings are reviewed for substantial evidence. Mixed questions of law and fact are reviewable under §1252(a)(2)(D). *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 225, 227-28 (2020).

ARGUMENT

I. TWO FEDERAL COURT ORDERS PROSCRIBED THE BIA’S RELIANCE ON THE FPG.

A. The BIA Lacked Authority to Sustain the FPG Because it is Predicated on a Vacated Government Policy.

In *AAUP*, described *supra*, the court found that a final agency action—by means of a Policy implemented by DHS and DOS, including via the Rubio Determination specifically targeting Petitioner (and four other noncitizen students)—was unconstitutionally viewpoint-discriminatory and designed to broadly censor pro-Palestinian speech. *AAUP*, 802 F.Supp.3d at 141-50 (discussing application of Policy to effectuate Petitioner’s removal); *see also id.* at 173 (defining

vacated agency action as “*to target a few [i.e. Petitioner] for speaking...with the goal of tamping down pro-Palestinian student protests*” (emphasis added)); *id.* at 191 (agency’s action targeting Petitioner, subjecting him to “tiger team” review, and referring him to Rubio for removal satisfies APA’s “final agency action test”).

The Court found the agency action violated the First Amendment, *id.* at 192, and was also an arbitrary and capricious departure from prior DHS guidance instructing that a “noncitizen’s exercise of their First Amendment rights...should never be a factor in deciding to take enforcement action.” *Id.* The Court thus held that the agency Policy—namely the arrest and attempted deportation of Petitioner (and four others) including via the Rubio Determination—“and the implementation thereof as set forth in the findings”—was “VOID, ILLEGAL, SET ASIDE, AND VACATED,” under APA, 5 U.S.C. §706(2). ROA.3739-48; *AAUP*, No. 25-10685-WGY, 2026 WL 524753, at *1 (D.Mass. Jan. 22, 2026).

As such, application of this final agency action, which includes the Rubio Determination, has been set aside and declared null and void.¹⁰ It cannot be a basis for his removal, as a §706(2) vacatur nullifies agency action *in toto* and forecloses any reliance by the government even against a non-party to the *AAUP* case like

¹⁰ The BIA “acknowledge[d] the findings of the United States District Court judge specific to the respondent” in *AAUP* and “the evidence discussed in that decision” but held that Petitioner had not shown it was “reasonably likely to change the Immigration Judge’s rulings[.]” ROA.1810. That reasoning is illogical and contrary to well-established law.

Petitioner and in any proceeding, including those before the BIA and this Court. *See Braidwood Mgmt., Inc. v. Becerra*, 104 F.4th 930, 951 (5th Cir. 2024) (“[S]etting aside agency action under §706 has ‘nationwide effect,’ is ‘not party-restricted,’ and ‘affects persons in all judicial districts equally.’” (citation modified)), *rev’d on other grounds*, *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748 (2025)); *Data Mktg. P’ship, LP v. Dep’t of Labor*, 45 F.4th 846, 859 (5th Cir. 2022); *Bautista v. Santacruz*, 820 F.Supp.3d 1016, 1026-27 (C.D.Cal. 2026) (vacatur of DHS policy precluded IJs from relying on BIA decision mirroring DHS policy).

Likewise, a set-aside of the Policy was necessary to protect the First Amendment interests of the *AAUP* plaintiffs—namely, to avoid the chill the Policy produced with the arrest and attempted removal of Petitioner. *See AAUP*, 802 F.Supp.3d at 162-67. Petitioner’s removal pursuant to the FPG would impermissibly deprive the *AAUP* plaintiffs of the benefit of the vacatur they achieved. *See Corner Post, Inc. v. Bd. of Governors of Fed. Rsv. Sys.*, 603 U.S. 799, 831 (2024) (Kavanaugh, J., concurring) (stressing that in APA actions “brought by unregulated but adversely affected parties,” vacatur is the only way to protect that party’s interests); *In re Clarke*, 94 F.4th 502, 512 (5th Cir. 2024) (in APA suit brought by third parties for review of agency action specific to regulated individual, finding that “should plaintiffs prevail on their APA challenge, this court just ‘set aside’ [the

agency] *ultra vires* rescission action, with nationwide effect.”)¹¹

Accordingly, the FPG as applied to Petitioner is null and void and cannot sustain the removal order.¹²

B. The BIA Lacked Authority to Sustain the FPG Because its Use Was and Is Enjoined and the IJ Had Vacated the Charge.

Even assuming the *AAUP* vacatur does not categorically foreclose removal, the preliminary injunction in *Khalil*, 2:25-cv-01963-MEF (D.N.J.), Dkt. 299, *as clarified by* Dkts. 350, 355, independently barred and continues to bar DHS and EOIR from relying on the FPG to remove Petitioner. ROA.16, 1828-36. The BIA’s attempt to deflect this obvious principle by asserting it didn’t know about the continuing viability of the injunction during the ongoing Third Circuit proceedings, ROA.1806, is far-fetched, given that the BIA is a component agency of the Attorney General, a party to those high-profile proceedings, and previously *sua sponte* issued orders immediately after significant developments there. ROA.1829-32, 5027. Regardless of whether the Third Circuit’s now-stayed mandate may *ultimately* issue and vitiate the existing injunction, the injunction categorically barred the BIA from

¹¹ Nothing in *Trump v. CASA, Inc.*, alters this clear law. *See* 606 U.S. 831, 847 n.10 (2025).

¹² While the *AAUP* court did not review the government’s addition of the post-hoc charge, the court’s factual findings demonstrating a broader Policy to target Petitioner, specifically, for his speech, is powerful predicate evidence that the post-hoc charge is a continuation of that retaliatory policy. *See supra* Section II.C.1.

relying on the FPG in issuing its decision. This Court cannot affirm the BIA's disregard of binding court orders.

Additionally, the BIA's statement that the IJ "found the respondent removable," ROA.1806, under the FPG on September 12 is plainly incorrect. In fact, the IJ recognized in her September 12 written decision that she could not rely on the enjoined FPG, which vacated her prior oral finding of FPG-removability. *See* ROA.6667 (Vacatur); ROA.5150-51 (incorporating Vacatur Order and describing it as "Court's Order Vacating Its June 20, 2025 decision"). The record shows: the IJ vacated the FPG finding, as required by the injunction; the September 12 decision contained no independent finding on the FPG; and DHS never cross-appealed, constituting a waiver. *See A.J. Valdez and Z. Valdez*, 27 I&N Dec. 496, 496 n.1 (BIA 2018). The record accords with EOIR's counsel's unequivocal representation to the Third Circuit that the FPG was *not* part of the removal order on appeal.¹³

The BIA therefore erred in sustaining removal based on the enjoined FPG.

¹³ *See Khalil v. President, U.S.*, No. 25-2162 (3d Cir. Oct. 22, 2025), Dkt. 125 at 59:4-10; 61:10-14; Dkt. 122.

II. THE FPG AND THE POST-HOC CHARGE CANNOT SUPPORT PETITIONER'S REMOVAL BECAUSE THEY ARE UNCONSTITUTIONAL.

A. The FPG Violates the First Amendment, Facially and As Applied.

Assuming *arguendo* that the FPG is a live issue, it is unconstitutional on several grounds.

1. The FPG Facially Violates the First Amendment.

The FPG authorizes the deportation of noncitizens for their constitutionally protected “beliefs, statements, or associations,” if the Secretary of State “reasonably” believes their presence “would compromise a compelling United States foreign policy interest.” §§1182(a)(3)(C), 1227(a)(4)(C)(i). As such, it violates the First Amendment’s cardinal rule against viewpoint discrimination. *See, e.g., Janus v. Am. Fed’n of State, Cnty., and Mun. Emps., Council 31*, 585 U.S. 878, 892 (2018) (citation modified) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics...or other matters of opinion...”); *see also Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (“Freedom of speech and of press is accorded aliens residing in this country.”). Like the anti-disparagement provision struck down in *Matal v. Tam*, the FPG restricts speech “based on the government’s disapproval of the speaker’s choice of message.” 582 U.S. 218, 250 (2017) (Kennedy, J., concurring).

Whether that disapproval stems from the Secretary’s own hostility to the message, or the effect of the message on audiences at home or abroad, makes no difference: “[A] speech burden based on audience reactions is simply government hostility and intervention in a different guise,” and just as impermissible. *Id.* That noncitizens face the threat of deportation for expressing views that the Secretary deems threatening to his understanding of U.S. foreign policy interests is exacerbated by the Secretary’s unbridled discretion. *See also infra* Section II.B.1. And, notably, if that discretion extends to the current Secretary, it will extend to any future Secretary’s assertions about which viewpoints offend future administrations’ foreign policy interests.

Viewpoint discriminatory statutes like the FPG are “likely...per se invalid.” *Honeyfund.com Inc. v. Governor*, 94 F.4th 1272, 1278 (11th Cir. 2024); *see also*, e.g., *Iancu v. Brunetti*, 588 U.S. 388, 398-99 (2019); *Merriott v. City of Bossier City*, 179 F.4th 393, 411 (5th Cir. 2026). Even if the FPG were not viewpoint discriminatory, it is undoubtedly content discriminatory, as it “applies to particular speech because of the topic discussed or the idea or message expressed,” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)—namely, any message the Secretary believes (sincerely or not) harms U.S. foreign policy. Content-based restrictions are likewise “presumptively unconstitutional” and subject to strict scrutiny. *Chiles v. Salazar*, 146 S. Ct. 1010, 1021 (2026) (quoting *Reed*, 576 U.S. at 163).

Finally, the FPG also unconstitutionally discriminates based on speaker identity because it selectively restricts the speech of noncitizens, and proscribes for them what citizens may freely say. “The Government may not...deprive the public of the right and privilege to determine for itself what speech *and speakers* are worthy of consideration.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 341 (2010) (emphasis added). “[T]hese categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.” *Id.* at 340. Thus, “speaker-based laws demand strict scrutiny when they reflect the Government’s...aversion to what the disfavored speakers have to say.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994) (citation modified). That is true here, where the FPG authorizes the Secretary to restrict the disfavored speech of noncitizens precisely *because* they may speak to the public with unique experience or authority on matters related to U.S. foreign policy with which the Secretary disagrees.

The FPG—as applied here—cannot survive strict scrutiny, which requires the government to prove its regulation is “narrowly tailored to serve compelling state interests.” *Reed*, 576 U.S. at 163. Far from advancing a compelling governmental interest, the government has no “valid, let alone substantial” interest “related to the suppression of free expression” even if the expression is deemed repugnant to U.S. interests. *Moody v. NetChoice, LLC*, 603 U.S. 707, 740 (2024). Equally, the

government has no legitimate interest in suppressing speech if it “may have an adverse emotional impact on the audience,” regardless of whether the audience is “foreign officials” or “American citizens.” *Boos v. Barry*, 485 U.S. 312, 322 (1988).

Moreover, the blanket term “foreign policy,” especially as interpreted by the government to encompass any policy that is not purely domestic in scope, is too open-ended to satisfy heightened scrutiny. *See Khalil v. Trump*, 784 F.Supp.3d 705, 761 (D.N.J. 2025) (listing 33 foreign policy “interests” identified in various governmental statements, including “fostering world economic stability” and “creating good will towards the United States”), *vacated and remanded sub nom. Khalil*, 164 F.4th 259. “The First Amendment requires a more careful assessment and characterization of an evil in order to justify a regulation as sweeping as this.” *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 819 (2000); *accord Republican Party of Minn. v. White*, 536 U.S. 765, 775 (2002).

Even if the government’s undefined foreign policy interests were deemed compelling, deploying a broad, subjective conception of “foreign policy” does not advance it in a narrowly tailored manner. Supreme Court precedents “make clear that concerns of...foreign relations do not warrant abdication of the judicial role,” requiring courts to carefully scrutinize legislation to ensure its speech restriction is tightly tailored to those interests. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 34 (2010); *see also Sessions v. Dimaya*, 584 U.S. 148, 185 (2018) (Gorsuch, J.,

concurring).

The FPG lacks *any* elements of tailoring. It authorizes the Secretary to render deportable a noncitizen because of their constitutionally protected “past, current, or expected beliefs, statements, or associations,” if the Secretary believes their presence “would compromise a compelling United States foreign policy interest.” §§1182(a)(3)(C), 1227(a)(4)(C)(i). And the provision has been construed to require only that the Secretary assert, rather than show, that the statutory standard has been satisfied. *See Massieu v. Reno*, 915 F.Supp. 681, 710 (D.N.J.), *rev’d on other grounds*, 91 F.3d 416 (3d Cir. 1996).

2. The FPG violates the First Amendment As Applied.

The FPG also violates the First Amendment as applied to Petitioner through the Rubio Determination. The Rubio Determination freely admits that Petitioner was rendered removable based on “beliefs, statements, or associations” that are “otherwise lawful”—including his “participation” in protests that Secretary Rubio deemed “antisemitic” and “disruptive.” ROA.9768-69. The Determination further declares that “condoning anti-Semitic conduct and disruptive protests in the United States” would undermine U.S. foreign policy interests. *Id.* That is blatant viewpoint (as well as content) discrimination, as the government acted on its “disapproval of a subset of messages it finds offensive.” *Matal*, 582 U.S. at 249 (Kennedy, J., concurring); *id.* at 223 (plurality op.); *accord Robinson v. Hunt Cnty.*, 921 F.3d 440,

447 (1st Cir. 2019). *See also Reed*, 576 U.S. at 163. Indeed, the *AAUP* court explicitly found that the Rubio Determination, as applied to Petitioner specifically, reflects an unconstitutional viewpoint discriminatory policy to suppress the message of support for Palestinian rights. *AAUP*, 802 F.Supp.3d at 141-150, 185-190.

The Rubio Determination’s viewpoint and content-based discrimination fails strict scrutiny for all the reasons discussed above. Regardless of whether the government considers a message antisemitic and offensive, it cannot legitimately seek to suppress it. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992). And even if the government could claim a compelling foreign-policy interest to justify a viewpoint- and content-discriminatory application of the FPG, it has failed to articulate such an interest here. The Determination does not even suggest that Petitioner’s speech affected U.S. relations with *any* foreign country. *Khalil*, 784 F.Supp.3d at 727.

B. The FPG is Unconstitutionally Vague, Facially and As Applied.

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A law can be impermissibly vague for two independent reasons: where it fails to “provide the kind of notice that will enable ordinary people to understand what conduct it prohibits,” or where it would “authorize and even encourage arbitrary and discriminatory enforcement.” *City of Chicago v. Morales*,

527 U.S. 41, 56 (1999) (citation modified). The FPG fails on both counts: it does not give proper notice to noncitizens residing in the country which “beliefs, statements, or associations” will result in their deportation; and it provides government officials with unfettered discretion to target subjectively disfavored speech.

The nature of the enactment affects “[t]he degree of vagueness that the Constitution tolerates.” *Village of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982). The “most exacting vagueness standard” applies to statutes governing removal because deportation is “a particularly severe penalty.” *Dimaya*, 584 U.S. at 156-57 (citations modified). And when regulations affecting speech are involved, particularly “rigorous adherence to [due process] requirements is necessary to ensure that ambiguity does not chill protected speech.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012); see *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997). Both thumbs are placed on Petitioner’s side of the scale because the FPG authorizes removal on the basis of constitutionally protected expression.

1. The FPG is Facially Void for Vagueness.

The text of the FPG provides no notice to noncitizens living in the country as to what speech could be grounds for removal. The statute does not clarify what are “potentially serious adverse foreign policy consequences” or what “would compromise a compelling United States foreign policy interest.” Nor is there any case law or administrative guidance to shed light on that standard. See *Khalil*, 784

F.Supp.3d at 720-23; *Massieu*, 915 F.Supp. at 700-01.

It is also impossible to know what expression might run afoul of the FPG because it would require knowing, at any given moment, what our foreign policy is, which is “unpublished, ever-changing, and often highly confidential.” *Massieu*, 915 F.Supp. at 700. The Constitution requires that the statute’s language “convey[] sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices,” *Jordan v. De George*, 341 U.S. 223, 231-232 (1951), but there cannot be a common understanding of what might affect our country’s foreign policy when “no one outside the Department of State and, perhaps, the President ever knows what our nation’s frequently covert foreign policy *is* at any given time.” *Massieu*, 915 F.Supp. at 700.

The FPG is also unconstitutionally vague because it gives the Secretary unbridled discretion, authorizing “wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.” *United States v. Williams*, 553 U.S. 285, 306 (2008); *cf. Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (statute had no standard for “credible and reliable”). According to the government, the decision also rests entirely with the Secretary, with no administrative or judicial review of his determination. *Cf. Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (enforcement depended “entirely [] upon whether or not a policeman is annoyed”).

This subjective enforcement standard impermissibly “would allow persons to be punished merely for peacefully expressing unpopular views.” *Cox v. State of Louisiana*, 379 U.S. 536, 551-52 (1965); *see also, e.g., Grayned*, 408 U.S. at 113 n.22 (collecting cases). And it undercuts the separation of powers principle “that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not.” *Dimaya*, 584 U.S. at 156; *accord id.* at 181-83 (Gorsuch, J., concurring). *See Massieu*, 915 F.Supp. at 707-711 (holding the FPG “represents an unconstitutional delegation of legislative power by which Congress eliminated the judiciary’s constitutionally required function of review while abdicating its lawmaking responsibilities in favor of standardless executive discretion”).

2. The FPG is Unconstitutionally Vague As Applied Through the Rubio Determination.

The FPG is also unconstitutionally vague as applied to Petitioner because it is an arbitrary and standardless application of a punitive statute, with no notice about what it prohibits when applied to lawful speech. *See Rabe v. Washington*, 405 U.S. 313, 315-16 (1972); *Bouie v. City of Columbia*, 378 U.S. 347, 351-56 (1964). As the D.N.J. court recognized, there is a complete mismatch between the statute’s text, legislative history, and enforcement history—which contemplate activities abroad that affect U.S. international relations—and the Rubio Determination, which focuses

exclusively on Petitioner’s protected expression in the U.S. and does not identify any impact on U.S. foreign relations. *See Khalil*, 784 F.Supp.3d at 719-67.

The operative phrase in the FPG, “foreign policy,” has been widely understood to concern a country’s relation with other countries. *Id.* at 724-26. This interpretation is further supported by the statute’s legislative and enforcement histories against foreign government officials. *See id.* at 743-47. Yet, here, the FPG was applied to Petitioner’s expression in the U.S., with no finding that Petitioner’s speech affected U.S. relations with foreign countries. Instead, the Rubio Determination describes a *domestic* impact to “Jewish students in the United States.” *Id.* at 730-32. Thus, despite asserting that Petitioner’s presence in the U.S. would “compromise a compelling United States foreign policy interest,” the Rubio Determination does not identify any such interest, much less explain how it has been compromised. Respondent’s application of the FPG to Petitioner, under the theory that a “foreign policy interest” is whatever the Secretary says it is, “leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against.” *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921).

C. The Post-Hoc Charge Is in Furtherance of the Government’s Censorship Policy and Constitutes First Amendment Retaliation.

1. Petitioner Satisfies the First Amendment Retaliation Factors.

Government actions “designed to retaliate against and chill political

expression strike[] at the heart of the First Amendment.” *Rolf v. City of San Antonio*, 77 F.3d 823, 827 (5th Cir. 1996); *Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002) (retaliation is dangerous as it enables the government to “obtain indirectly a result that it could not command directly.”). First Amendment retaliation claims are analyzed under the *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle* framework. 429 U.S. 274 (1977) (“*Mt. Healthy*”). Petitioner must demonstrate that “(1) he was engaged in constitutionally protected activity; (2) the defendants’ actions caused him to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) the defendants’ adverse actions were substantially motivated against [his] exercise of constitutionally protected conduct.” *Merriott*, 179 F.4th at 413 (citation modified). After Petitioner makes this prima facie case, the burden shifts to the government to prove, by a preponderance of the evidence, it would have taken the same adverse action even absent the protected speech. *Mt. Healthy*, 429 U.S. at 287.

There is overwhelming, *uncontested* evidence that the government added the post-hoc removability charge in retaliation for Petitioner’s protected, pro-Palestinian advocacy and his lawsuit challenging the FPG. The addition of the post-hoc charge and the almost unprecedented decision to keep Petitioner detained under it after the district court’s FPG injunction, was likewise in furtherance of the government’s unlawful censorship Policy, by maximizing Petitioner’s punishment—and

corresponding chill on others' speech. Because the government would not have added the post-hoc charge absent Petitioner's protected activities, Petitioner is entitled to relief.¹⁴

a. *Mt. Healthy* factors 1 and 2: Petitioner engaged in protected activity and the government took retaliatory action.

Petitioner's political speech "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). Petitioner's lawsuit challenging the FPG and his unlawful detention was also an exercise of the right to petition, "one of the most precious of the liberties safeguarded by the Bill of Rights." *Lozman v. Riviera Beach*, 585 U.S. 87, 101 (2018).

As to injury, the addition of the post-hoc charge constitutes an adverse action sufficient to deter a person of ordinary firmness from exercising their First Amendment rights. The Supreme Court has "long recognized" that deportation is "a particularly severe 'penalty'" for LPRs. *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (citation modified); *see also Ragbir v. Homan*, 923 F.3d 53, 71-72 (2d Cir.

¹⁴ As this Court has found, "[t]he causation issue in first amendment cases is purely factual[.]" *Pro. Ass'n of Coll. Educators, TSTA/NEA v. El Paso Cnty. Cmty. Coll. Dist.*, 730 F.2d 258, 266 (5th Cir. 1984). For the reasons set forth in section IV.C, to the extent this Court finds that there are insufficient or otherwise disputed facts necessary for Petitioner's constitutional claims, it must grant the pending Hobbs Act Motion, Dkt. 28. Or at a minimum, it must remand to the agency with instructions to permit adequate factual development.

2019) (threat of removal constitutes adverse action under First Amendment analysis). In addition, the government’s decision, following the district court’s FPG injunction, to shift its detention justification to the post-hoc charge was “highly unusual,” *Khalil*, 2:25-cv-01963-MEF (D.N.J.), Dkt. 330 at 57:6; *see also* ROA.2154, 2231-32, 2239, 2241-44, and was an “adverse action” obviously designed to exacerbate punishment and chill. *See Mohammed H. v. Trump*, 781 F.Supp.3d 886, 892 (D.Minn. 2025).

The undisputed evidence demonstrates that Petitioner’s speech, like that of others who share his views, has been curtailed because of the government’s actions here. ROA.2211-14, 2201-02, 2208, 2238-39; *Khalil*, 2:25-cv-01963-MEF (D.N.J.), Dkt. 345-4, ¶¶ 5-13 (post-hoc charge causing Petitioner to live in a “constant state of hypervigilance,” “censor [himself] before speaking” and constantly “double- and triple-check everything I say or write”); *see also AAUP*, 802 F.Supp.3d at 194. *See Merriott*, 179 F.4th at 413-14 (in a retaliation case, “[t]he effect on freedom of speech may be small” and finding “self-censor[ship] for fear of repercussion” a “cognizable injury”) (citation modified).

b. *Mt. Healthy* factor 3: Petitioner’s protected expression was a substantial or motivating factor for the government’s actions.

Evidence of causation can be objective and subjective, and can include government statements, timing and proximity of the adverse action, a pattern of

hostility, and other context by which retaliation may be “plausibly inferred.” *Petzold v. Rostollan*, 946 F.3d 242, 253-54 (5th Cir. 2019); *see also N. Miss. Commc’ns, Inc. v. Jones*, 951 F.2d 652, 655 (5th Cir. 1992); *Thompson v. McGehee*, No. 25-10196, 2026 WL 2069890, at *9 (5th Cir. July 17, 2026). Here, the undisputed record shows that Petitioner’s protected expression——both his political speech on which the FPG was expressly based and his filing of a lawsuit challenging it——was “a substantial” or “a motivating factor,” *Mt. Healthy*, 429 U.S. at 287, in the government’s decision to add the post-hoc charge. *Pro. Ass’n of Coll. Educators, TSTA/NEA*, 730 F.2d at 266 (causation shown where government’s “improper motive set[] in motion the events that le[]d to [the adverse action] that would not otherwise occur.”); *see also Jordan v. Ector Cnty.*, 516 F.3d 290, 300-01 (5th Cir. 2008). The record also shows that the post-hoc charge was, like the FPG, in furtherance of the government’s unlawful censorship Policy, added with the goal of chilling others from engaging in similar expressive activity. ROA.2146-49, 2151-54, 2192-2202, 2224-44, 2248-90, 2303-95, 3783, 4304. The *AAUP* court’s findings that Petitioner was specifically targeted by a Policy to punish him for his speech, conclusively demonstrates the government’s retaliatory intent; the addition of the post-hoc charge days after the retaliatory FPG charge sits naturally on this retaliatory continuum.

The government’s improper motive from the outset—to punish Petitioner for political speech that it disfavored and to chill similar political speech in the U.S.—

“set[] in motion” an unbroken causal chain of events, leading to the addition of the post-hoc charge on March 17. *See Pro. Ass’n of Coll. Educators, TSTA/NEA*, 730 F.2d at 266; *see also Jordan*, 516 F.3d at 300-01. The throughline of the government’s conduct is a “tight chain of events” that shows a continuing effort to secure any available basis to remove Petitioner for his speech. *Petzold*, 946 F.3d at 253–54.

First, the EOs, as well as internal government documents and public statements, provide direct and circumstantial evidence that the government decided to deport Petitioner because of his protected speech. ROA.2146-49, 2248-90, 2303-95, 2293-99, 3811-3950, 3988-90, 4957-59; *see Ragbir*, 923 F.3d at 70-71 (citing immigration officials’ remarks as indicia of retaliation); *Gutierrez-Soto v. Sessions*, 317 F.Supp.3d 917, 934 (W.D.Tex. 2018) (same); *Mohammed H. v. Trump*, 786 F.Supp.3d 1149, 1156 (D.Minn. 2025). DHS’s subsequent investigation was aimed at finding a basis to remove Petitioner for his speech. ROA.4269-73. It included a review of Petitioner’s approved I-485 as well as tabloid articles that DHS would only *later* proffer as support for the post-hoc charge, after Petitioner’s lawsuit challenging the FPG. *Id.* Yet, on March 7, DHS concluded that only the FPG “would be applicable” to Petitioner. ROA.4304. The stated basis for his March 8 arrest, detention, and initiation of removal proceedings expressly relied on Petitioner’s protected political speech. ROA.9768-69. As *AAUP* found, the FPG was applied to

Petitioner specifically as part of the government’s viewpoint discriminatory Policy. 802 F.Supp.3d at 175. Thus, the addition of the post-hoc charge, a mere eight days later, and after Petitioner sued to challenge the FPG, is a product of the same unconstitutional Policy. It carries with it the “taint of the unconstitutional conduct.” *Ragbir*, 923 F.3d at 79.

The March 17 addition of the post-hoc charge was also substantially motivated by Petitioner’s March 13 legal challenge to the FPG’s constitutionality. The four-day interval between Petitioner’s legal challenge and the lodging of the new charge, particularly viewed in light of DHS’s determination just days earlier that no other removal charge applied, satisfies the causation prong of Petitioner’s prima facie retaliation case. *See Evans v. City of Houston*, 246 F.3d 344, 354 (5th Cir. 2001) (finding five-day lapse sufficient and noting this Court has found “up to four months” sufficient evidence of causal link of retaliation); *N. Miss. Commc’ns, Inc.*, 951 F.2d at 655 (evidence of “timing, hostility and admissions ... established the motivating factor inquiry”).

Context and admissions add to the powerful inference stemming from the timing. In the days between arresting Petitioner under the FPG and issuing the post-hoc charge, federal officials praised his arrest and detention and confirmed that the action was taken because of his speech. ROA.2146-49. President Trump openly admitted the censorship Policy’s broadly repressive intention by stating that

Petitioner’s “arrest is the first of many to come.” ROA.7645. In addition, federal officials recognized that the FPG was constitutionally vulnerable, which served as a motivating factor to add the post-hoc charge to ensure Petitioner’s continued detention and removability, thereby chilling the speech of others. ROA.4310, 4314-15. Statements by federal officials after the post-hoc charge have only confirmed that Petitioner’s protected, disfavored, speech remains their target. ROA.2303, 2315, 2332; *AAUP*, 802 F.Supp.3d at 164-72. Further, the record contains undisputed attestations from expert immigration practitioners that the addition of the post-hoc charge was highly unusual—both in timing and substance. ROA.2192-95-2202, 2224-44.¹⁵

Finally, Petitioner’s case is replete with a “pattern of hostility” towards Petitioner for his speech, including a series of abuses of, and departures from, ordinary immigration process to achieve a retaliatory purpose. ROA.687-733, 802, 2140-45, 2151-61, 2192-2244, 5012, 5056-68, 6680-84; *Jordan*, 516 F.3d at 300-01.

¹⁵ While Petitioner “certainly do[es] not need” to prove that he did not intentionally misrepresent a material fact on his I-485 to succeed on his retaliation claim, the meritless nature of the charge, as set forth in Section III.B.2, is “powerful evidence” of its pretextual nature. *Hill v. City of Scranton*, 411 F.3d 118, 130 (3d Cir. 2005).

c. The government has not and cannot meet its burden.

Following Petitioner’s showing, the burden “shifts to the [government] to prove by a preponderance of the evidence that it would have made the same decision in the absence of the protected conduct.” *N. Miss. Commc’ns, Inc. v. Jones*, 874 F.2d 1064, 1069 (5th Cir. 1989). The government cannot make this showing because its own admissions make clear that the addition of the post-hoc charge was, and continues to be, motivated by Petitioner’s speech. *Scott v. Flowers*, 910 F.2d 201, 209-10 (5th Cir. 1990). In addition, despite having ample opportunity, Respondent made no record to demonstrate it would have sought Petitioner’s removal or added the post-hoc charge for *any reason* other than antipathy toward his speech. The pretext of the post-hoc charge is plain, and “[o]n this record, these events appear to be reverse-engineered justifications for speech-based targeting and enforcement.” *Mohammed H.*, 786 F.Supp.3d at 1156-57; *see Robinson v. Jackson State Univ.*, 714 F. App’x 354, 362-63 (5th Cir. 2017) (in employment retaliation case, finding employer’s stated reason for terminating plaintiff pretextual, evidenced by its “changing explanations, departure from termination protocol, and temporal proximity.”).

2. AADC Does Not Bar Petitioner’s Retaliation Claim.

In *Reno v. American-Arab Anti-Discrimination Committee* (“AADC”), the Supreme Court stated that “an alien unlawfully in this country has no constitutional

right to assert selective enforcement as a defense against his deportation.” 525 U.S. 471, 488 (1999). This holding has no application here.

First, *AADC*’s limitation on selective enforcement claims has no bearing on Petitioner’s doctrinally distinct First Amendment retaliation claim. Petitioner is not challenging his prosecution based on differential treatment of his group membership or identity. See *AADC*, 525 U.S. at 473-75 (alleging selection for enforcement based on membership in a group deemed to be an international terrorist organization, while ignoring others similarly situated); *United States v. Armstrong*, 517 U.S. 456 (1996) (alleging selection based on race). Petitioner challenges the government’s punishment meant to suppress a *message* it categorically disagrees with, which is a classic First Amendment claim, and done pursuant to a broader government *policy* to censor and suppress that disfavored speech by noncitizens. See *Vullo*, 602 U.S. 175; *Lozman*, 585 U.S. at 88-89. Petitioner’s speech is clearly protected by the First Amendment, while the expression at issue in *AADC* (material support for terrorism) is not.

Second, the cases are in fundamentally different postures. *AADC* involved a *collateral* attack to the commencement of removal proceedings, to which 8 U.S.C. §1252(g)’s PFR-channeling provision applies. Here, Petitioner’s claim *is brought in*

a *PFR*, which is not subject to §1252(g) limitations.¹⁶ *See AADC*, 525 U.S. at 495 (Ginsburg, J., concurring). Third, to the extent that *AADC* limited noncitizens’ *constitutional* right to bring a selective enforcement claim even in the *PFR* context, Congress subsequently enacted §1252(a)(2)(D), which provides Petitioner an independent *statutory* right to seek review of any “constitutional claims or questions of law” in his *PFR*.

Fourth, the *AADC* rule, by its terms, applies to persons “*unlawfully*” present—i.e., those who entered without inspection or admission or who overstayed authorization. 8 U.S.C. §§1182(a)(6)(A)(i), 1182(a)(9)(B)(ii). It does not apply to *lawful* permanent residents, like Petitioner.

Finally, even if *AADC* applies, it expressly recognizes an exception for cases of “outrageous” discrimination, as is present here. *AADC*, 525 U.S. at 491; *see Ragbir*, 923 F.3d at 69 (setting forth *AADC* exception multifactor test). Petitioner’s protected speech implicates the “apex” of First Amendment protections, and the government’s retaliation was specifically because of “disapproval” of his message. *Id.* at 69-70. Indeed, the arrest, detention, and attempted removal of Petitioner, a lawful permanent resident, via an unprecedented and pretextual use of the INA effectuated a government policy to censor and suppress speech in the U.S. that it

¹⁶ Respondent concedes as much. Dkt. 62 at 20 (challenges to removal orders “must be channeled into a petition for review”).

disfavors about Israel and its actions in Gaza during a period of immense public interest on the topic. *See Vullo*, 602 U.S. at 187 (use of otherwise valid enforcement authority to suppress political viewpoints “is uniquely harmful to a free and democratic society.”). That the highest levels of government intentionally publicized Petitioner’s punishment to chill others into silence, and that the government is aware of the ongoing and widespread chilling effect that both its actions against Petitioner and its continued publicizing of those actions have had, are nothing short of “outrageous” discrimination. *Ragbir*, 923 F.3d at 69; *AAUP*, 802 F.Supp.3d at 145-50, 190; ROA.2146-49, 2211-14, 2201-02, 2208, 2238-39, 2248-90, 2303-95.

3. The Post-Hoc Statute Is Unconstitutionally Vague As Applied.

The operative language in the statute predicates deportability, by reference to an inadmissibility ground, on any noncitizen “willfully misrepresenting a material fact” on an application for an immigration benefit—applied to Petitioner, his I-485. *See* §1227(a)(1)(A) (citing §1182(a)(6)(C)(i)). But the statute provides no definition or notice of what constitutes willful misrepresentation of a material fact; noncitizens must instead rely on the applicable form. Here, the I-485 question on membership and involvement is “vague and ambiguous and has always been problematic in that applicants do not understand how to answer.” ROA.2230; *Hamdi v. USCIS*, No. EDCV1000894VAPDTBX, 2012 WL 13135302, at *6 (C.D.Cal. Aug. 29, 2012). As discussed *infra* Section III.B.2.a, Petitioner believed he answered the form

correctly, and nothing in the statute or form provides definition or notice of the “material” information he allegedly did not state. The statute is therefore unconstitutionally vague as applied to Petitioner and the post-hoc charge should not have been sustained. *See Morales*, 527 U.S. at 56.

III. THE BIA ERRED IN SUSTAINING BOTH CHARGES BECAUSE THEY FAIL TO MEET THEIR LEGAL REQUIREMENTS.

A. The Rubio Determination Is Legally Deficient and Cannot Support the FPG.

The BIA misapplied its own precedent and erred in sustaining the FPG because DHS failed to fulfill statutory requirements.

1. The Rubio Determination Failed To Fulfill Statutory Requirements.

The agency failed to examine whether a “reasonable” basis exists for the Rubio Determination, instead treating its mere existence as “presumptive and sufficient evidence” of Petitioner’s deportability that was “facially valid.” ROA.1807. But this Court can—and must—determine whether the Rubio Determination is compliant. It clearly is not—the determination, on its face, bears no relation to the Secretary’s authority under the statute.

First, by its terms, the statute cannot be used against protected speech occurring inside the country, as the Determination here does. The subjunctive tense of the relevant statutory phrase—authorizing the Secretary to render a noncitizen removable for “beliefs, statements or associations [that] *would be* lawful within the

United States,” §1182(a)(3)(C)(iii) (emphasis added)—is properly read to apply only to speech occurring *outside* the country that nevertheless “would be” lawful inside it. *See* §1227(a)(4)(C)(ii) (“The exceptions described in clauses (ii) and (iii) of section 1182(a)(3)(C) of this title shall apply to deportability under clause (i) in the same manner as they apply to inadmissibility under section 1182(a)(3)(C)(i) of this title.”); *Khalil*, 784 F.Supp.3d at 744, 750 (finding FPG’s legislative and enforcement histories support inference that FPG applies to activity outside the U.S.); *see also Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (courts should avoid interpretations of statutes that raise serious constitutional doubts).

Second, the Rubio Determination does not provide any “reasonable” basis, as required by §§1227(a)(4)(C), 1182(a)(3)(C), because it nowhere addresses how Petitioner’s protected expression within the U.S. “compromise[d] a compelling United States foreign policy interest,” §1182(a)(3)(C)(iii), or even that it affected U.S. relations with any foreign government. *See* Section II.B.2; *Khalil*, 784 F.Supp.3d at 730; ROA.9029-33.

Third, the Secretary abandoned statutorily required procedures. A necessary condition for issuing a “determination” predicated on protected expression, like the Rubio Determination, is notifying the chairs of the House Judiciary and Foreign Affairs Committees and the Senate Judiciary and Foreign Relations Committees of his decision. *See* §1182(a)(3)(C)(iii), (iv); H.R. Conf. Rep. 101-955 at 35417 (1990),

reprinted in 1990 U.S.C.C.A.N. 6784, 6793 (Oct. 26, 1990) (Congress intended “compelling foreign policy interest standard” to be used “only in unusual circumstances,” as indicated by congressional notification requirement) (citation modified). BIA caselaw confirms this requirement. *Ruiz-Massieu*, 22 I&N Dec. 833, 838 (BIA 1999) (“the alien may not be excluded or deported *unless...such determination is communicated to the appropriate committees[.]*”) (emphasis added). There is no evidence that the Secretary fulfilled this statutory mandate. The BIA’s decision must be reversed.

2. The BIA Unconstitutionally Applied the “Facially Legitimate and Bona Fide” Standard to Petitioner.

The BIA erred in applying the deferential “facially legitimate and bona fide” standard derived from *Mandel* in *Ruiz-Massieu*, because such a diminished standard does not apply to noncitizens who have entered the U.S., and amplified that error in applying it to Petitioner, an LPR whose Determination is based on protected speech.

First, *Mandel* was “an unadmitted and nonresident alien,” seeking to enter the U.S. *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). While the Supreme Court has since applied the *Mandel* standard in other *exclusion* contexts, it has never applied it in the context of removal. And for good reason. “Whatever deference applies to exclusion decisions and broad entry restrictions, that line of authority does not resolve a unified policy that...reaches noncitizens already living in the United States, including [LPRs] subject to deportability determinations.” *Coal. for Indep. Tech.*

Rsch. v. Rubio (“CITR”), No. 26-815, 2026 WL 2030770, at *19 (D.D.C. July 14, 2026); *Zadvydas*, 533 U.S. at 693.

Second, even if the *Mandel* standard could apply in *Ruiz-Massieu*, it cannot apply here because of Petitioner’s LPR status. While *Ruiz-Massieu* was “a nonimmigrant visitor for pleasure,” 22 I&N Dec. at 834, Petitioner is an LPR entitled to “heightened procedural protections.” *Qatanani v. Att’y Gen. U.S. of Am.*, 144 F.4th 485, 504 (3d Cir. 2025); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

Third, *Ruiz-Massieu* is inapplicable here because it did *not* deal with the exception provisions for lawful speech and associations at §§1182(a)(3)(C)(iii), 1227(a)(4)(C)(ii). 22 I&N Dec. at 838, 841-46. The deference that *Ruiz-Massieu* afforded the Secretary in a case where the exceptions did not apply has no bearing on the speech-based Rubio Determination. The BIA therefore erred in applying the deferential *Ruiz-Massieu* standard to Petitioner, an LPR targeted for his protected speech, rather than strict scrutiny, which it clearly fails. *See* Section II.A.2.

3. Even if the “Facially Reasonable and Bona Fide” Standard Applied, the Rubio Determination is Still Defective.

Even the ministerial review contemplated by *Ruiz-Massieu* demonstrates the BIA erred in sustaining the FPG.

First, in *Ruiz-Massieu*, the BIA found the determination facially legitimate and bona fide because there was “no question” that the judgement involved “the

foreign policy interests of the [U.S.].” 22 I&N Dec. at 846. The failure to return Ruiz-Massieu:

would jeopardize our ability to work with Mexico on law enforcement....[O]ur support of such reforms [of the Mexican judicial system] would be seen as hollow and self-serving and would be a major setback for...U.S.-Mexican relations.

Id. at 834, 848-50.

Here, the Rubio Determination says nothing at all about foreign relations. *See* Section II.B.2. It is therefore manifestly neither facially legitimate nor bona fide under §1227(a)(4)(C). *See Allende v. Shultz*, 605 F.Supp. 1220, 1224 (D.Mass. 1985).

Second, the Determination is not “facially legitimate and bona fide” because it’s based exclusively on domestic political speech. “[P]olitical speech is not, on its own, a facially legitimate reason for expelling persons from this country” *AAUP*, 802 F.Supp.3d at 183. No court has held otherwise. *See Mandel*, 408 U.S. at 758, 769 (denial of waiver was “facially legitimate and bona fide” because it was based on visa violation, not protected speech).

A constitutionally impermissible purpose cannot constitute a bona fide reason. “It is clear from the [*Mandel*] Court’s discussion that a facially legitimate and bona fide reason means any *constitutionally permissible* reason. In the context of the First Amendment, this would mean a reason unrelated to the alien’s speech.” *Am. Acad. of Religion v. Chertoff*, 463 F.Supp.2d 400, 415 n.17 (S.D.N.Y. 2006);

Dargahifadaei v. Kerry, No. 3-12-CV-01942-K, 2013 WL 1627887, at *5 (N.D.Tex. Apr. 15, 2013); *Abourezk v. Reagan*, 592 F.Supp. 880, 887 (D.D.C. 1984) (entry may not be denied “solely on account of the content of speech”), *vacated and remanded on other grounds* by 785 F.2d 1043 (D.C. Cir. 1986).

That the Secretary describes Petitioner’s activity as “antisemitic,”¹⁷ does not change that Petitioner’s activity was constitutionally protected and cannot be a bona fide basis for removal. *See CITR*, 2026 WL 2030770, at *20 (“The Government cannot make protected private expression a facially legitimate and *bona fide* basis for immigration consequences simply by placing it under [a] capacious and contested label,” in that case: “censorship.”).

Even under the facially legitimate and bona fide standard, when a noncitizen makes “an affirmative showing of bad faith,” this Court can “look behind” the Rubio Determination. *Kerry v. Din*, 576 U.S. 86, 104-05 (2015) (Kennedy, J., concurring). Petitioner has made that showing. The record shows, and the *AAUP* court found by clear and convincing evidence, that “the challenged enforcement steps [including, specifically, Petitioner’s arrest, detention, and the Determination against him] was targeted intentionally at specific viewpoints *in order to chill speech*.” 802 F.Supp.3d

¹⁷ While not necessary for Petitioner’s claim, the record is replete with evidence contradicting the Secretary’s characterization, which is based on tabloid articles in Petitioner’s Subject Profile. This includes letters from Jewish students and faculty at Columbia, ROA.9035-60, 9512-20, and Petitioner’s own testimony, ROA.5462, which the IJ found credible, candid, and consistent with the record.

at 187 (citation modified); *see also* Section II.C.1. The BIA therefore erred by failing to look behind the Determination to assess it.

B. The BIA Erred In Sustaining The Post-Hoc Charge.

1. The BIA Violated the INA, Regulations, and Due Process by Sustaining the Post-Hoc Charge Based on Allegations That Do Not Appear in the I-261.

The agency erred by sustaining the post-hoc charge based on allegations that DHS did not present in writing, thereby violating §1229(a) and 8 C.F.R. §§1003.15(b) and 1003.30. These provisions provide notice to Petitioner of the acts and conduct DHS alleges render him removable, as required by the Constitution. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-98 (1953) (notice is fundamental to due process).

To initiate removal proceedings, §1229(a) requires DHS to issue an NTA notifying the noncitizen of “the acts or conduct alleged to be in violation of law.” §1229(a)(1)(C); *see also* §1003.15(b). An NTA “serves as the basis for commencing a grave legal proceeding...like an indictment in a criminal case [or] a complaint in a civil case.” *Niz-Chavez v. Garland*, 593 U.S. 155, 163-164 (2021) (citation modified). During proceedings, DHS may then lodge “additional or substituted...factual allegations...in writing” via a Form I-261. §1003.30. Critically, “[t]he alien *shall* be served with a copy of these additional...allegations and the Immigration Judge *shall* read them to the alien.” *Id.* (citation modified). Agencies

are bound to follow their own regulations. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). The violation of a regulation providing procedural safeguards, or required by statute or the Constitution, is a per se denial of due process. *See Gov't of Canal Zone v. Brooks*, 427 F.2d 346, 347 (5th Cir. 1970); *Arzanipour v. INS*, 866 F.2d 743, 746 (5th Cir. 1989).

Here, DHS alleged that, in response to part 8, page 9, of his I-485, Petitioner did not state he was a “member” of UNRWA. ROA.9826-27. The IJ *did not* find Petitioner to be a “member.” ROA.6899. That should have been dispositive because DHS did not establish its allegation. But the IJ instead sustained the charge on the *unalleged and uncharged* theory that Petitioner was “involved in” or “associated with” UNRWA. *Id.* On appeal, the BIA stated the IJ “permissibly found that DHS provided sufficient notice that the respondent was being charged with removability based on a misrepresentation regarding his involvement with UNRWA, regardless of whether he was a ‘member’[.]” ROA.1808. That is factually and legally incorrect.

The IJ did not find that DHS provided Petitioner notice that he was also facing an allegation that he was “involved in” or “associated with” UNRWA. ROA.6899; §1003.1(d)(3)(iv). Nor could she. DHS never presented an allegation or charge to that effect. Further, neither the IJ nor the BIA could, on their own, advance a new allegation when DHS did not provide written notice of the new acts, and the IJ never

read them to Petitioner, as required by §1229(a)(1)(C) and §1003.30. Thus, the post-hoc charge could not be sustained, and the BIA’s decision must be reversed. *See United States v. Hoover*, 467 F.3d 496, 502 (5th Cir. 2006) (“when the government chooses to specifically charge the manner in which the defendant’s statement is false, the government should be required to prove that it is untruthful for that reason.”).

2. The Agency Erred In Finding Petitioner Committed A Willful and Material Misrepresentation.

To sustain removability under the post-hoc charge—§§1227(a)(1)(A), 1182(a)(6)(C)(i)—DHS must demonstrate by “clear, unequivocal, and convincing evidence” that the noncitizen, “by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States.” *D-R-*, 27 I&N Dec. 105, 107 (BIA 2017); *Bosuego*, 17 I&N Dec. 125, 128 (BIA 1979; 1980); *Kungys v. United States*, 485 U.S. 759, 771-72 (1988). Because DHS failed to prove either willfulness or materiality by clear and convincing evidence, the BIA erred in affirming the post-hoc charge. §1003.1(d)(3)(iv). Even assuming DHS carried its burden, the IJ failed to conduct the final part of the analysis: assessing whether Petitioner would be inadmissible if his internship placement had been known, an error which the BIA repeated. *D-R-*, 27 I&N Dec. at 113 (citing *Maslenjak v. United States*, 582 U.S. 335 (2017)).

a. Any perceived omission was not willful.

A statement constituting a misrepresentation must be made with “knowledge of [its] falsity” for it to be “willful.” *Witter v. INS*, 113 F.3d 549, 554 (5th Cir. 1997). “Willfully” is distinguished from “accidentally, inadvertently, or in a good faith belief that the factual claims are true.” USCIS Policy Manual, Vol. 8, Part J, Ch. 3, §D.1; *Emokah v. Mukasey*, 523 F.3d 110, 116-17 (2d Cir. 2008) (distinguishing willfulness from “innocent mistake, negligence or inadvertence”). Where, as here, the alleged “misrepresentation” is a failure to disclose, DHS’s burden is heightened because “[s]ilence is not a misrepresentation, and does not shut off a line of inquiry.” *Tijam*, 22 I&N Dec. 408, 425 (BIA 1998) (Rosenberg, concurring in part and dissenting in part) (citation modified); *see also* USCIS Policy Manual, Vol. 8, Part J, Ch. 3, §D.2. When it is “not unlikely” that the noncitizen themselves considered the alleged misrepresentation to be accurate and provides a “plausible” explanation, a finding of willfulness is not warranted. *Healy and Goodchild*, 17 I&N Dec. 22, 28-29 (BIA 1979).

Here, Petitioner never made any statement on his I-485 that he knew to be false, nor did the IJ find that any omission was willful. ROA.6899, 6901 (noting only that “intent to deceive is not a required element”). Petitioner’s testimony established that, because his internship at UNRWA was approved by Columbia, overseen by Columbia, sponsored by Columbia (through a stipend), and authorized under his F-

1 status, he believed that, by disclosing his employment at Columbia as a graduate student, his UNWRA internship was necessarily included. ROA.5490-94. The IJ found Petitioner to be credible. ROA.6910. DHS declined to cross-examine Petitioner on this aspect of his testimony or submit any evidence or argument disputing it. The BIA ignored Petitioner's unimpeached, credible testimony that he "never hid the fact that I had an internship at UNRWA" and believed he accurately disclosed his employment as a graduate student paid by Columbia, which sponsored his internship at UNRWA as part of his degree requirements. Petitioner's credible testimony is to be taken as true. *R-A-*, 22 I&N Dec. 906, 942 (BIA 1999; A.G. 2001). His explanation is also more than "plausible," and definitively demonstrates that he attempted to complete the I-485 accurately.

The I-485's structure and lack of guidance or definitions corroborates Petitioner's credible testimony that any perceived omission was inadvertent. The I-261's UNRWA membership allegation stems from a question "at part 8, page 9" of the I-485, which asks about membership, involvement, or association "with any organization, association, fund, foundation, party, club, society, or similar group." ROA.9683. It is understandable that Petitioner would not view his school-sponsored internship as responsive to this question about "membership" particularly because the I-485 separately asks about employment history. ROA.9679. Moreover, as explained *infra* Section II.D, the I-485 membership question is fatally amorphous

and, at minimum, demonstrates the plausibility of Petitioner's statements here. *See, e.g., Abusamhadaneh v. Taylor*, 873 F.Supp.2d 682, 689 (E.D.Va. 2012) (plaintiff's interpretation of application question was reasonable because the form "does not specify...the meaning of the terms member and associated" and instructions do not include a definition.).

Inadvertent omission of an internship placement especially cannot support a willfulness finding where, as here, USCIS decided not to interview Petitioner, such that he (1) never was notified that, per the government, he misunderstood the question and (2) never had the opportunity to clarify his answer. *Healy and Goodchild*, 17 I&N Dec. at 28 n.6; ROA.2200. Record evidence demonstrating that Petitioner publicly disclosed his internship at UNRWA on his LinkedIn, ROA.9537, and his credible, unchallenged testimony that he believed DOS was notified of his internship placement, ROA.5492, further make clear that Petitioner had no interest in concealing his connection to UNRWA and would have truthfully answered any clarifying questions.

The Board erred in finding Petitioner acted willfully.

b. Any perceived omission was immaterial.

A misrepresentation is material when it "tends to shut off a line of inquiry that is relevant to the [individual's] admissibility *and* that would predictably have disclosed other facts relevant to...eligibility for a visa, other documentation, or

admission.” *D-R-*, 27 I&N Dec. at 113 (citation modified); *Kungys*, 485 U.S. at 772. A misrepresentation that has “no bearing on [the noncitizen’s] receipt of immigration benefits” is immaterial. *Gonzalez-Maldonado v. Gonzales*, 487 F.3d 975, 978 (5th Cir. 2007).

Here, the IJ concluded that the perceived omission of Petitioner’s internship placement “shut off a line of inquiry that would predictably have disclosed other relevant facts regarding his activities with UNRWA,” without citing any evidence to support her finding or explaining what facts relevant to his eligibility might have been disclosed. This was clear legal error: DHS bore the burden to prove materiality by clear, unequivocal, and convincing evidence, *see D-R-*, 27 I&N Dec. at 107, yet the IJ cited no evidence at all. The BIA attempted to conceal the IJ’s error by baldly asserting that Petitioner’s internship could have led an immigration officer to inquire regarding “security-related grounds of inadmissibility.” ROA.1809. But the IJ made no such finding, and the BIA cannot make factual findings. §1003.1(d)(3)(iv).

Moreover, any perceived omission of Petitioner’s internship placement did not shut off any line of inquiry *relevant to his admissibility*. *See D-R-*, 27 I&N Dec. at 113. His internship was not a potential basis to deny his I-485, and neither the IJ nor the BIA cited any evidence indicating how it could be. 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. DHS therefore failed to establish that any omission

was material. *See Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962, A.G. 1964) (forged job offer immaterial when applicant was not otherwise inadmissible); *Mazar*, 10 I&N Dec. 79 (BIA 1962) (nondisclosure of Communist Party membership immaterial where membership did not render inadmissible); *Cf. Xing Yang Yang v. Holder*, 770 F.3d 294, 305-06 (4th Cir. 2014) (collecting examples of material misrepresentations, including misrepresenting serious criminal history, using a false name and information to misrepresent visa eligibility, and falsely claiming to have never been married and have no children); *see also* ROA.2192-2202, 2224-44 (explaining highly unusual nature of post-hoc charge and IJ's decision sustaining it).

c. The IJ and BIA failed to assess whether the internship placement would render Petitioner inadmissible.

Assuming *arguendo* the IJ properly found DHS made a *prima facie* showing, the IJ failed to assess whether Petitioner established “that no proper determination of inadmissibility could have been made.” *D-R-*, 27 I&N Dec. at 113 (after DHS meets its burden, the burden shifts to respondent to show they would have remained admissible). The IJ never applied the burden-shifting framework to address this issue, and neither did the BIA. Record evidence and testimony demonstrate Petitioner's school-sponsored internship would *not* render him inadmissible. For example, Petitioner submitted a letter from UNRWA's New York Director explaining that his internship involved attending meetings, briefings, and other events at the UN related to the situation of Palestine refugees; writing meeting

reports; preparing monthly newsletters; and tracking media coverage of Palestine refugees and UNRWA, among other administrative tasks. ROA.9533; *see also* ROA.9522, 9535 (demonstrating Columbia sponsored Petitioner’s internship). Petitioner credibly testified that DOS was notified of his internship (and evidently took no action), further demonstrating that USCIS would have found him admissible even if his I-485 listed “UNRWA.” The Court must reverse or at minimum remand for the agency to conduct the inquiry under the proper framework.

IV. THE BIA COMMITTED OTHER REVERSIBLE ERRORS.

A. The BIA Violated Its Own Rules By Failing To Provide Petitioner A Fair Hearing.

Statute, regulation, and due process entitled Petitioner to a fair hearing and neutral decisionmaker. §§1229a(b)(4), 1229a(c)(1)(A) (IJ must render decision “based only on evidence produced at the hearing”); §§1003.10(b) (IJ must exercise independent judgment), 1003.1(d)(1)(ii) (BIA member must exercise independent judgment); *Valley v. Rapides Par. Sch. Bd.*, 118 F.3d 1047, 1052 (5th Cir. 1997); *Accardi*, 347 U.S. at 260. Petitioner plausibly alleged that the IJ and BIA predetermined the outcome of his proceedings, making fair judgment impossible, *see* ROA.1740-83, violating controlling statutes and regulations required by the Constitution, and causing him prejudice, *per se*, *Arzanipour*, 866 F.2d at 746.

The prejudgment manifested in numerous irregularities due to the pace, manner, and outcomes pursued by the IJ and BIA. *See, e.g.*, ROA.1747-56, 2151-

61, 2188-2244, 6680-84. Since Petitioner’s removal proceedings concluded, newly revealed information confirms he was deprived of a fair hearing before a neutral adjudicator. *See* ROA.19-23, 687-733.¹⁸

The denial of Petitioner’s right to a fair hearing contravenes agency regulation and invalidates the removal order. *Gulf States Mfrs., Inc. v. NLRB*, 579 F.2d 1298, 1308 (5th Cir. 1978), *on reh’g*, 598 F.2d 896 (5th Cir. 1979). Though the BIA has refused to adjudicate this question by sitting on Petitioner’s Motion to Reopen, this Court independently cannot affirm an unlawfully issued removal order that is the result of profound due process violations. At minimum, fact-finding on this issue is required, or the Court must hold this PFR in abeyance until the BIA adjudicates the Motion to Reopen to determine whether (1) proceedings are reopened or (2) this PFR should be held and consolidated with any review of a Motion to Reopen denial. *See* §1252(b)(6).

B. The BIA Erred in Failing to Address Petitioner’s Argument That Proceedings Must Be Terminated Based on DHS’s Warrantless Arrest.

The BIA must “consider the issues raised and 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)

¹⁸ Petitioner is entitled to factual development on this claim. *See* Dkt. 28, ROA.1780-81.

(quotation omitted). Here, the BIA did not address Petitioner’s argument that proceedings should be terminated because ICE committed an egregious regulatory violation in arresting him without a warrant, in the lobby of his private residence and in violation of a binding settlement agreement. *See* ROA. 7808-198; 8 C.F.R. §287.8(c)(2)(i); Settlement Agreement, *Castanon Nava v. Dep’t of Homeland Sec.*, No. 1:18-cv-03757 (N.D.Ill. Nov. 30, 2021), Dkt. 146-1; *Garcia-Flores*, 17 I&N Dec. 325, 328 (BIA 1980) (certain regulatory violations “render subsequent agency actions invalid”); *Sanchez v. Sessions*, 904 F.3d 643, 654 (9th Cir. 2018). The agency should have terminated proceedings. At minimum, the BIA was required to at least *address* this argument. Remand is therefore required.

C. The BIA Erred in Denying Discovery and Refusing to Remand.

The IJ erred in denying discovery relevant to Petitioner’s defenses on both charges, prejudicing him and restricting his ability to present significant evidence supporting his constitutional claims. ROA.9618-57; *Khalil*, 164 F.4th at 280 (IJ’s refusal to allow discovery “may have prevented him from proving a causal link to retaliation or discriminatory enforcement, which could show that the alleged policy is unconstitutionally vague”). On appeal, Petitioner therefore sought remand to develop the record with new First Amendment retaliation evidence released through

AAUP and to conduct targeted discovery.¹⁹ ROA.4981-5006. But the BIA erred in affirming the discovery denial and refusing remand.

Contrary to the BIA's decision, the IJ did not deny discovery because Petitioner failed to satisfy 8 C.F.R. §1003.35. She held she lacked authority to order discovery, which is incorrect. *See* ROA.9628, 9642. The IJ also gave Petitioner only 48 hours after DHS filed the Rubio Determination before sustaining the FPG—an extraordinarily short period in a case of this complexity, which prevented Petitioner from adequately presenting his defenses. ROA.693-94, 9618-26.

Attempting to sidestep these issues, the BIA concluded (based on the Third Circuit's reasoning) that factual development could occur during this PFR. *See* ROA.1810 (citing *Khalil*, 164 F.4th at 279-81). Despite attempting to pursue factual development through both EOIR and federal court, Petitioner has had no meaningful opportunity to do so. *See Diahn v. Blanche*, 175 F.4th 291, 302 (4th Cir. 2026) (agency's failure to develop record violated controlling regulations and caused prejudice). Petitioner's Hobbs Act Motion remains pending, and the Court denied his motion to hold this PFR in abeyance pending its resolution. Unless this Court grants the still-pending Hobbs Act Motion, it will decide critically important issues

¹⁹ As Petitioner has explained, *see* Dkt. 28, the *AAUP* evidence does not include numerous documents relevant to Petitioner's constitutional claims, including documents in the period between the issuance of the NTA and the I-261 that would further demonstrate the pretextual and retaliatory nature of the post-hoc charge.

without a complete factual record.

For this PFR to be an adequate substitute for habeas under the Suspension Clause that ensures meaningful review of Petitioner's constitutional claims, a factfinder must possess comparable powers to that of a federal district court in habeas proceedings. *See Khalil*, 164 F.4th at 280-82; *AADC*, 525 U.S. at 496 n.2 (Ginsburg, J., concurring). Without the availability of a district court to oversee factual development under the Hobbs Act, a PFR would *not* be an adequate substitute for habeas. *See id.* Whatever factual development may be typically permitted by an IJ, that procedure would not be an adequate substitute for habeas in federal district court. Therefore, if the Court does not grant Petitioner's PFR on the existing record and terminate proceedings, it must grant Petitioner's Hobbs Act Motion, or alternatively remand to the agency with instructions to permit factual development in accordance with the mechanisms used in federal district court. Otherwise, Petitioner will be denied *any forum* in which to develop his substantial constitutional claims.

D. The BIA Erred in Denying Relief.

Assuming *arguendo* Petitioner was properly deemed removable, the BIA erred in denying relief.

As a threshold matter, the BIA erred in finding Petitioner ineligible for a §1227(a)(1)(H) waiver based on the vacated FPG and enjoined Rubio

Determination. *See* Section I. The BIA independently erred in affirming the IJ’s waiver denial *without providing Petitioner the evidentiary hearing he requested*, ROA.6200-01, and which is required by statute, regulation, and due process. §1229a(b)(4)(B); §1240.11(a)(2) (the IJ “shall afford the alien an opportunity to make application during the hearing”); ROA.6717-18; *see also Arzanipour*, 866 F.2d at 746.

The IJ prevented Petitioner from presenting evidence and testimony supporting his waiver request, including testimony from his U.S.-citizen wife, *see* ROA.6198-6202, concerning the family hardships caused by the government’s retaliatory actions and the removal process—hardship inflicted as the couple were raising a child together under immense scrutiny following his detention. By excluding this testimony and failing to provide a hearing, EOIR violated its own regulations and prevented proper consideration of Petitioner’s equities, substantially prejudicing him (even though he need not show prejudice) and resulting in an erroneous denial. This Court has emphasized that the agency’s failure to follow its own regulations is reversible error. *Francois*, 120 F.4th at 466. Reversal is thus required.

The agency likewise erred in finding Petitioner barred from asylum based on the enjoined Rubio Determination. That determination could not render him statutorily ineligible, and the IJ further deprived him the opportunity to rebut the

purported bar. *See* ROA.2084-85. The IJ's merits denial, and the BIA's affirmance, were similarly erroneous. ROA.2085-92.

Finally, the BIA erred in affirming the denial of voluntary departure, which Petitioner identified as a form of relief. His waiver evidence was applicable and relevant, yet the IJ never considered his application. ROA.2092. The BIA's assertion that Petitioner did not apply for voluntary departure is false, and its erroneous conclusion that he did not qualify for voluntary departure is based on yet another instance of improper fact-finding. At minimum, remand is required.

CONCLUSION

This Court should vacate the BIA's decision and order proceedings terminated for all the reasons stated above. To the extent the Court finds further factual development is required, the Court should grant Petitioner's Hobbs Act Motion or remand to the agency with instructions to permit full factual development. If the Court declines to terminate proceedings, the BIA's numerous reversible errors at minimum require remand.

August 14, 2026

/s/ Johnny Sinodis

NEW YORK CIVIL LIBERTIES UNION
FOUNDATION
Veronica Salama
Robert Hodgson
Amy Belsher
Molly Biklen
125 Broad Street, 19th Floor
New York, N.Y. 10004
Tel: (212) 607-3300

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
Omar Jadwat
Noor Zafar
Michael K.T. Tan
Sidra Mahfooz
Brian Hauss
Esha Bhandari
Brett Max Kaufman
Lauren Yu
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2500

VAN DER HOUT LLP
Marc Van Der Hout
Johnny Sinodis
Oona Cahill
360 Post St., Suite 800
San Francisco, CA 94108
Tel: (415) 981-3000

CENTER FOR CONSTITUTIONAL RIGHTS
Baher Azmy
Samah Sisay
666 Broadway, 7th Floor
New York, NY 10012
Tel: (212) 614-6464

CLEAR PROJECT
MAIN STREET LEGAL SERVICES, INC.
Naz Ahmad
Mudassar Hayat Toppa
Shezza Abboushi Dallal
CUNY School of Law
2 Court Square
Long Island City, NY 11101
Tel: (718) 340-4558

WASHINGTON SQUARE LEGAL SERVICES,
INC.
Alina Das
Immigrant Rights Clinic
245 Sullivan Street, 5th Floor
New York, New York 10012
Tel: (212) 998-6430

Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that on August 14, 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 Petitioner's counsel, are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

August 14, 2026

/s/ Johnny Sinodis
Johnny Sinodis

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. 47, because it contains 14,995 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).

August 14, 2026

/s/ Johnny Sinodis
Johnny Sinodis