Case No. 26-60344

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MAHMOUD KHALIL,
Petitioner,
v.
TODD WALLACE BLANCHE, *U.S. Attorney General,*
Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals

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CERTIFICATE OF INTERESTED PERSONS

Amici Immigration Lawyers, Law Professors, and Scholars, through their undersigned counsel, submit this Certificate of Interested Parties to fully disclose all those with an interest in this brief. Pursuant to the fourth sentence of Rule 28.2.1, the undersigned counsel of record certifies that the large group of individuals fully listed as *amici* at the end of this brief have an interest in the outcome of this case. *Amici* are all individuals, and they do not have a financial interest in this litigation. *Amici* are unaware of any persons with an interest in the outcome of this litigation other than the signatories to this brief and their counsel, the signatories to the declaration attached to this brief, and those identified in the briefs submitted by the parties and any other *amici* in this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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DATED: August 21, 2026

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Administrative Cases

U.S. Code (Title 8)

<u>Federal Rules of Appellate Procedure</u>

<u>Miscellaneous</u>

STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amici curiae are more than one hundred leading lawyers, law professors, and scholars who practice, write about, research, and teach immigration law.[2] *Amici* collectively have many centuries of experience representing individuals at all stages of their immigration proceedings and in federal court. Regardless of their differing views on campus protests and the war in Gaza that began in October 2023, *amici* are united in the view that the government may not use the foreign-policy deportability ground to remove a noncitizen based on protected political speech. *Amici* have a strong interest in the outcome of this case because it raises fundamental questions about the constitutional limits on the government's power to deport noncitizens. Allowing the government to impose the grave consequence of removal based on protected political expression would violate longstanding principles of due process, chill protected First Amendment speech not just on campuses but in communities nationwide, and have devastating effects on immigrants and the practice of immigration law.

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[1] Petitioner and Respondent have consented to the filing of this brief. No party or its counsel had any role in authoring this brief. No person or entity—other than *amici* and their counsel—contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E).

[2] A list of *amici* is set forth at the end of this brief. The positions taken in this brief are those of *amici* alone and should not be attributed to any institution with which *amici* are or have been affiliated.

INTRODUCTION

Mahmoud Khalil ("Mr. Khalil") has been charged under a provision of the Immigration and Nationality Act (INA) that makes deportable any "[noncitizen] whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States." 8 U.S.C. § 1227(a)(4)(C)(i), INA § 237(a)(4)(C)(i). This deportability ground includes an exception, which prohibits deportation because of a noncitizen's lawful "past, current, or expected beliefs, statements, or associations, . . . unless the Secretary of State personally determines that the [noncitizen's presence] would compromise a compelling United States foreign policy interest." 8 U.S.C. § 1182(a)(3)(C)(iii), INA § 212(a)(3)(C)(iii) (incorporated by reference through the exception in 8 U.S.C. § 1227(a)(4)(C)(ii), INA § 237(a)(4)(C)(ii)).

Among all the deportability grounds in the INA, Section 1227(a)(4)(C)(i) provides one of the most sweeping grants of discretionary executive power. This ground has rarely been invoked by the Department of Homeland Security (DHS), and *amici* are not aware of any cases before March 2025 where it has been used to try to deport a permanent resident for any reason, let alone for political speech.

Prior to Mr. Khalil's charge under this ground, the only federal district court to have considered its constitutionality held that it violates due process because it is unconstitutionally vague and deprives noncitizens of a meaningful opportunity to be heard. *See Massieu v. Reno*, 915 F. Supp. 681 (D.N.J. 1996), *rev'd on other grounds*, 91 F.3d 416 (3d Cir. 1996). In Mr. Khalil's case, it also runs afoul of the First Amendment.

ARGUMENT

I. *AMICI* ARE UNAWARE OF THE GOVERNMENT HAVING EVER RELIED ON 8 U.S.C. § 1227(a)(4)(C) TO DEPORT A PERMANENT RESIDENT FOR POLITICAL SPEECH.

It is not unusual for permanent residents to be placed in removal proceedings. Nor is it novel for the government to target Palestinians or those who express pro-Palestinian views where they have allegedly violated some other provision of the immigration laws.[3] However, the use of the foreign policy ground relied on by DHS in Mr. Khalil's case is extraordinarily rare, and we are unaware of it having ever been used, prior to March 2025, to remove a lawful permanent resident for political speech. Upholding the use of Section 1227(a)(4)(C) in this case would give the federal government power to deport permanent residents and

[3] Henry Weinstein, *Final Two L.A. 8 Defendants Cleared*, LA Times (Nov. 1, 2007).

other lawfully present noncitizens at the whim of the Secretary of State (or at the whim of the President, through the Secretary of State). As President Trump explained when Mr. Khalil was first arrested by Immigration and Customs Enforcement (ICE), "[t]his is the first arrest of many to come."[4]

The implications of this case are by no means limited to noncitizens who engage in pro-Palestinian speech. The presence of Ukrainians who are critical of Russia, supporters of greater security cooperation with Europe, and critics of the administration's policies on tariffs, sanctions, or foreign aid, could all suddenly be considered adverse to U.S. foreign policy interests and subject to deportation based on the unilateral determination of the Secretary of State. The list of controversial topics to be censored has no end, and no meaningful limiting principles. In *Massieu*, the government's reliance on the foreign policy deportability ground was based on "nothing more than the obstinacy of a foreign sovereign that is high on the list of nations that the United States must not offend or disappoint." 915 F. Supp. at 701 n.18.

A. Section 1227(a)(4)(C) Is Unique Among Deportability Grounds Because It Purportedly Authorizes Deportation Based on the Unfettered Discretion of a Single Political Official

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[4] Donald J. Trump (@realDonaldTrump), Truth Social, (Mar. 10, 2025, 1:05 PM), at https://truthsocial.com/@realDonaldTrump/posts/114139222625284782.

Almost all the deportability grounds in the Immigration and Nationality Act (INA) require a lawfully present noncitizen to engage in some *conduct* to be deported, such as committing a crime (1227(a)(2)), engaging in fraud (1227(a)(3)), or unlawfully voting (1227(a)(6)). Among the "[s]ecurity and related grounds" in 1227(a)(4), the foreign policy ground is the only one that can be invoked based solely on the subjective beliefs of an executive official, rather than any action by the noncitizen. Indeed, the other subsections of 1227(a)(4) require significant legal breaches, such as engaging in terrorism, seeking to overthrow the U.S. government through unlawful means, and participating in torture. *See* 8 U.S.C. §§ 1227(a)(4)(A), (B), (D), (E), (F).

By contrast, the foreign policy ground merely requires the presence of a noncitizen and the decision of the Secretary of State; it does not target any of the noncitizen's conduct whatsoever, let alone some specified kind of conduct. 8 U.S.C. § 1227(a)(4)(C)(i) (referring to "presence *or* activities"). Nor does the foreign policy ground require a showing of any *actual* adverse foreign policy consequences; it simply requires the Secretary to have "reasonable ground to believe"—a determination the immigration judge and Board of Immigration

Appeals purportedly cannot question[5]—that the noncitizen's presence or activities "*would have potentially* serious" adverse foreign policy consequences. *Id.* (emphasis added). By purportedly giving unfettered discretion to an executive official to decide that someone lawfully present in the United States is deportable, Section 1227(a)(4)(C) is a stark outlier among all the deportability grounds.

From its enactment in 1990 until Mr. Khalil's arrest in March 2025, only one federal district court had an opportunity to address the foreign policy ground, and that court determined it was unconstitutional. *Massieu*, 915 F. Supp. at 686. The district court in *Massieu* described this ground as a "breathtaking departure" from "deportation based on adjudications of defined impermissible conduct." *Id.* The Third Circuit reversed the decision based on its finding that the plaintiff had not exhausted administrative remedies; it never reached the constitutional questions.

B. Prior to March 2025, Section 1227(a)(4)(C) Was Almost Never Invoked by DHS.

The foreign policy deportability ground was introduced in 1990 and originally codified at 8 U.S.C. § 1251(a)(4)(C), INA § 241(a)(4)(C).[6] Prior to

[5] *See* Part II.A.2 below.

[6] In 1996, with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104–208, the provision was transferred to INA § 237(a)(4)(C), 8 U.S.C. § 1227(a)(4)(C).

March 2025, the use of this provision to seek an individual's deportation was almost unprecedented. In Mr. Khalil's habeas case, the district court in New Jersey ordered the government to provide a list of all instances in which the government had invoked 8 U.S.C. § 1227(a)(4)(C)(i), INA § 237(a)(4)(C)(i), or any predecessor statutes to seek the removal of individuals from the United States. *Khalil v. Trump*, No. 25-cv-1963 (MEF) (D.N.J.), Order, Dkt. No. 231. In response to the district court's order, the government identified a total of five cases originating before Mr. Khalil's arrest in March 2025. *Id.*; Govt's Resp., Dkt. No. 241; Govt's Second Resp., Dkt. No. 246. The government's justifications for invoking these charges in the past were materially different from the situation here. For instance, the government claimed to have sought removal under Section 1251(a)(4)(C) of leaders of foreign terrorist or paramilitary organizations, or individuals charged with or convicted of crimes. Dkt. No. 241. The one individual whom the government sought to remove under Section 1227(a)(4)(C) before March 2025 had "participated in and/or contributed to violent political activity in Somalia." *Id*.

The government stated that these may not be the only instances of the statute's invocation. However, the government's own data and published immigration decisions reveal strikingly few cases. Based on publicly available data from the Executive Office of Immigration Review (EOIR), out of 11.7 million cases, DHS has invoked INA § 241(a)(4)(C)(i) or INA § 237(a)(4)(C)(i) as a removal charge in *only fourteen cases* before March 2025, when ICE charged Mr. Khalil under this ground.[7] Decl. of Graeme Blair and David Hausman ("Blair and Hausman Decl.") ¶¶7, 9-10, 13. In just seven of these fourteen cases, the foreign policy deportability ground was the sole charge alleged throughout the proceeding—as was initially true of Mr. Khalil's case. *Id*. ¶ 13. Furthermore, at most four of the fourteen individuals were ultimately ordered removed. *Id*.[8]

What's more, nearly all of these cases arose in the distant past, shortly after the provision was enacted. In this century, INA § 237(a)(4)(C)(i) was invoked only *four times*, and *only twice* was it the sole charge alleged throughout the proceeding. *Id*. ¶ 13. The data do not indicate whether any of those four individuals were lawful permanent residents—and, narrowing further, whether they were lawful permanent residents charged solely for their speech. Even these tiny numbers may be a

[7] In the EOIR data, cases may not necessarily mean different individuals. Blair and Hausman Decl. ¶ 6. Therefore, it is possible that this charge has been invoked against even fewer than fourteen individuals.

[8] Removal was ordered in three of the cases included in the table, and the outcome is missing for one other individual.

significant overcount given possible errors in the data and the extreme rarity of the charges. *Id.* ¶¶ 14-17. Regardless, that the government has invoked the statute based solely on political speech by a permanent resident makes the assertion of authority here vanishingly rare.[9]

Although at least some uses of the foreign policy ground appear to have resulted in deportations, the majority have not, highlighting the problems with the overall discretion granted by the statute. This case—which challenges the administration's policy of viewpoint-based immigration enforcement, not the INA itself—clearly falls outside any reasonable application of the provision in light of the serious constitutional concerns explained below.

II. SECTION 1227(A)(4)(C) IS UNCONSTITUTIONAL.

Section 1227(A)(4)(C) is unconstitutional for two reasons. First, it violates due process. Second, it violates the First Amendment.

A. Section 1227(a)(4)(C) Violates Due Process.

It is well-settled that noncitizens have a right to due process. *Reno v. Flores,* 507 U.S. 292, 305–07 (1993). Section 1227(a)(4)(C)(i) violates due process

[9] The BIA decision in Massieu's case confirms that the foreign policy deportability ground "has been used very rarely." *Matter of Ruiz-Massieu*, 22 I&N Dec. 833, 838 (BIA 1999) (citing *Matter of Khalifah*, 21 I&N Dec. 107 (BIA 1995), as "the only published Board case"). *Amici* have exhaustively searched unpublished BIA cases involving INA § 241(a)(4)(C) or INA § 237 (a)(4)(C) and have found none.

because it is void for vagueness and deprives noncitizens of a meaningful opportunity to be heard, effectively resulting in pre-judgment of their deportability.

1. Section 1227(a)(4)(C) Is Void for Vagueness.

The Supreme Court has long held that a person cannot constitutionally be punished under a vague criminal statute, as this would undermine "ordinary rules of fair play" and violate "the first essential of due process." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). The void-for-vagueness doctrine has also long been applied to deportation statutes. *See Jordan v. De George*, 341 U.S. 223, 231 (1951) (recognizing that deportation is a "drastic measure"). In 2018, the Supreme Court relied on the void-for-vagueness doctrine to strike down the residual clause of the "crime of violence" aggravated felony deportability ground. *Sessions v. Dimaya*, 584 U.S. 148, 174-75 (2018).

As the Supreme Court recognized in *Dimaya*, a law is unconstitutionally vague if it fails either one of two clearly articulated tests. *Id.* at 155 (plurality). The key questions are whether a statute "'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *United States v. Branson*, 139 F.4th 475, 478 (5th Cir. 2025) (quoting *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)).

The purpose of the first inquiry regarding fair notice "is to enable the ordinary [person] to conform his or her conduct to the law." *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999). The second inquiry, which has been described as "the more important" of the two, *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), requires a court to inquire whether the statutory language is "of such a standardless sweep" that it allows enforcers "to pursue their personal predilections." *Smith v. Goguen,* 415 U.S. 566, 575 (1974).

Section 1227(a)(4)(C) violates both tests. First, as the district court held in *Massieu*, this deportability ground "provides absolutely no notice to [noncitizens] as to what is required of them under the statute." 915 F. Supp. at 699. Since "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, . . . there is no conceivable way that [a noncitizen] could know, *ex-ante*, how to conform his or her activities to the requirements of the law." *Id.* at 700. Furthermore, "it is even less likely that [a noncitizen] could know that his or her mere presence here would or could cause adverse foreign policy consequences when our foreign policy is unpublished, ever-changing, and often highly confidential." *Id.* As Professor Jennifer Lee Koh has argued, "[n]otice before the imposition of immigration penalties is particularly important because immigration adjudications do not operate on a level playing field between the parties." Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127, 1157 (2016) (internal quotation marks omitted).

The Fifth Circuit has rejected terms that "turn on a listener's 'sensitivity' alone," because such terms fail to provide reasonable notice of what conduct is prohibited. *See Merriott v. City of Bossier City*, 179 F.4th 393, 408 (5th Cir. 2026) (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 613–14 (1971)). Identifying the official who makes the relevant determination does not supply an objective standard for decisionmaking. Indeed, *Merriott* emphasized that the ordinance invalidated in *Coates* was vague even though it depended on an identified decisionmaker—whether "a policeman [was] annoyed." *Id.* (quoting *Coates*, 402 U.S. at 614). Section 1227(a)(4)(C) suffers from the same fundamental defect: whether a noncitizen's presence or activities may have "potentially serious adverse foreign policy consequences" ultimately turns on the subjective foreign-policy judgments of the particular Secretary of State who holds office.

Second, Section 1227(a)(4)(C) is unconstitutionally vague because it invites arbitrary, discriminatory enforcement. "When an enactment is plagued with . . . hopeless indeterminacy or is so standardless that it invites arbitrary enforcement, it is unconstitutionally vague." *Merriott*, 179 F.4th at 409 (internally quotation marks omitted). "This inquiry focuses on whether the enactment has workable definitions or 'explicit standards,'" *id.,* and whether it is susceptible "to being 'stretched out of shape.'" *United States v. De Bruhl*, 118 F.4th 735, 745 (5th Cir. 2024) (quoting *Skilling v. United States*, 561 U.S. 358, 412 (2010)). Section 1227(a)(4)(C) fails on both counts. It provides no "explicit standards" for determining when a noncitizen's presence or activities would have "potentially serious adverse foreign policy consequences," leaving the Secretary of State with virtually unfettered discretion to supply that standard himself. The provision therefore fails to provide even "minimal guidelines to govern law enforcement," and allows the Secretary of State, or the President, acting through the Secretary of State, "to pursue their personal predilections." *Smith*, 415 U.S. at 574–75. And because its capacious terms can readily be "stretched out of shape" to encompass disfavored speech or speakers, *De Bruhl*, 118 F.4th at 745, the provision permits deportation "on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

Finally, as the Supreme Court has recognized, "where a vague statute abut(s) upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of (those) freedoms," leading people to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S.at 109 (internal quotation marks and footnotes omitted). Consequently, statutes that trigger First Amendment concerns have historically received more scrutiny from courts when challenged on vagueness. *Merriott*, 179 F.4th at 407 ("When the challenged enactment 'potentially restricts the right of freedom of speech, then the standard is more stringent.'") (quoting *Medlin v. Palmer*, 874 F.2d 1085, 1090 (5th Cir. 1989). In *Merriott,* the Fifth Circuit found that numerous terms infringing on expression during city council meetings were void for vagueness, including prohibitions on "slanderous," "personal," and "impertinent" remarks, as well as "boisterous" behavior. 179 F.4th at 407–09.

A statute need not touch on First Amendment concerns, however, to be unconstitutionally vague on its face. In *Dimaya,* for example, the Supreme Court determined that the residual clause of the crime of violence deportability ground was facially invalid despite the absence of First Amendment interests, because the provision "produces more unpredictability and arbitrariness than the Due Process Clause [of the Fifth Amendment] tolerates," 584 U.S. at 175. That holding serves to reinforce the conclusion that 1227(a)(4)(C), which clearly threatens First Amendment interests, can be facially invalid under the void-for-vagueness doctrine. Section 1227(a)(4)(C)(ii) expressly authorizes the Secretary of State to rely exclusively on a person's lawful "beliefs, statements, or associations" in determining that a person should be deportable under the provision, as long as the Secretary of State makes a personal determination that the foreign policy interests are "compelling." 8 U.S.C. § 1227(a)(4)(C)(ii) (incorporating by reference 8 U.S.C. § 1182(a)(3)(C)(iii), INA § 212(a)(3)(C)(iii).[10] This intrusion into First Amendment interests provides additional support for finding Section 1227(a)(4)(C) unconstitutionally vague.

2. Section 1227(a)(4)(C) Deprives Noncitizens of a Meaningful Opportunity to Be Heard and Effectively Permits Prejudgment of a Noncitizen's Case.

The fundamental right to due process requires a "full and fair opportunity to litigate an issue." *Hardy v. Johns–Manville Sales Corp.,* 681 F.2d 334, 338 (5th Cir. 1982). In a typical deportation proceeding, DHS bears the burden of establishing deportability by "clear and convincing evidence," and an immigration judge's decision must be based on "reasonable, substantive, and probative evidence." 8 U.S.C. § 1229a(c)(3)(A). That decision is normally made after a full administrative hearing, where the noncitizen has "a reasonable opportunity to

[10] The use of the word "compelling" in this exception distinguishes it from the language in Section 1227(a)(4)(C)(i) requiring only "potentially serious adverse foreign policy consequences."

examine the evidence" submitted by DHS, to present evidence, and to cross-examine the government's witnesses. 8 U.S.C. § 1229a(b)(4)(B). In the government's view, under Section 1227(a)(4)(C), however, it is the Secretary of State who unilaterally determines that a noncitizen is deportable. Even though a noncitizen charged under this ground has a technical right to a hearing before an immigration judge, the BIA has determined that there is no way for the noncitizen to actually question or challenge the Secretary of State's determination: no evidence must be presented to support the Secretary of State's assertions, and no opportunity is provided for the noncitizen to cross-examine the Secretary of State or any other government official about the alleged foreign policy concerns. *Matter of Ruiz-Massieu,* 22 I&N Dec. at 844-45.

In *Matter of Ruiz-Massieu*, the majority of the Board, sitting en banc, held that the Secretary of State's letter "should be treated as *conclusive evidence* of the respondent's deportability," finding that the immigration judge had "erred in holding that the [government] is obliged to present clear, unequivocal, and convincing evidence in support of the Secretary of State's belief." *Id.* at 842 (emphasis added). The Board reasoned that the government met its burden of proof "by the Secretary's *facially reasonable and bona fide determination* that the respondent's presence here would cause potentially serious adverse foreign policy consequences for the United States." *Id.* (emphasis added). The Board stressed that the statute granted the Secretary of State "exclusive authority" to determine the existence of a "reasonable ground" for believing in potentially serious adverse foreign policy consequences, *id.* at 842, and confirmed "the fundamentally ministerial aspect of the Immigration Judge's role" in such proceedings. *Id.* at 844. Any other approach, according to the Board, would require the immigration judge and the Board to "intrude into the realm of foreign policy." *Id.* at 844.

The near complete deference given to the Secretary of State's determination under the Board's decision in *Ruiz-Massieu* is similar to relying on "secret evidence," which courts have found "cabined by constitutional due process limitations." *Kaur v. Holder*, 561 F.3d 957, 960 (9th Cir. 2009) (BIA violated due process by using secret evidence against a petitioner); *see also Zerezghi v. United States Citizenship & Immigr. Servs.*, 955 F.3d 802, 813 (9th Cir. 2020) (vague reference to unspecific records deprived U.S. citizen and his noncitizen wife of a meaningful opportunity to respond in violation of due process); *cf. Matter of Ruiz-Massieu*, 22 I&N. Dec. at 845 (reasoning that allowing the immigration judge to review the reasonableness of the Secretary's determination could require the government "to proffer secret or confidential information and expert witnesses, or involve a deposition of the Secretary of State"). The Board's interpretation of

Section 1227(a)(4)(C) both deprives the noncitizen of the right to a meaningful opportunity to be heard and results in pre-judgment of deportability based solely on the Secretary of State's assertions, in violation of the Fifth Amendment.[11]

B. Section 1227(a)(4)(C) Violates the First Amendment.

The public statements made by both the White House and the State Department confirm that Mr. Khalil was placed in deportation proceedings because he engaged in constitutionally protected political protests. The Supreme Court long ago stated, without qualification, that "[f]reedom of speech and of press is accorded [noncitizens] residing in this country." *Bridges v. Wixon*, 326 U.S. 135, 148 (1945). *Bridges* concerned an Australian union organizer who lived much of his life in Northern California. Various U.S. government officials repeatedly targeted him for his pro-labor speech activities, but the Supreme Court protected him twice—first from jail and contempt of court in *Bridges v. California*, 314 U.S. 252 (1941), and later from deportation in *Bridges v. Wixon*.

[11] By contrast, the Board has held that the "reasonable ground to believe" standard in both the terrorist activity inadmissibility ground and the bar to withholding of removal based on being a danger to the security of the United States are akin to probable cause determinations. *In re U-H-*, 23 I&N Dec. 355, 356 (BIA 2003); *see also Guo Qi Wang v. Holder,* 583 F.3d 86, 90 (2d Cir. 2009) (equating "serious reasons to believe" standard to probable cause); *Alarcon–Serrano v. I.N.S.,* 220 F.3d 1116, 1119 (9th Cir. 2000) ("reason to believe" standard for controlled substance traffickers ground must be based on "reasonable, substantial, and probative evidence").

In the decades since *Bridges v. Wixon* was decided, the Supreme Court, on several occasions, ruled against noncitizens who argued that immigration decisions violated their free speech rights. Critically, however, in none of these cases has the Court retreated from its holding that noncitizens living in the United States are protected by the First Amendment. When the Supreme Court upheld the deportation of former Communist Party members during the Red Scare, it did so by concluding that the deportations were permitted by the First Amendment, which at the time was less protective of the speech rights of citizens and noncitizens alike. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 592 & nn.18-19 (1951) (applying the framework in *Dennis v. United States*, 341 U.S. 494 (1951), a non-immigration case). And when the Court rejected the speech claims of citizens who argued that the exclusion of the Communist professor they had invited was pretextual, the Court did not decide the core free speech question, holding only that it would not look behind the facially valid reason given for the visa denial in order to sort out whether the professor had really been excluded because of his speech. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972); *cf. United States v. Armstrong*, 517 U.S. 456 (1996) (refusing, in a non-immigration case alleging pretextual prosecution, to permit discovery in order to look behind the facially valid reason given for the charging decision). The Court's approach in these cases is consistent with the application of ordinary principles of free speech and constitutional law, not some special watered-down set of protections for noncitizens. *See* Adam Cox, *The Invention of Immigration Exceptionalism*, 134 YALE L.J. 329 (2024); Ahilan Arulanantham & Adam Cox, *First Amendment and Due Process Issues in Deportation of Pro-Palestinian Student Activist(s)*, Just Security (Mar. 12, 2025). Here, since the only basis for deporting Mr. Khalil is his political speech, the present case does not involve the complicated issue of pretext that was present in *Mandel,* or the selective prosecution question at issue for the Palestinians who had fallen out of status in *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 488-92 (1999) (refusing to find selective prosecution of unlawfully present students, but still keeping the door open for "outrageous" selective prosecution claims in such cases). Mr. Khalil, of course, is a lawfully present permanent resident.

As noted above, Section 1227(a)(4)(C) contains, on its face, an exception openly authorizing deportation because of a person's speech—so long as the Secretary of State makes a "personal determination" that the ideological deportation is warranted (according to the "compelling United States foreign policy interest" standard). *See* 8 U.S.C. § 1227(a)(4)(C)(ii) (incorporating by reference 8 U.S.C. § 1182 (a)(3)(C)(iii)). This provision clearly conflicts with the Supreme Court precedents holding that the First Amendment protects the free speech rights of noncitizens residing in the United States. Section 1227(a)(4)(C) is therefore unconstitutional.

If this statutory provision is permitted to stand, even temporarily, it will continue to have a chilling effect on speech at universities and in communities across the country. *Amici* personally observed this chilling effect on their campuses in the months following the arrest of Mr. Khalil and other pro-Palestinian protestors. Students, scholars, professors, and others have feared and continue to fear speaking freely after President Trump announced that many more arrests would come, and Secretary of State Marco Rubio confirmed "we're going to keep doing it,"[12] "revoking the visas and/or green cards . . . so they can be deported."[13]

CONCLUSION

Amici respectfully request that the Court grant Mr. Khalil's petition for review and hold that the invocation of the foreign policy ground in his case was unconstitutional.

DATED: August 21, 2026 /s/ Fatma Marouf

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[12] Kaia Hubbard, *Secretary of State Marco Rubio Says "We're Going to Keep Going It" After Arrest of Columbia Activist*, CBS News Face the Nation (Mar. 16, 2025).
[13] Marco Rubio (@marcorubio), X (Mar. 9, 2025, 3:10 PM), https://x.com/marcorubio/status/1898858967532441945.

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[14] This amicus brief does not purport to present the institutional views of the schools with which the preparers of this amicus brief are affiliated.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29 and 32, undersigned counsel certifies that the foregoing brief:

1. Complies with the type-volume limitation of Local Rules 29.1(c) and 32.1(a)(4)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4615 words.
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2026, an electronic copy of the brief of amici curiae Immigration Lawyers, Law Professors, and Scholars was filed with the Clerk of the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I also certify that all participants are registered CM/ECF users and will be served via the CM/ECF system.

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Case No. 26 60344

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MAHMOUD KHALIL,
Petitioner,
v.
TODD WALLACE BLANCHE, *U.S. Attorney General,*
Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals

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APPENDIX I TO BRIEF OF AMICI CURIAE IMMIGRATION LAWYERS, LAW PROFESSORS, AND SCHOLARS

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IN THE UNITED STATES COURT OF APPEALS
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MAHMOUD KHALIL,
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v.
TODD WALLACE BLANCHE, *U.S. Attorney General,*
Respondent.

DECLARATION OF GRAEME BLAIR, Ph.D.
AND DAVID HAUSMAN, J.D., Ph.D.

We, Graeme Blair and David Hausman, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. Graeme Blair is a professor of political science at UCLA. He studies state violence and how to make social science research more credible, ethical, and useful. He teaches courses on research design and data analysis for undergraduates and Ph.D. students. His book, *Research Design in the Social Sciences*, was published by Princeton University Press in 2023, and his book *Crime, Insecurity, and Community Policing* was published by Cambridge University Press in 2024. He received a Ph.D. in politics from Princeton University and a B.A. in political science from Reed College. He is the recipient of the Leamer-Rosenthal Prize in Open Social Science.

2. David Hausman is an assistant professor of law at UC Berkeley. He has conducted data analysis as a consulting expert in numerous immigration cases. He has also published scholarly research using immigration enforcement datasets, evaluating, for example, the effect of sanctuary policies (*Proceedings of the National Academy of Sciences*), the effect of an algorithmic no-release policy (*Journal of Law and Economics*, forthcoming), the effect of the first Trump

administration's efforts to control the immigration courts (*Journal of Law, Economics and Organization*), and the effect of appeals on immigration court outcomes (*University of Pennsylvania Law Review*). He received his J.D. and Ph.D. in political science from Stanford University and clerked for Judge Stephen Williams on the D.C. Circuit Court of Appeals. He practiced as an attorney at the ACLU Immigrants' Rights Project in New York from 2016 to 2019, and again briefly as a volunteer attorney in early 2025. He did not work for the Project on this case.

3. Hausman and Blair are Co-Directors of the Deportation Data Project. That Project collects, analyzes, and posts public, anonymized U.S. government immigration enforcement datasets. In addition to posting publicly available data on its website, the Project uses the Freedom of Information Act to obtain datasets from federal government agencies and posts the datasets it receives.

4. We submit this declaration in support of the Brief of Immigration Lawyers, Law Professors, and Scholars as Amici Curiae in the above-captioned case.

5. For our calculations in this declaration, we used the CASE dataset posted by the Executive Office of Immigration Review ("EOIR") in its FOIA Library.[1] We are familiar with the spreadsheets and the data contained therein.

6. The spreadsheets track immigration proceedings and record the detention status of individuals whose cases are pending or complete in the immigration courts and the Board of Immigration Appeals ("BIA"). They include, among other things, the immigration charges against each person, their entry date, the date on the Notice to Appear ("NTA"), the date and time of every hearing scheduled in the case, the outcome of the case, and, when applicable, an appeal. The spreadsheets do not include personally identifiable information, such as names or A-numbers.

7. The latest EOIR CASE dataset before the government most recently began its use of the immigration charges discussed here was posted in early March 2025. It contains 11,720,036 unique cases. Each "case" in the EOIR CASE dataset

[1] Available at https://www.justice.gov/eoir/foia-library-0. Because of the sheer volume of the spreadsheets, which would be millions of pages in length if printed or saved in paginated format, it is impractical to submit copies to the Court. As a result, pursuant to Federal Rule of Evidence 1006, this declaration contains a summary of the contents of the spreadsheets.

does not necessarily correspond to a different, unique individual. For example, if a removal proceeding against a specific individual ends, and later, DHS issues a new charging document against them, two "cases" corresponding with that same individual would appear in the EOIR CASE dataset.

8. Counsel for Amici Curiae asked us to discuss cases where the Department of Homeland Security ("DHS") alleged that a noncitizen violated the Immigration and Nationality Act ("INA") § 237(a)(4)(C)(i) or, prior to 1996, INA § 241(a)(4)(C)(i). We identified a list of relevant case numbers for the analysis from two sources.

9. We first accessed the charges table in the CASE dataset, and we searched by charge.[2] We found 14 cases where DHS charged a noncitizen with removability under INA § 237(a)(4)(C)(i) or § 241(a)(4)(C)(i).

10. Second, counsel for Amici Curiae shared a written BIA decision, *Matter of Khalifa*, 21 I&N Dec. 107 (BIA 1995), with us. According to the BIA decision, the noncitizen in that case was charged with removability under INA § 241(a)(4)(C)(i) on December 16, 1994. That case did not appear in our search of the CASE dataset, likely because that charge was added when the NTA was amended. That case does not appear in Table 1 below.

11. With these 14 cases, we constructed a table of information presented below. We started with the most recent proceeding for each case from the proceedings table in the CASE dataset and retained the date DHS issued the charging document to the noncitizen ("OSC date"; the Notice to Appear was previously called an Order to Show Cause) and a code representing the Immigration Judge's ("IJ") decision in the proceeding. We then merged in the charges for each proceeding from the charges table, which resulted in one to three charges that were entered in at least one proceeding for these cases. We then merged by case number to include details from the cases table, including the date of entry into the United States. We then merged by case number to the appeals table to add the BIA decision date. We then constructed a date representing the final decision date in the case ("Decision date") by either taking the completion date from the last proceeding or, if it was later, the BIA decision date from the Table of Appeals.

12. There are 4 cases in the EOIR CASE dataset where DHS charged a noncitizen with removability under INA § 237(a)(4)(C)(i) or § 241(a)(4)(C)(i) and

[2] We accounted for differences in punctuation and capitalization.

the date on the NTA was on or after January 1, 2000.

13. Table 1, below, shows these data for all 14 cases, including the case ID, entry date (date of entry into the United States), OSC date (date DHS issued the charging document to the noncitizen), the decision date (final decision date either from the proceedings table or appeals table as described above), the decision (the final decision of the IJ after any appeals, if applicable), and the charges from the charges table.

Case ID	Entry date	OSC date	Decision date	Decision	Charges: First	Charges: Second	Charges: Third
2454560	1977-10-17	1991-03-15	1992-01-15	Relief/rescinded	241a04ci		
2529143	1992-02-17	1999-08-04	2000-07-13	Removed	237a04ai	237a04ci	
3000162	1994-02-01	1994-10-28	2005-09-20	Relief/rescinded	241a01b	241a04ci	
3000168	1994-02-01	1994-10-28	2005-09-20	Relief/rescinded	241a01b	241a04ci	
3000175	1994-02-01	1994-10-28	1997-04-14	Administrative closing - other	241a01b	241a04ci	
3042103	1989-07-01	1995-01-04	1995-08-02	Relief/rescinded	241a04ci		
3130892	2001-11-16	2003-10-15	2003-10-27	Voluntary departure	237a01b	237a04ci	
3357300	1995-02-23	1995-07-18	1995-12-08	Case terminated by IJ	241a04ci		
3457035	1994-12-24	1995-04-11	2003-09-24	Deported	241a04ci		
3466804	1994-04-23	1996-11-26	1997-05-08	Case terminated by IJ	241a01b	241a01ci	241a04ci
3476658	1995-03-02	1995-12-21	1999-10-14	Case terminated by IJ	241a04ci		
5573574	2005-10-02	2006-08-03	2008-09-03	Case terminated by IJ	237a04ci		
7760620	[missing]	2015-09-15	2015-10-28	Removed	237a01ci	237a04ci	237a01b
9108003	2018-06-02	2019-08-21	[missing]	[missing]	237a04ci		

14. We have reasons to believe that the list of 14 cases we identified in the EOIR CASE dataset may be a significant overcount of the number of individuals charged with removability under INA § 237(a)(4)(C)(i) or § 241(a)(4)(C)(i).

15. Counsel for Amici Curiae shared with us two letters filed by the government in the case *Khalil v. Joyce, et al.*, Civ. Act. No. 25-1963 (MEF) (D.N.J.), Dkt. Nos. 241, 246. We understand that these letters were filed in response to the District of New Jersey's Order requiring the government to provide a list of all instances in which the government has invoked INA § 237(a)(4)(C)(i) or any predecessor statutes to seek the removal of individuals from the United States. In these letters, the government identified a total of five such cases originating before March 2025. Four of the five cases involved the predecessor statute, § 241(a)(4)(C)(i), and were invoked before January l, 2000.

16. Because the government is likely to have more complete information about the instances in which these removability charges have been invoked, it is

plausible that the 14 cases we identified in the EOIR CASE dataset were a significant overcount.

17. This overcount is plausible given the combination of the possibility of errors in the data and the extreme rarity with which these charges have been used. In the EOIR CASE dataset, there are nearly twelve million cases altogether. *See* ¶7 above. Even if the dataset only included an error in charges one in a million times, that would result in twelve errors. The government's letters suggested that these charges were used more rarely still only five times out of the same number of cases. Therefore, even if errors in entering charge data occur very rarely, error might nonetheless be the most likely reason for the appearance of charges under INA 237(a)(4)(C)(i) or § 241(a)(4)(C)(i) in the dataset if actual cases with these charges are rarer still.

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