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

No. 26-60344

MAHMOUD KHALIL,

Petitioner,

v.

TODD WALLACE BLANCHE, *U.S. Attorney General*,

Respondent.

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

**BRIEF OF *AMICI CURIAE* SCHOLARS OF
CONSTITUTIONAL LAW IN SUPPORT OF PETITIONER
AND REVERSAL**

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in Fifth Circuit Rule 28.2.1 and Fifth Circuit Rule 29.2, have an interest in the outcome of this case, beyond that set forth in the Petitioner's Certificate of Interested Persons. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal:

Amici Scholars of Constitutional Law are represented in these proceedings by the following counsel on a pro bono basis: Michael R. Noveck, Lawrence S. Lustberg, and Madhulika Murali, of the law firm FBT Gibbons LLP.

Amici's counsel listed herein also represent some of the same *Amici* in Petitioner's proceedings before the U.S. Court of Appeals for the Third Circuit.

Dated: August 21, 2026

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STATEMENT OF *AMICI*¹

Amici curiae, whose names and affiliations are set forth in the attached Addendum, are distinguished scholars and nationally recognized experts who teach, lecture, and write about constitutional law, national security, civil liberties, and the separation of powers.

This case implicates fundamental questions about individuals’ rights to speak; to be free from unlawful detention; to be on notice of the legal consequences of their own conduct; and to equal treatment under the law. Specifically, this case involves the historically familiar practice of the Executive Branch invoking national security or policy concerns during times of perceived crisis to target non-citizens for detention and removal. Here, that issue arises through a novel application of an obscure statutory provision, 8 U.S.C. § 1227(a)(4)(C)(i) (the “Foreign Policy Ground”). As scholars, *Amici* seek to assist the Court by providing an historical overview of such executive overreach, and how it has been discredited by history and by judges who vindicated the important role of the judiciary in checking executive power and protecting fundamental rights. For the reasons set forth below, *Amici* respectfully submit that this Court should reverse the decision of the Board of Immigration Appeals (“BIA”).

¹ All parties have consented to the filing of this brief. No party or party’s counsel authored this brief in whole or in part, and no person or entity contributed money to fund the preparation or submission of this brief, other than *Amici* and their counsel.

SUMMARY OF ARGUMENT

On March 8, 2025, Petitioner Mahmoud Khalil (“Petitioner”), a lawful permanent resident, was arrested in New York City by plainclothes federal officers. The next day, the Department of Homeland Security (“DHS”) issued a statement saying that Petitioner’s arrest was carried out “in support of President Trump’s executive orders prohibiting anti-Semitism, and in coordination with the Department of State.” *Am. As’n of Univ. Professors v. Rubio* (“AAUP”), 802 F. Supp. 3d 120, 145 (D. Mass. 2025) (quoting DHS statement), *appeal pending*, No. 26-1195 (1st Cir.).

Petitioner was transferred to Louisiana for his removal proceedings. DHS asserted that Petitioner was removable under INA § 237(a)(4)(C), 8 U.S.C. § 1227(a)(4)(C), based upon a determination by Secretary of State Marco Rubio (the “Rubio Determination”) that he has “reasonable grounds to believe that [Petitioner’s] presence or activities in the United States would have potentially serious adverse foreign policy consequences for the United States.” ROA.9879-81. Shortly after, DHS added a second basis for Petitioner’s removal, asserting that Petitioner had misrepresented material information on his application for lawful permanent resident status. *See* INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A).²

² Petitioner challenged his detention through a habeas petition filed in the United States District Court for the Southern District of New York and then transferred to the District of New Jersey. That court held that Petitioner could not be removed

On June 20, 2025, the Immigration Judge issued a written decision finding Petitioner removable based, in part, upon the Rubio Determination. ROA.6894. The Immigration Judge issued an amended decision on September 12, 2025 incorporating her prior decision by reference and denying Petitioner's request for a waiver of inadmissibility under section 237(a)(1)(H) of the INA. ROA.5149.

Petitioner appealed to the BIA. On April 9, 2026, the BIA dismissed Petitioner's appeal, denied his motion to remand proceedings to the immigration court to present relevant evidence of First Amendment retaliation, and entered a final order of removal. *Matter of M-K-*, 29 I. & N. Dec. 556 (BIA 2026).

Of particular concern to *Amici* is how the BIA upheld the Foreign Policy Ground as applied to Petitioner solely because the Rubio Determination was "presumptive and sufficient evidence" to sustain that ground for removal. *Id.* at 559. *Amici* explain below how this likens Petitioner's case to actions that have been taken by the Executive during prior periods of perceived crisis. Those actions demonstrate a pattern of the Executive invoking national security or foreign policy concerns to target certain non-citizens for detention and removal, often based on their expression

under the Foreign Policy Ground. *Khalil v. Trump*, 786 F. Supp. 3d 871 (D.N.J. 2025). A divided Third Circuit reversed on jurisdictional grounds, holding that the INA channels Petitioner's challenge to the Foreign Policy Ground to a petition for review from a final order of removal. *Khalil v. President, United States*, 164 F.4th 259 (3d Cir. 2026). Because there is undisputedly no jurisdictional barrier to review here, the Third Circuit's opinion has no bearing on this Court's review.

of political views.³ But these concerns were ultimately revealed to have been overstated and unsubstantiated,⁴ and these actions, which were eventually discredited by the courts and by history, now only serve as a terrible national embarrassment. In this case, there is little question but that the executive action taken against Petitioner occurred as part of a pattern of repression of non-U.S. citizens—specifically, those who advocate for Palestinian rights. Whatever deference the Executive is owed regarding national security or foreign policy matters, no such deference is owed under circumstances which involve the targeting of certain non-U.S. citizens based on their constitutionally protected speech.⁵

Amici submit that this Court should follow all other courts that have considered whether detention and removal in these circumstances is constitutional, and hold that the Foreign Policy Ground—as applied to Petitioner—violates his First and Fifth Amendment rights. In doing so, and in accordingly reversing the BIA’s

³ See generally Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime From the Sedition Act of 1798 to the War on Terrorism* 5, 283-307, 528-29 (W.W. Norton & Co. 2004); David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 Harv. C.R.-C.L. L. Rev. 1 (2003).

⁴ See, e.g., Anthony J. DeMattee, Matthew J. Lindsay & Hallie Ludsin, *An Unreasonable Presumption: The National Security/Foreign Affairs Nexus in Immigration Law*, 88 Brook. L. Rev. 747, 759-66 (2023); Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 Wis. L. Rev. 273, 273 (2003).

⁵ See Shirin Sinnar, *A Label Covering A “Multitude of Sins”: The Harm of National Security Deference*, 136 Harv. L. Rev. F. 59, 74 (2022).

decision, this Court will fulfill its fundamental role in our system as a necessary check on executive overreach.

ARGUMENT

I. EXECUTIVE BRANCH ACTION IN TARGETING NON-CITIZENS FOR DETENTION AND REMOVAL DURING TIMES OF PERCEIVED CRISIS, INCLUDING BASED ON THEIR EXPRESSION OF POLITICAL VIEWPOINTS, HAS NOT SURVIVED LEGAL OR HISTORICAL SCRUTINY.

A. The Executive’s pattern of responding to perceived political crisis by invoking supposed national security or foreign policy concerns to target certain non-citizens for detention and removal

Throughout American history, the Executive Branch of government has, during periods of perceived national “crisis,” invoked national security or foreign policy concerns to target certain non-citizens for detention and removal, often based on the expression of their political viewpoints. In doing so, it has drawn upon a “presumed nexus between immigration, on the one hand, and national security and foreign affairs, on the other.”⁶

This presumed nexus can be traced as far back as the 1889 Chinese Exclusion Case, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). There, the Court held that, in the context of an alleged “Oriental invasion,” the Scott Act properly prohibited the reentry of Chae Chan Ping, a longtime resident of the United States, in order to “give security against foreign aggression and encroachment.” *Id.* at 595,

⁶ DeMattee, Lindsay & Ludsin, *supra* note 4, at 748.

606. Justice Field devoted much of his opinion not to security concerns but instead to the contentions that people of Chinese descent had allegedly failed to assimilate by “adhering to the customs and usages of their own country,” and that they were “content with the simplest fare” and made labor market competition unfavorable towards “our people.” *Id.* at 595. Of course, Justice Field’s “inter[weaving] then-familiar anti-Chinese tropes with [] foreign affairs and national security themes”⁷ cannot be squared with our American values. Scholars have accordingly, over time, challenged any presumed nexus between immigration and national security or foreign policy; that is because “most immigration cases do not touch on sensitive questions of national security or foreign policy.”⁸

Indeed, when the Executive has invoked such concerns to target certain non-citizens during perceived crises over the past century, the concerns have often been overstated or unsubstantiated, contributing to the obloquy this executive practice has received.⁹ The first major iteration of such executive action occurred in 1919.¹⁰ Responding to a series of bombings targeting several public figures, Attorney General Mitchell Palmer launched nationwide raids aimed at detaining and removing

⁷ *Id.* at 757.

⁸ *Id.* at 749; see also Jonathan Hafetz, *Immigration and National Security Law: Converging Approaches to State Power, Individual Rights, and Judicial Review*, 18 ILSA J. Int’l. & Comp. L. 625, 638-39 (2012).

⁹ See Tushnet, *supra* note 4, at 283-84, 298.

¹⁰ See generally Robert K. Murray, *Red Scare: A Study in National Hysteria, 1919-1920*, at 69-71 (1955).

large numbers of non-citizens from the United States.¹¹ But the raids were not aimed at those suspected of conducting the attacks. Rather, motivated by suspicion about “Bolsheviks,”¹² the raids were aimed generally at so-called foreign “radicals,”¹³ creating a period of repression now known as the first “Red Scare.”¹⁴ The result was the Alien Act of October 16, 1918, Pub. L. No. 65-221, 40 Stat. 1012, which permitted the deportation of any alien who believed in or advocated the violent overthrow of the government, and creating a broad rule that mere association with certain left-wing organizations sufficed to qualify a non-citizen for removal,¹⁵ regardless of whether the non-citizen had ever even attended any relevant meetings.¹⁶ Given the public’s fears of “radicals, immigrants, and labor unrest,”¹⁷ “[t]he main target of the raids and arrests were Russians and Eastern Europeans.”¹⁸

¹¹ David Cole, *Enemy Aliens*, 54 Stan. L. Rev. 953, 995 (2002).

¹² Harlan Grant Cohen, *Note: The (Un)Favorable Judgment of History: Deportation Hearings, the Palmer Raids, and the Meaning of History*, 78 N.Y.U. L. Rev. 1431, 1456 (2003).

¹³ See Attorney General A. Mitchell Palmer on Charges Made Against Department of Justice by Louis F. Post and Others, Hearing Before the House Comm. on Rules, 66th Cong. 157, 166 (1920) (“The results of the investigations conducted by the Bureau of Investigation . . . showed that the predominating cause of the radical agitation . . . was the alien population in this country.”); *id.* at 26 (“Most of the individuals involved in this movement are aliens or foreign-born citizens.”).

¹⁴ Cole, *Enemy Aliens*, *supra* note 11, at 995.

¹⁵ Cohen, *supra* note 12, at 1458.

¹⁶ Charles H. McCormick, *Seeing Reds: Federal Surveillance of Radicals in the Pittsburgh Mill District, 1917-1921* 155-58 (Univ. of Pitt. Press 1997).

¹⁷ Cohen, *supra* note 12, at 1456.

¹⁸ *Id.* at 1458.

In total, across the raids, federal and local officials arrested between 4,000 and 10,000 individuals.¹⁹ On December 21, 1919, 249 non-citizens were loaded onto a ship and deported to Russia.²⁰ Yet none of those deported were shown to have been involved in planning the bombings. In fact, “[n]ot a single bomber was found,”²¹ and not one of the thousands of immigrants detained was charged with involvement in the bombings.²²

The Palmer raids now represent a historical “lesson in overreaction.”²³ Almost immediately afterwards, leading scholars and lawyers vehemently condemned the raids in a report that concluded: “American institutions have not in fact been protected by the Attorney General’s ruthless suppression. On the contrary, those institutions have been seriously undermined No organization of radicals acting through propaganda over the last six months could have created as much revolutionary sentiment in America as has been created by the Department of Justice itself.”²⁴ Attorney General Palmer was called to defend his conduct before

¹⁹ Cole, *Enemy Aliens*, *supra* note 11, at 996.

²⁰ See *200 Caught in New York*, N.Y. Times, Nov. 8, 1919, at 1.

²¹ David Cole, *Reflections on Immigration One Hundred Years After the Red Scare*, 65 N.Y.L. Sch. L. Rev. 178 (2020-2021).

²² David Cole, *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. Chi. L. Rev. 1329, 1347-48 (2008).

²³ Cole, *Reflections on Immigration*, *supra* note 21, at 172.

²⁴ The Nat’l Popular Gov’t League, *To the American People: Report Upon the Illegal Practices of the United States Department of Justice* 7 (1920).

Congress.²⁵ Over a century later, the Federal Bureau of Investigation (“FBI”) concedes that the Palmer raids “were certainly not a bright spot for the young Bureau,”²⁶ while scholars maintain that the raids represent a “concrete example of what happens to a democratic nation and its people when faith and reason are supplanted with fear.”²⁷

Unfortunately, Congress and the Executive again exploited anti-communist sentiment during World War II and the Cold War that followed. Like the first Red Scare, these actions were couched in the language of national security and foreign affairs, to suppress protected speech. In this next episode, “[g]uilt by association was the watchword, as loyalty oaths, blacklists, registration requirements, and congressional inquiries sought to identify and penalize those who were sympathetic to or associated with the Communist Party, irrespective of their involvement in any otherwise illegal activity.”²⁸

²⁵ See *Att’y Gen. A. Mitchell Palmer on Charges Made Against Dep’t of Justice by Louis F. Post and Others: Hearings Before the H. Comm. on Rules*, 66th Congress, 2d Sess. (1920); *Charges of Illegal Practices of the Dep’t of Justice: Hearings Before a Subcomm. of the S. Comm. on the Judiciary*, 66th Cong., 3d Sess. (1921).

²⁶ Fed. Bureau of Investigation, *Famous Cases and Criminals: Palmer Raids*, <https://www.fbi.gov/history/cases-and-criminals/palmer-raids> (last visited Aug. 21, 2026).

²⁷ Murray, *supra* note 10, at ix.

²⁸ Cole, *Enemy Aliens*, *supra* note 11, at 996-97.

Though citizens were also implicated in the scourge of the McCarthyism that is now viewed as such a “grave error” in American history,²⁹ non-citizens suffered particularly harsh consequences. In 1939, Congress considered more than 100 anti-immigrant proposals, eventually adopting statutory provisions that allowed for the deportation and exclusion of those associated with communist groups.³⁰ For example, the Internal Security Act of 1950 and the Immigration and Nationality Act of 1952 required communist organizations to register with the Attorney General, prohibited citizenship, and allowed for the removal of members of communist groups.³¹

Scholars are unanimous that “the massive repression”³² of McCarthyism “violated the most fundamental norms and the most essential values of the American constitutional systems.”³³ And the courts, fulfilling their role in checking impermissible executive action, stepped up, recognizing that “the McCarthy era tactics were not merely a mistake, but unconstitutional.”³⁴ Eventually, the Supreme

²⁹ Cole, *The New McCarthyism*, *supra* note 3, at 7.

³⁰ David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* 130 (The New Press 2003) [hereinafter “Enemy Aliens book”].

³¹ Internal Security Act of 1950 §§ 7, 22, Pub. L. No. 81-831, 64 Stat. 987 (1950); Immigration and Nationality Act of 1952 §§ 212, 241, 313, Pub. L. No. 82-414, 66 Stat. 163 (1952).

³² Mari J. Matsuda, *Foreword: McCarthyism, the Internment and the Contradictions of Power*, 19 B.C. Third World L.J. 9 (1998).

³³ Geoffrey R. Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 Cal. L. Rev. 1387, 1405 (2005).

³⁴ Cole, *Enemy Aliens*, *supra* note 11, at 997.

Court held that “both the First Amendment right of association and the Fifth Amendment’s Due Process Clause preclude imposition of criminal or even civil liability for association absent specific intent to further a group’s illegal ends.”³⁵

Unfortunately, the 21st century has seen a continuation of this executive practice. Although the “war on terrorism”³⁶ of the last two decades has involved new means of targeting of non-citizens,³⁷ the process is familiar: “Today’s war on terrorism . . . demonstrate[s] our government’s remarkable ability to evolve its tactics in ways that allow it simultaneously to repeat history and to insist that it is not repeating history.”³⁸ Adopting an “unprecedented”³⁹ approach to broad executive power after the attacks of September 11, 2001, the government began an operation that targeted between 2,000 and 5,000 individuals for mass arrests, detentions, interrogations, and removals.⁴⁰ Almost all of those targeted were Arab

³⁵ *Id.* (citing *United States v. Robel*, 389 U.S. 258, 262 (1967)); *see also id.* at 968 n.62 (citing cases).

³⁶ *Id.* at 955.

³⁷ *See generally* Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. L. Rev. 1 (2006).

³⁸ Cole, *The New McCarthyism*, *supra* note 3, at 1-2 (“We have not . . . interned people solely for their race, but we have detained approximately two thousand people . . . largely because of their identity . . . we have subjected Arab and Muslim noncitizens to discriminatory deportation, registration, fingerprinting, visa processing, and interviews . . .”).

³⁹ Chemerinsky, *supra* note 37, at 4.

⁴⁰ Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction without a Difference?*, 38 U.C. Davis L. Rev. 609, 620 (2005).

and Muslim,⁴¹ but almost none of them were shown to have any connection to terrorist activity or charged with any terrorism-related crime.⁴² For example, the FBI initiated an investigation designated “PENTTBOM” immediately after the attacks,⁴³ detaining more than 1,200 individuals for interrogation.⁴⁴ “Although many were questioned and released with no charges pressed against them, many were detained for immigration law violations,”⁴⁵ and some deemed “of interest” were administratively detained until the FBI cleared them of terrorist involvement.⁴⁶ But according to the Department of Justice’s Inspector General, the “of interest” designation was applied in an “indiscriminate and haphazard manner,”⁴⁷ with detainees “arrested more by virtue of chance encounters . . . rather than by any genuine indications of a possible connection with or possession of information about

⁴¹ *Id.*

⁴² *Id.* at 621, 631-32.

⁴³ “Pentagon/Twin Towers Bombings.” See Office of the Inspector Gen., U.S. Dep’t of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* 12 (2003), available at <http://www.justice.gov/oig/special/0306/full.pdf>. [hereinafter *OIG Report*].

⁴⁴ See Muzaffar A. Chishti, et al., *America’s Challenge: Domestic Security, Civil Liberties, and National Unity After September 11* 7 (Migration Policy Institute 2003).

⁴⁵ Akram & Karmely, *supra* note 40, at 622.

⁴⁶ *OIG Report*, *supra* note 43, at 1.

⁴⁷ *Id.* at 70.

terrorist activity.”⁴⁸ At least 762 non-citizens, the vast majority of whom were Muslim men from South Asia, South West Asia, and North Africa, were detained.⁴⁹

Congress also passed the “USA PATRIOT ACT,”⁵⁰ which authorized the Executive to remove, or deny entry to, foreign nationals who provided support to groups broadly designated as “terrorist organizations,” including those that “seek[] to fund lawful ends, such as political and humanitarian activities.”⁵¹ This Act, too, has been disproportionately applied to Arab and Muslim communities, without a lawful basis for removal.⁵² For this reason, at least one immigration judge described the removal proceedings of two Palestinians under Section 411 of the Act as “an embarrassment to the rule of law.”⁵³

In combination with disproportionately targeting Arab and Muslim non-citizens, the “war on terrorism” has involved “adapted”⁵⁴ tactics of the McCarthy era—for example, “penalizing people under criminal and immigration laws for

⁴⁸ *Id.* at 41-42, 70.

⁴⁹ *Id.* at 20-21; Human Rights Watch, Report: *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees* 10 (2002).

⁵⁰ Uniting & Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001); USA Patriot Act §§ 411 & 412, 8 U.S.C. §§ 1182 & 1226.

⁵¹ Akram & Karmely, *supra* note 40, at 633.

⁵² See, e.g., Hon. Paul Brickner & Meghan Hanson, *The American Dreamers: Racial Prejudices and Discrimination As Seen Through the History of American Immigration Law*, 26 T. Jefferson L. Rev. 203, 231 (2004).

⁵³ *In re Hamide and Shehadeh*, Nos. A 19 262 560 & A 30 660 528 at 9-10, 11 (IJ Dec. Jan. 29, 2007), available at <http://www.adc.org/PDF/LA8.pdf>.

⁵⁴ Cole, *The New McCarthyism*, *supra* note 3, at 1.

providing “material support” to politically selected “terrorist” groups, without regard to whether an individual’s support was intended to further or in fact furthered any terrorist activity”—certainly a form of “guilt by association.”⁵⁵ Meanwhile, part of the “new paradigm” of the war on terrorism has been the designation of certain non-citizens as “enemy combatants,” enabling the Executive to detain and torture them at U.S.-run offshore detention centers, such as Guantánamo Bay, Bagram Air Base in Afghanistan, and secret CIA “black sites.”⁵⁶ Yet, military and intelligence officers themselves recognized that many offshore detainees presented no threat to the U.S.⁵⁷

Once again, scholars condemned these actions, concluding that “[s]ince September 11, 2001, some of the worst aspects of American history have been repeating themselves.”⁵⁸ “While it has altered slightly the tactics . . . to avoid literally repeating history, in its basic approach the government [was] replaying the mistakes of the past.”⁵⁹

⁵⁵ *Id.* at 2.

⁵⁶ Jonathan Hafetz, *Habeas Corpus After 9/11: Confronting America’s New Global Detention System* 31-67 (2011).

⁵⁷ Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* 70 (2006) (“[I]n many cases, we had simply gotten the slowest guys on the battlefield.”) (quoting Lieutenant Colonel Thomas Berg).

⁵⁸ Erwin Chemerinsky, *Civil Liberties and the War on Terrorism*, 45 Washburn L.J. 1, 1 (2005).

⁵⁹ Cole, *The New McCarthyism*, *supra* note 3, at 3.

Today, the paradigm for the targeting of non-citizens includes different offshore detention sites,⁶⁰ newer formulations of national security or foreign policy concerns,⁶¹ and greater claims of unreviewable executive authority.⁶² Viewed in context, the Executive is again undertaking those actions that have indelibly stained the nation's history. In these times, the need for meaningful checks on executive power—even (and particularly) when the Executive cites national security or foreign policy concerns—is more important than ever. This Court's judicial review in this case must be viewed, in context, as one such critical check.

B. Judicial review plays a crucial role in constraining such abuses of executive power, especially those that violate the Constitution.

In granting Fred Korematsu's *coram nobis* petition and vacating his conviction, Judge Marilyn Hall Patel stated that the Supreme Court's decision in *Korematsu v. United States*, 323 U.S. 214 (1944), “stands as a caution that in times of distress the shield of military necessity and national security must not be used to

⁶⁰ See Brian Finucane, *The Legal Fig Leaf: The US-El Salvador Detainee Diplomatic Notes*, Just Security, Jul. 17, 2025, <https://www.justsecurity.org/117271/us-elsalvador-diplomatic-notes/>.

⁶¹ See Amicus Br. of Immigration Lawyers, Law Professors, and Scholars, *Khalil v. Trump*, 2:25-cv-01963-MEF (D.N.J.), Dkt. No. 110-1, at 7-8 (“It may well be that [Petitioner’s] case is unprecedented in the history of this provision and in the history of the United States.”).

⁶² *Garcia v. Noem*, No. 25-1404, 2025 U.S. App. LEXIS 9237, at *6 (4th Cir. Apr. 17, 2025) (“If today the Executive claims the right to deport without due process and in disregard of court orders, what assurance will there be tomorrow that it will not deport American citizens and then disclaim responsibility to bring them home?”).

protect governmental actions from close scrutiny and accountability [I]n times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.” *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984). Indeed, “a system based on checks and balances” is a foundational principle of American democracy.⁶³ Thus, in times of perceived crisis, courts have played a crucial role in constraining abuses of executive power.

For example, during the Palmer raids, discussed above, several courts carefully scrutinized the Executive’s actions, ultimately undoing them.⁶⁴ Judge George Anderson in Massachusetts decried the Executive’s “mob” tactics and granted the habeas petitions of numerous detainees.⁶⁵ Judge George Bourquin in Montana, granting a writ of habeas corpus, stated in no uncertain terms: “Assuming petitioner is of the so-called ‘Reds[,]’ he and his kind are less a danger to America than are those who indorse or use the methods that brought him to deportation.” *Ex parte Jackson*, 263 Fed. 110, 113 (D. Mont. 1920).

⁶³ Chemerinsky, *supra* note 37, at 3; *see also Stern v. Marshall*, 564 U.S. 462, 482-83 (2011).

⁶⁴ Cole, *Enemy Aliens* book, *supra* note 30, at 120.

⁶⁵ *Colyer v. Skeffington*, 265 F. 17, 43, 79-80 (D. Mass. 1920), *rev’d in part sub nom. Skeffington v. Katzeff*, 277 F. 129, 133 (1st Cir. 1922).

Likewise, during the second Red Scare, the Supreme Court made clear that the Executive cannot invoke unlimited removal authority by mere citation to national security or foreign policy grounds. For example, in *Bridges v. Wixon*, 326 U.S. 135 (1945), an early Cold War case, the Court overturned a removal order because the Executive did not prove any meaningful affiliation with the Communist Party or its violent aims. *Id.* at 156-57. The Court held that an individual “who cooperates with such an organization only in its *wholly lawful activities* cannot by that fact be said as a matter of law to be ‘affiliated’ with it.” *Id.* at 143.

Similarly, in *Rowoldt v. Perfetto*, 355 U.S. 115 (1957), the Court held that the government did not meet its burden of proving that a non-citizen was deportable under the requirements of the Internal Security Act. *Id.* at 121. The non-citizen’s own testimony that he joined the Communist party, paid dues, attended meetings, and worked in a Communist bookstore was not enough, *id.* at 116-21, in light of “the solidity of proof that is required for a judgment entailing the consequences of deportation.” *Id.* at 120. The Court reached a similar conclusion in *Gastelum-Quinones v. Kennedy*, 374 U.S. 469 (1963), overturning a deportation order because the government’s case rested on “a mere inference based upon the alien’s silence,” which was unacceptable given that “deportation is a drastic sanction, one which can destroy lives and disrupt families.” *Id.* at 479.

Notably, even in the context of detentions of non-citizens designated as “enemy combatants” in the “war on terrorism,” the Supreme Court has assumed a “robust judicial role vis-à-vis security decision-making.”⁶⁶ The Court acknowledged in *Boumediene v. Bush*, 553 U.S. 723 (2008), that “[i]n considering both the procedure and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches.” *Id.* at 796. But the *Boumediene* Court nevertheless went on to hold that “[l]iberty and security can be reconciled; and in our system they are reconciled within the framework of the law.” *Id.* at 798. The Court thus held that the petitioners had a constitutional right to challenge their confinement via habeas corpus. *Boumediene* followed a string of cases born out of the “war on terrorism” in which the Supreme Court reinforced the reviewing power of the judicial branch, even when the Executive claimed heightened deference based on national security or foreign policy concerns. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006) (holding that military commissions set up by the Executive lacked the power to proceed because they violated the Uniform Code of Military Justice and the Geneva Conventions); *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (holding that federal courts have jurisdiction to hear non-citizens’ habeas corpus and other statutory challenges to their detention at Guantanamo Bay).

⁶⁶ Sudha Shetty, *The Rise of National Security Secrets Commentary: National Security: Response*, 44 Conn. L. Rev. 1563, 1572 n.40 (2012).

In sum, the judiciary plays a critical role in checking executive action given the Executive’s repeated breach of the Constitution during times of perceived crisis. This case speaks directly to this history.

II. THIS COURT SHOULD FOLLOW ALL OTHERS WHO HAVE CONSIDERED THE QUESTION AND CONCLUDE THE FOREIGN POLICY GROUND—AS APPLIED TO PETITIONER—IS UNCONSTITUTIONAL.

A. This case typifies the undesirable executive action of the past.

A common feature of the different periods of history described in Part I is a climate of repression in which non-citizens, or those espousing particular beliefs, were disproportionately targeted. For example, during the Red Scares, there was a climate of repression of communists or communist sympathizers, with certain non-citizens bearing the brunt of the repression; likewise, the war on terrorism involved repression of those perceived to be terrorists, many because they had certain religious affiliations or came from certain regions of the world. In these times, courts have stood strong against executive overreach. *See supra* Part I. After all, “[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate,” *Snyder v. Phelps*, 562 U.S. 443, 461 (2011), across a range of ideological contexts. *See, e.g., 303 Creative LLC v. Elenis*, 600 U.S. 570 (2023) (holding that a statute which might require an individual to advertise her wedding website services in a manner inconsistent with her belief in only heterosexual marriage violated the First Amendment); *Ashcroft v. ACLU*, 542 U.S.

656 (2004) (holding that a statute intended to protect children from sexual Internet material impermissibly constituted content-based discrimination); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (holding that a statute criminalizing the display of a burning cross, a swastika, and other similar symbols impermissibly constituted unnecessary content-based discrimination); *Nat'l Socialist Party of Am. v. Skokie*, 432 U.S. 43 (1977) (upholding the First Amendment rights of participants in a Nazi parade).

This case connects this history to current times. Today, we once again find ourselves in a period of repression of those engaging in certain (here, pro-Palestinian) advocacy in which non-citizens are being disproportionately targeted, harkening back to the most unfortunate episodes of American history. *See, e.g., AAUP*, 802 F. Supp. 3d at 194 (holding that “[the federal government] acted in concert to misuse the sweeping powers of their respective offices to target non-citizen pro-Palestinians for deportation primarily on account of their First Amendment protected political speech. They did so in order to strike fear into similarly situated non-citizen pro-Palestinian individuals, pro-actively (and effectively) curbing lawful pro-Palestinian speech and intentionally denying such individuals (including the plaintiffs here) the freedom of speech that is their right.”).

The Executive Orders here at issue are just such repressive measures. For example, “Protecting the United States from Foreign Terrorists and other National

Security and Public Safety Threats,” Exec. Order No. 14161, 90 Fed. Reg. 8451 (Jan. 30, 2025), expressly declares a policy of protecting against “aliens who . . . espouse hateful ideology . . .”. Similarly, the White House described “Additional Measures to Combat Anti-Semitism,” Exec. Order No. 14188, 90 Fed. Reg. 8847 (Jan. 29, 2025), as specifically targeting “leftist, anti-American colleges and universities” and sending a clear message to all “resident aliens who participated in pro-jihadist protests” that the federal government “will find you . . . and deport you.”⁶⁷

Indeed, “[s]tudents have been arrested and subjected to institutional sanctions; faculty members have been censured and terminated; and universities have been threatened with the prospect of losing their federal funding and accreditation if they allow pro-Palestinian [expressive activity] on campus.”⁶⁸ Secretary Rubio has indicated that more than 300 students have had their visas revoked for engaging in pro-Palestinian expressive activity.⁶⁹

⁶⁷ Exec. Order 14188 “Fact Sheet” (Jan. 30, 2025), available at <https://perma.cc/9EGD-T9P7>.

⁶⁸ René Reyes, *Free Speech as White Privilege: Racialization, Suppression, and the Palestine Exception*, 111 Va. L. Rev. Online 166, 168 (2025), available at <https://virginialawreview.org/articles/free-speech-as-white-privilege-racialization-suppression-and-the-palestine-exception/>.

⁶⁹ U.S. Dep’t. of State, *Secretary of State Marco Rubio and Guyanese President Irfaan Ali at a Joint Press Availability*, Mar. 27, 2025 <https://www.state.gov/secretary-of-state-marco-rubio-and-guyanese-president-irfaan-ali-at-a-joint-press-availability/>.

Underscoring this repression, Petitioner was targeted even though he “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.” Pet’r Br. 6. Nonetheless, the BIA held that “[t]he Immigration Judge was correct in ruling that Secretary Rubio’s letter is presumptive and sufficient evidence that [Petitioner] is removable.” *Matter of M-K-*, 29 I. & N. Dec. at 559. It did so by concluding that “Congress assigned the Secretary of State unilateral judgment regarding adverse foreign policy consequences.” *Id.* This credulous acceptance of executive action effectively writes courts out of our fundamental system of checks and balances, contrary to how the judiciary has always served as a critical check on executive power and a guarantor of constitutional rights, even when national security is implicated.

B. The Foreign Policy Ground, as applied to Petitioner, violates the Constitution.

The Foreign Policy Ground provides that a 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 is deportable.” 8 U.S.C. § 1227(a)(4)(C)(i). But when a person’s lawful, past, current, or even “expected” beliefs, statements, or associations are cited as the basis for their deportation, removal is barred unless the Secretary of State personally

determines that the non-citizen’s continued presence or activities would compromise a “compelling” foreign policy interest. 8 U.S.C. § 1182(a)(3)(C)(iii); *see also* 8 U.S.C. § 1227(a)(4)(C)(ii). Every federal court to have considered the issue has concluded that the Foreign Policy Ground, in targeting non-citizens for detention and removal is substantially likely to violate the First and Fifth Amendments.

For example, in *Mahdawi v. Trump*, 781 F. Supp. 3d 214 (D. Vt. 2025), the court found that the petitioner—similarly charged under the Foreign Policy Ground for statements during campus protests—was engaged in “core political speech and thus trenches upon an area in which the importance of First Amendment protections *is at its zenith*.” (citation modified). *Id.* at 230. Because “Mr. Mahdawi’s speech [did] not appear to fall within any areas in which the First Amendment permits restrictions based on the content of speech,” *id.*, and because “the Government’s public statements, including Executive Orders 14161 and 14188[] [constituted] evidence of retaliatory intent,” *id.*, Mr. Mahdawi made a “substantial claim regarding the alleged violation of his First Amendment right.” *Id.* at 229 (citation modified). The court also concluded that the government’s actions likely violated the Fifth Amendment, reasoning that “[i]mmigration detention cannot be motivated by a punitive purpose” and that “[i]f the Government detained Mr. Mahdawi as

punishment for his speech, that purpose is not legitimate, regardless of any alleged First Amendment violation.” *Id.* at 232.⁷⁰

The court reached the same conclusion in *Ozturk v. Trump*, 782 F. Supp. 3d 801 (D. Vt. 2025), with respect to a petitioner who was the subject of a Rubio Determination because of an op-ed which she co-authored, “criticiz[ing] the University’s response to ... three resolutions passed by the Tufts Community Union Senate and ask[ing] the University to acknowledge the Palestinian genocide” *Id.* at 806 (citation modified). There, the court observed that “the government has neither rebutted the argument that retaliation for Ms. Ozturk’s op-ed was the motivation for her detention nor identified another specific reason for [her] detention.” *Id.* at 810. Because the petitioner’s speech “carrie[d] all the hallmarks of protected speech on public issues” and “does not fall into any recognized exception,” and because the evidence showed that her op-ed was the “but-for cause of her detention,” petitioner presented “a substantial claim of a First Amendment violation.” In response to the same invocation of absolute national security deference that the BIA accepted here, the *Ozturk* court held that “[w]hile it is uncontested that the government has discretion in this area, that discretion is not accompanied by the

⁷⁰ A Second Circuit panel recently held that the INA deprived the district court of jurisdiction and required that constitutional challenges be brought in a petition for review of a final order of removal. *Mahdawi v. Trump*, ___ F.4th ___, ___, 2026 U.S. App. LEXIS 21542, at *21 (2d Cir. July 21, 2026). The constitutionality of the Foreign Policy Ground is thus properly before this Court. *See also supra* note 2.

authority to violate the Constitution.” *Id.* The court also found that petitioner’s “detention is punishment for her op-ed, and that her punishment is intended to serve as a warning to other non-citizens who are contemplating public speech on issues of the day,” demonstrating a “substantial claim of a violation of [her Fifth Amendment] due process [rights].” *Id.* at 811.

Again, the district court in *Suri v. Trump*, No. 25-cv-480 (PTG)(WBP), 2025 U.S. Dist. LEXIS 94297 (E.D. Va. May 14, 2025), ordered the immediate release of petitioner in the face of the government’s invocation of the Foreign Policy Ground, holding, *inter alia*, that “speech . . . opposing Israel’s military campaign is likely protected political speech,” *Suri*, No. 25-cv-480 (PTG)(WBP), Dkt. No. 71 at 28:23–25, and that “Respondent’s detention and apprehension of Petitioner was caused by his speech . . .” *Id.* at 30:1–4.

Fifth Amendment vagueness concerns pervade this matter as well. As then-District Judge Maryanne Trump Barry held in declaring the Foreign Policy Ground void for vagueness in 1996, “the statute provides absolutely no notice to aliens as to what is required of them under the statute.” *Massieu v. Reno*, 915 F. Supp. 681, 699 (D.N.J. 1996), *rev’d on other grounds*, 91 F.3d 416 (3d Cir. 1996). Moreover, as the district court in *Khalil v. Trump* noted, *see* 784 F. Supp. 3d at 718, when the statute affects speech, 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 also Reno v. ACLU*, 521 U.S. 844, 870-71 (1997). Indeed, “the grave nature of deportation—a drastic measure, often amounting to lifelong banishment or exile” provides further impetus for such an exacting standard of review. *Sessions v. Dimaya*, 584 U.S. 148, 157 (2018); *see also Lee v. United States*, 582 U.S. 357, 370 (2017).

In the greatest traditions of our nation, and of the rule of law which is at its foundation, courts have exercised their constitutional authority to prohibit the Executive from capitalizing on obscure immigration laws, invoking national security or foreign policy concerns, against non-citizens who have engaged in disfavored expressive activity, and targeting them for detention and removal as part of a broader strategy of repression. *Amici* respectfully ask this Court to do so as well and accordingly reverse the decision of the BIA.

CONCLUSION

“It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.” *Robel*, 389 U.S. at 264. At stake in this case is not only Petitioner’s ability to speak, but more profoundly, the viability of our constitutional system of government in which the judicial branch of Government acts as the critical check and balance on the Executive Branch, particularly when—as history shows happens—it threatens fundamental rights. Ultimately, the case reminds us that those

who ignore history are condemned to repeat it. George Santayana, *Reason in Common Sense*, in *The Life of Reason* 284 (1st ed. 1905). For these reasons, *Amici* respectfully urge the Court to reverse the decision below.

Dated: August 21, 2026

Respectfully submitted,

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I, Michael R. Noveck, Esquire, hereby certify that:

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Michael R. Noveck

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I hereby certify that on this 21st day of August 2026, I caused a true copy of the foregoing to be filed through the Court's CM/ECF system, which will automatically serve all counsel of record.

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s/ Michael R. Noveck
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