No. 25-1113

United States Court of Appeals for the Second Circuit

MOHSEN MAHDAWI,

Petitioner–Appellee,

Donald J. TRUMP, in his official capacity as President of the United States; David T. WESLING, in his official capacity as Acting Boston Field Office Director, Immigration and Customs Enforcement, Enforcement and Removal Operations; J DOE, in official capacity as Vermont Sub-Office Director of Immigration and Customs Enforcement, Enforcement and Removal Operations; David J. VENTURELLA, in his official capacity as Senior Official Performing the Duties of the Director, U.S. Immigration and Customs Enforcement; Markwayne MULLIN, in his official capacity as Secretary of the Department of Homeland Security; Marco A. RUBIO, in his official capacity as Secretary of State; and Todd BLANCHE, in his official capacity as Acting U.S. Attorney General,

Respondents–Appellants.

On Rehearing En Banc Before the Second Circuit Court of Appeals

BRIEF FOR AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, THE FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION, PEN AMERICA, THE RUTHERFORD INSTITUTE, AND THE NATIONAL COALITION AGAINST CENSORSHIP AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae collectively state that they do not have parent corporations and that no publicly held corporations hold 10% or more of their stock.

Dated: November 13, 2026

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INTEREST OF *AMICI CURIAE*[1]

The American-Arab Anti-Discrimination Committee (ADC), founded in 1980, is a nonpartisan, nonprofit civil rights organization committed to defending the civil and constitutional rights of Americans, with a focus on issues affecting the Arab-American community and those defending that community. ADC challenges government action that penalizes protected political expression, including in immigration and national security contexts. *See*, *e.g.*, *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1064 (9th Cir. 1995), *vacated on other grounds*, 525 U.S. 471 (1999). ADC's President, Jenin Younes, is a First Amendment litigator who has defended freedom of expression across the political spectrum, including in litigation challenging government pressure to suppress speech on social media, restrictions on physicians' speech, and efforts to penalize expression concerning Palestine. *See, e.g.*, *Murthy v. Missouri*, 603 U.S. 43 (2024); *Høeg v. Newsom*, 728 F. Supp. 3d 1152 (E.D. Cal. 2024); *Sumrall v. Ali*, No. 25-cv-2277 (TNM), 2026 WL 2409424 (D.D.C. Aug. 18, 2026), *appeal docketed*, No. 26-7186 (D.C. Cir.

[1] No person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. Pursuant to this Court's September 11, 2026 Order inviting amicus curiae briefs, ECF No. 246, amici submit this brief without a motion for leave. *See* Fed. R. App. P. 29(a)(2).

Sept. 14, 2026). Her work reflects ADC's commitment to defending political expression regardless of viewpoint.

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization that defends the rights of all Americans to free speech and thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended freedom of expression nationwide without regard to speakers' political views through public advocacy, targeted litigation, and *amicus curiae* filings. *See, e.g.*, *Stanford Daily Publ'g Corp. v. Rubio*, 820 F. Supp. 3d 974 (N.D. Cal. 2026), *appeal docketed*, No. 26-6906 (9th Cir. Oct. 19, 2026); *Volokh v. James*, 148 F.4th 71 (2d Cir. 2025); *Pernell v. Fla. Bd. of Governors of State Univ.*, 181 F.4th 1135 (11th Cir. 2026); *Reges v. Cauce*, 175 F.4th 1014 (9th Cir. 2026). As such, FIRE is deeply concerned by the government's claim of authority to subject resident noncitizens to adverse action for their expressed viewpoints.

PEN American Center, Inc. (PEN America) is a nonpartisan nonprofit organization working at the intersection of literature and human rights. Founded in 1922, PEN America advocates for free expression in the United States and around the world. PEN America has engaged in research and advocacy related to protest rights and the free speech rights of immigrants.

The Rutherford Institute is a nonprofit civil liberties organization, which was founded in 1982 by its President, John W. Whitehead. The Institute provides legal

assistance at no charge to individuals whose constitutional rights have been violated and educates the public about issues affecting their freedoms.

The National Coalition Against Censorship (NCAC) is an alliance of more than sixty national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups. NCAC has long opposed attempts to censor or limit youth free expression on college campuses and tracks efforts to suppress artistic and cultural expression related to political conflict in Israel and Palestine. *See, e.g.*, *Art Censorship Index: Israel and Palestine 2023-Onwards*, Nat'l Coal. Against Censorship, https://ncac.org/art-censorship-index-israel-palestine-2023-onwards (last visited Nov. 12, 2026). It therefore has a longstanding interest in assuring the continuance of robust First Amendment protections for all, including students and noncitizens. The positions advocated in this brief do not necessarily reflect the views of NCAC's member organizations.

SUMMARY OF ARGUMENT

The district court did not lack jurisdiction to grant Petitioner habeas relief under 8 U.S.C. § 1252(b)(9). The three-judge panel incorrectly held that provision of the Immigration and Nationality Act (INA) strips federal courts of jurisdiction to review a *habeas* petition challenging a noncitizen's detention, allegedly undertaken in retaliation for the exercise of his First Amendment rights before a final determination in his immigration proceedings. The panel, misapprehending the

nature of the First Amendment injury, wrongly held that Section 1252(b)(9) prohibits federal habeas review prior to resolution of the immigration case. *See Mahdawi v. Trump*, 183 F.4th 103, 115–24 (2d Cir. 2026). It reasoned that Mahdawi's challenge to his detention is inextricably intertwined with his removal because both arise from the government's allegedly unlawful retaliation against First Amendment-protected speech and protest, so § 1252(b)(9) mandates waiting until the conclusion of immigration proceedings before his case may be heard by a federal court. *Mahdawi*, 183 F.4th at 115–24.

That reasoning misapprehends the nature of Mahdawi's constitutional injury, which is caused both by the government's action in the first instance and aggravated by the approach the panel adopted. This flawed decision carries grave, sweeping implications for millions of noncitizens residing within United States borders. It gives the federal executive *carte blanche* to deprive those noncitizens of their liberty for months or even years before they are afforded the opportunity to challenge their detention in an independent, Article III court. And it is irreconcilable with the fundamental principle that "the First Amendment prohibits retaliation for speech generally." *Nat'l Rifle Ass'n of Am. v. Vullo*, 144 F.4th 376, 387 (2d Cir. 2025). Preventing review until conclusion of administrative immigration proceedings not only permits the government to inflict constitutional and psychological harm against noncitizens being punished for their protected speech. It also casts a pall of fear

across the entire country by sending the message that federal courts will provide no respite to other noncitizens targeted for their speech for the months and years during which their ability to remain in the country is in limbo, thereby aggravating the chilling effect stemming from the government's unlawful conduct.[2]

First, retaliatory detention itself inflicts a constitutional injury because the Government's conduct not only prevents the individual from engaging in the protected expression at issue, but has the effect—and, as alleged here and other courts have recognized, the intended consequence—of chilling others' protected speech and advocacy. The injury arises from the detention itself and exists independently of whether Mahdawi is ultimately ordered removed.

Second, postponing judicial review until a final order of removal has issued cannot remedy the First Amendment harm, because the deprivation of liberty and suppression of speech have already occurred. As this Court recognized in *Öztürk*, delaying review until the conclusion of removal proceedings may deprive a detainee of timely judicial review. 136 F.4th at 401. The relevant question is therefore not simply whether Mahdawi's legal arguments may eventually be considered on a petition for review, but whether the constitutional injury caused by his allegedly

[2] The panel's conclusion is also at odds with the reasoning of *Öztürk v. Hyde*, 136 F.4th 382 (2d Cir. 2025), in which a different panel of this Circuit recognized that § 1252(b)(9) does not necessarily preclude habeas review of claims challenging immigration detention.

retaliatory detention can adequately be remedied at that later stage. Because the deprivation of First Amendment rights, even for a short period of time, is an irreparable harm, it cannot. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Third, immigration proceedings are an inadequate substitute for timely review by an independent Article III court. Immigration courts are part of the executive branch, and their judges may be removed by the Attorney General. Although immigration adjudicators may consider certain constitutional arguments, that possibility does not establish that the administrative process provides adequate review of an independent First Amendment retaliatory detention claim—particularly in light of the lack of independence from the prosecutorial body. Indeed, in Mahdawi's own case, the BIA deferred consideration of his constitutional arguments until an appeal from an administratively final removal order, without adjudicating the constitutionality of his detention. *See Matter of Mahdawi,* at 7 (BIA Apr. 29, 2026), attached to Rule 28(j) Letter, *Mahdawi v. Trump*, No. 25-1113 (2d Cir. May 5, 2026), ECF No. 230.1; *see also Mahdawi*, 183 F.4th at 135 n.27 (Menashi, J., concurring); Rule 28(j) Letter at 2, ECF No. 230.1. The possibility of eventual review therefore cannot substitute for timely judicial intervention when the alleged constitutional injury is occurring during detention.

For these reasons, the Court should affirm the district court's exercise of habeas jurisdiction to adjudicate Petitioner's First Amendment claim.

ARGUMENT

I. RETALIATORY DETENTION INFLICTS IMMEDIATE AND IRREPARABLE FIRST AMENDMENT HARM

The First Amendment prohibits government officials from subjecting individuals to adverse action in retaliation for protected expression. *See Hartman v. Moore*, 547 U.S. 250, 256 (2006). The Supreme Court has long recognized that this protection extends to noncitizens residing in the United States and accordingly forbids weaponization of immigration detention and removal proceedings to retaliate against protected speech. Notably, the First Amendment was intentionally framed as a restraint on government. It reads: "Congress shall make no law…" U.S. Const. amend. I. The plain text of the First Amendment is unconcerned with the citizenship status of the speaker, and for good reason. The Framers of the Constitution understood that free speech is a human right, and that societies flourish when all of those living within them may speak their minds without retribution from government. For example, James Madison's earlier draft of the First Amendment read: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." 1 Annals of Cong. 434 (1789). In 1722, Benjamin Franklin, one of the founding fathers whose thought was influential in shaping American

constitutional principles, republished an essay by Thomas Gordon declaring that: "Without freedom of thought, there can be no such thing as wisdom – and no such thing as public liberty without freedom of speech." Thomas Gordon, *Of Freedom of Speech: That the Same is Inseparable from Publick Liberty, Cato's Letters*, No. 15 (Feb. 4, 1721); *see also* Benjamin Franklin, *Silence Dogood*, No. 8, *New-England Courant* (July 9, 1722).

The Supreme Court has repeatedly recognized as much in its jurisprudence addressing this issue. In *Bridges v. Wixon*, 326 U.S. 135, 148 (1945), the Court considered the deportation of a noncitizen labor organizer based on his political activities and associations, expressly recognizing that "[f]reedom of speech and of press is accorded aliens residing in this country." *Id.* at 148.[3] The Court subsequently reaffirmed the constitutional protections afforded to resident noncitizens in *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953), recognizing that the First Amendment does not distinguish between citizens and resident noncitizens. These opinions establish that noncitizens do not forfeit their freedom of expression merely because they are subject to the Government's immigration authority. As a district

[3] While courts have recognized limited circumstances in which the First Amendment may apply differently to noncitizens, such as restrictions on campaign contributions, those circumstances are not implicated here. Courts have consistently recognized that noncitizens residing in the United States enjoy First Amendment protection for political expression. *See, e.g.*, *Stanford Daily*, No. 25-cv-06618-NW; *Am. Ass'n of Univ. Professors v. Rubio*, 802 F. Supp. 3d 120, 182–83 (D. Mass. 2025).

court recently reaffirmed following a bench trial on the papers in a challenge to immigration enforcement targeting protected expression: "Stated plainly, in the United States, freedom of speech belongs to the people. It is not the government's to take." *Stanford Daily Publ'g Corp. v. Rubio*, No. 25-cv-06618-NW, ECF No. 108, at 2 (N.D. Cal. Aug. 28, 2026).

The Supreme Court recognizes that deprivation of physical liberty, including detention in immigration facilities, is among the most severe forms of adverse action that government may take against an individual. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Fifth Amendment's Due Process Clause] protects."). Consistent with these principles, courts addressing the current Administration's detention of noncitizens based on advocacy for Palestinian rights have recognized the serious First Amendment concerns raised by such detention. *See, e.g.*, *Öztürk v. Trump*, 783 F. Supp. 3d 801, 809–10 (D. Vt. 2025); *Mahdawi v. Trump*, 781 F. Supp. 3d 214, 228–31, 234 (D. Vt. 2025). Indeed, the court below observed that Mahdawi's advocacy for a peaceful resolution of the conflict in Gaza and opposition to Israel's military campaign were "at the heart of an ongoing political debate among the American people." *Mahdawi*, 781 F. Supp. 3d at 230. The district court concluded that Mahdawi had raised a substantial First Amendment retaliation claim. *Id.* Quoting

this Court's decision in *Ragbir*, the district court recognized that because Mahdawi's speech concerned "political change," it constituted "core political speech" for which First Amendment protections are "at [their] zenith." *Id.* (quoting *Ragbir v. Homan*, 923 F.3d 53, 70 (2d Cir. 2019)). These concerns are yet more pronounced when retaliation reflects government policy rather than the isolated actions of a single official. *See Lozman v. City of Riviera Beach*, 585 U.S. 87, 100 (2018) (when retaliation against protected speech "is elevated to the level of official policy, there is a compelling need for adequate avenues of redress").

Here, Petitioner's retaliatory detention unquestionably constitutes part of a sweeping strategy designed to curtail expression of a certain viewpoint in the United States: high-ranking executive branch officials have unabashedly and explicitly boasted that it is. *See Öztürk*, 783 F. Supp. 3d at 811 (acknowledging that the Government's action against petitioner intended "to serve as a warning to other non-citizens who are contemplating public speech"); *see Am. Ass'n of Univ. Professors*, 802 F. Supp. 3d at 194 (explaining that officials sought "to strike fear into similarly situated non-citizen pro-Palestinian individuals" and that their enforcement actions "continue[] unconstitutionally to chill freedom of speech"); *id.* at 175 (finding that plaintiffs had "shown by clear and convincing evidence" that Secretaries Noem and Rubio "intentionally and in concert implemented Executive Orders" in a "viewpoint-discriminatory way to chill protected speech").

The record in *Stanford Daily Publishing Corporation v. Rubio* further illustrates the government's use of immigration enforcement to suppress protected political expression. The court described how officials "intentionally targeted political speech in order to stop campus protests" and sought "to target a few for speaking out" to suppress broader expression. *Stanford Daily*, 2026 WL 2549090 at *5-6. The record further revealed that federal officials prepared reports about noncitizens whose protest participation, organizational affiliations, and social media activity were scrutinized for potential immigration enforcement.[4] *Id.* at *9. The court also documented the resulting chilling effect: noncitizen journalists and contributors had withdrawn articles, refused assignments, requested anonymity, and refrained from speaking publicly for fear of immigration consequences. *Id.* at *8, *23.

[4] The record also documented the use of information from Canary Mission, an anonymously operated website that publishes personal information about students, professors, and organizations it identifies as promoting hatred toward the United States, Israel, or Jews. Its published criteria include participation in the Boycott, Divestment, and Sanctions (BDS) movement. *See Stanford Daily*, 2026 WL 2549090 at *9; *see also* Canary Mission, *Our Mission,* https://canarymission.org/about (last visited November 12, 2026); Canary Mission, *Ethics Policy*, https://canarymission.org/ethics_policy (last visited Nov. 12, 2026). Indeed, Canary Mission's profile of Mahdawi identifies his participation in a university divestment rally, support for BDS, and public criticism of Columbia University's response to the war in Gaza as examples of his purportedly objectionable activism. *See* Canary Mission, *Mohsen Mahdawi,* https://canarymission.org/individual/Mohsen_Mahdawi. Notably, the *Stanford Daily* court found that Canary Mission had published profiles of Mahdawi, Mahmoud Khalil, and Rümeysa Öztürk before their detention and attempted deportation. *See Stanford Daily*, 2026 WL 2549090 at *9.

Notably, these individuals curtailed their expression in response to the Government's treatment of others, including Mahdawi. *Id.* at *29–31.

Following a bench trial, the court in *AAUP* similarly found that the Government's immigration enforcement policy "objectively chills" the protected speech of noncitizen students and faculty. *Am. Ass'n of Univ. Professors*, 802 F. Supp. 3d at 180–81. As the court observed, "It is an odd kind of freedom that compels one to leave writing unpublished, leadership positions unpursued, and terminally ill relatives unvisited." *Id.* at 180. These findings provided concrete evidence of how the Government used immigration investigations targeting political expression to deter similar speech by others.

The chilling effect of the Government's retaliatory immigration enforcement arises when individuals are targeted for their protected expression, whether through detention, investigations, or the initiation of removal proceedings — not merely when removal ultimately occurs. As this Court recognized in *Öztürk*, the "core argument" in a First Amendment challenge to retaliatory detention is that the detainee's "free speech and due process rights are being violated, now." *Öztürk*, 136 F.4th at 401. While in ICE custody, Petitioner was deprived of the ability to continue the political advocacy and organizing that led the Government to target him in the first place. The district court correctly found that his ongoing detention threatened

irreparable harm not only by restricting Mahdawi's own expression, but by chilling the protected speech of others. *Mahdawi*, 781 F. Supp. 3d at 234.

In short, the Government's actions in this case were intended to and did strip Petitioner of his First Amendment rights and were intended to and did chill the First Amendment-protected expression of countless noncitizens living in the United States. As the court observed in *AAUP*, the Administration's actions sought to convey the message to noncitizens "that there are certain [First Amendment protected] things that it may be gravely dangerous for them to say or do." *Am. Ass'n of Univ. Professors v. Rubio*, 802 F. Supp. at 189.

II. REVIEW AFTER A FINAL ORDER OF REMOVAL CANNOT REMEDY PAST FIRST AMENDMENT VIOLATIONS

Courts have long recognized that injuries to First Amendment freedoms are uniquely serious because they cannot be remedied after the fact. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373.

A different panel of this Court, considering the Government's request for a stay in *Öztürk v. Hyde*, recognized that postponing review of unconstitutional immigration detention until the conclusion of removal proceedings may effectively deny a detainee judicial review of that detention. The *Öztürk* panel explained that requiring a detainee to await a final removal order may render her detention claim "effectively unreviewable" because the unlawful confinement will already have

occurred by the time that order is entered. 136 F.4th at 401 (quoting *Jennings v. Rodriguez*, 583 U.S. 281, 293 (2018)). Moreover, because a final removal order may never issue, the detainee could be deprived of "any meaningful chance for judicial review." *Id.* Although *Öztürk* arose in the context of a stay application, its reasoning is equally relevant to addressing the problem of postponing constitutional challenges to detention until final-order review. The Third Circuit has, in the past, recognized that § 1252(b)(9) "does not strip jurisdiction when aliens seek relief that courts cannot meaningfully provide alongside review of a final order of removal." *E.O.H.C. v. Sec'y U.S. Dep't of Homeland Sec.*, 950 F.3d 177, 186 (3d Cir. 2020) (emphasis added). The panel in the present case, however, framed the inquiry principally in terms of whether Mahdawi's legal and factual claims could eventually be considered on a petition for review. *See Mahdawi*, 183 F.4th at 115–24. But the possibility of later review does not provide a remedy for the First Amendment injuries inflicted during detention and thereafter.

Review following a final order of removal cannot remedy Petitioner's First Amendment injury because vacatur of a removal order months or years after his detention cannot restore the period during which his protected expression was suppressed. As this Court has recognized, "[t]he harm is particularly irreparable where, as here, a plaintiff seeks to engage in political speech, as timing is of the essence in politics and a delay of even a day or two may be intolerable." *N.Y.*

Progress & Prot. PAC v. Walsh, 733 F.3d 483, 486 (2d Cir. 2013) (quoting *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009)); *see Oestereich v. Selective Serv. Sys. Loc. Bd. No. 11, Cheyenne*, 393 U.S. 233, 237, 239 (1968) (holding that lower courts erroneously withheld *habeas* review of induction into military; because draft was "retaliat[ion]" for "political views[,]" the petitioner was entitled to avail himself of federal court review immediately). Nor did release cure the violation, particularly because of the ongoing chilling effect on both Mahdawi and others, as discussed in Part I, *supra*. Absent judicial protection against renewed retaliation, a person of ordinary firmness would refrain from engaging in the type of expression that led to Mahdawi's detention, particularly after being confined in a 7-by-12-foot solitary cell.[5] The chilling effect continues because, without habeas protection, Mahdawi can be re-detained at any time and his future speech may be used against him. *See Gill v. Pidlypchak*, 389 F.3d 379, 384 (2d Cir. 2004) (holding that retaliatory confinement "would deter a prisoner of ordinary firmness from

[5] *Green Card Honey Trap: Meditating From Captivity to Freedom, SuperHumanizer Podcast,* at 1:22:56 (Feb. 7, 2026) (hosted by Dr. Hani Chaabo & Katie Bogen), https://www.buzzsprout.com/2284534/episodes/18640346-green-card-honey-trap-meditating-from-captivity-to-freedom (interview with Mohsen Mahdawi describing the dimensions of his detention cell).

vindicating his or her constitutional rights through the grievance process and the courts").

A court reviewing a final removal order cannot restore the advocacy that was silenced or the chilling effect on Petitioner and others. Thus, postponing judicial review until conclusion of removal proceedings permits the Government to violate noncitizens' First Amendment rights unchecked and becomes "the practical equivalent of a total denial of judicial review." *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 497 (1991); *see also Care One, LLC v. NLRB*, 166 F.4th 335, 348 (2d Cir. 2026) ("Constitutional violations—particularly First Amendment violations—have been presumed irreparable when, by their nature, their injury cannot be undone."); *Reyes v. City of New York*, 141 F.4th 55, 68 (2d Cir. 2025) (recognizing the "actual, imminent, and irretrievable loss" of the opportunity to engage in timely expression).

III. IMMIGRATION PROCEEDINGS CANNOT MEANINGFULLY ADJUDICATE FIRST AMENDMENT RETALIATION CLAIMS

The panel rejected Mahdawi's argument that requiring him to complete the immigration process prior to seeking redress in the federal courts would deprive him of a genuine opportunity for judicial review. Relying on the Third Circuit's decision in *Khalil*, the panel reasoned that "our legal system routinely forces petitioners—even those with meritorious claims—to wait to raise their arguments." *Mahdawi*,

183 F.4th at 121 (quoting *Khalil v. President*, 164 F.4th 259, 275 (3d Cir. 2026)). According to the majority, § 1252(b)(9) "does not foreclose meaningful review," but instead promotes "the orderly adjudication of claims" by "requir[ing] bringing legal questions later if they can be answered later." *Id.* (quoting *Khalil*, 164 F.4th at 275–76).

But the availability of review through the immigration process does not establish that the process provides an adequate mechanism for adjudicating an independent First Amendment retaliatory detention claim. Neither the possibility of administrative release nor the eventual review of a removal order necessarily affords a detainee effective relief for the constitutional injury caused by retaliatory confinement and removal proceedings.

The panel further reasoned that Mahdawi could have sought release through the administrative process by requesting a hearing under *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). *Mahdawi*, 183 F.4th at 121. But a *Joseph* hearing addresses whether a noncitizen has been properly classified as ineligible for an ordinary bond hearing. Even a successful challenge would merely permit the immigration judge to consider release on bond; it would not adjudicate whether the Government detained Mahdawi in retaliation for protected speech. For that reason, it would not vitiate the chilling effect created by the government's abuse of immigration law to detain noncitizens for their speech. Nor would it remedy the First Amendment injury

already inflicted during his confinement and continuing through the chilling effect resulting from fear of impending deportation as proceedings are ongoing. The possibility of administrative release is therefore not equivalent to judicial redress for an independent constitutional retaliation claim.

The panel's reliance on *Khalil* overlooks a critical distinction between immigration proceedings and the criminal appellate process. Unlike a criminal defendant, who may raise constitutional challenges before an independent court at trial and on direct appeal, a noncitizen challenging retaliatory detention may be required to complete years of executive-branch proceedings before obtaining judicial consideration of the alleged First Amendment violation in an independent Article III court. Moreover, even in criminal proceedings, the Supreme Court has recognized exceptions to ordinary finality requirements where postponing review would leave significant First Amendment questions unresolved. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55–57 (1989).

Importantly, immigration courts are housed within the Department of Justice (DOJ), which is part of the executive branch. Under the existing structure, immigration judges (IJs) and the Board of Immigration Appeals (BIA) are "delegates of the Attorney General" (AG). *Garcia v. Garland*, 64 F.4th 62, 76 (2d Cir. 2023); *see* Review of Custody Determinations, 71 Fed. Reg. 57873-01 (Oct. 2, 2006) (codified at 8 C.F.R. pt. 1003) ("The immigration judges and the Board are delegates

of the Attorney General in carrying out his authority under the INA."). The AG has the power to remove IJs and review their decisions. *See Duenas v. Garland*, 78 F.4th 1069, 1072–74 (9th Cir. 2023); Sarah Pierce, *Obscure but Powerful: Shaping U.S. Immigration Policy through Attorney General Referral and Review*, Migration Pol'y Inst. (Jan. 2021). The practical reality is that IJs may be called upon to evaluate constitutional challenges to the conduct of the same executive branch within which they operate. That structure raises significant concerns about relying exclusively on administrative adjudication to provide an adequate remedy for alleged First Amendment retaliation by executive officials.

The resulting inadequacy of administrative review is not merely hypothetical or speculative. In Mahdawi's own case, the BIA declined to consider his constitutional arguments, stating that they could be raised "in any appeal from an administratively final order." *Matter of Mahdawi*, at 7. Nor did the BIA consider the lawfulness of his detention. *See* Rule 28(j) Letter at 2, ECF No. 230.1. Moreover, the immigration judge who initially terminated Mahdawi's removal proceedings after finding that the Government failed to establish removability was subsequently fired by the Department of Justice. *See id.*; Hamed Aleaziz et al., *Judges Fired After Blocking Deportations of Pro-Palestinian Students*, N.Y. Times (Apr. 11, 2026), https://www.nytimes.com/2026/04/11/us/politics/immigration-judges-deportations-students.html. Thus, the administrative proceedings the panel identified as sufficient

to justify postponing federal judicial review until the conclusion of the immigration process are not an adequate substitute for habeas review.

In sum, Mahdawi's immigration proceedings illustrate the central defect in the panel's approach: the availability of eventual review of removability does not guarantee effective judicial review of an independent constitutional challenge to detention. Requiring Mahdawi to await the conclusion of removal proceedings before obtaining federal judicial review would allow the alleged suppression of his protected speech to occur without timely judicial intervention, threatening the First Amendment rights of noncitizens throughout the United States.

CONCLUSION

"If there is any fixed star in our constitutional constellation, it is that no official… can prescribe what shall be orthodox in politics." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The panel majority's decision flouts the Supreme Court's oft-cited words. The Government has used immigration enforcement "to strike fear" into the hearts of noncitizens and their families, and to "curb[] lawful… speech" by imposing a chilling effect that extends far beyond a single case. *Am. Ass'n of Univ. Professors*, 802 F. Supp. 3d at 194. By requiring noncitizens to await the conclusion of removal proceedings before obtaining judicial review of retaliatory detention, the Second Circuit's panel decision enables that

practice to continue while the resulting First Amendment injuries remain unremedied. For these reasons, the Court should hold that § 1252(b)(9) does not deprive the district court of jurisdiction to adjudicate Petitioner's independent First Amendment retaliation claim and grant appropriate habeas relief.

Dated: November 13, 2026

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP, COMPLIANCE WITH WORD-COUNT AND TYPEFACE REQUIREMENTS, AND VIRUS CHECK

I certify that I am a member in good standing of the Bar of this Court. Pursuant to Fed. R. App. P. 32(g), I certify that this Brief complies with the type-volume limitation, typeface requirements, and type style requirements of Fed. R. App. P. 32(a) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,637 words and has been prepared in a proportionally spaced typeface using Microsoft Word 2016 and using Times New Roman in 14 font size.

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2026, I electronically filed the foregoing document with the Clerk for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system, which will send notification of this filing to the attorney of record and all registered participants.

Dated: November 13, 2026

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