UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

MOHSEN MAHDAWI, Petitioner,	)	
	)	
v.	)	No. 25-cv-389
	)	
DONALD J. TRUMP; *et al.*, Respondents.	)	

PRE-HEARING SUBMISSION

On April 16, the Court noticed a status conference in this matter for April 23. ECF No. 15. On April 18, the Court ordered that counsel be prepared to address "preliminary issues of jurisdiction and detention or release" at the April 23 hearing. ECF No. 16. This morning, the Court noticed that tomorrow's hearing would also take up Petitioner's Motion for Release that was filed last night. ECF Nos. 19 & 21. This submission is intended to facilitate the Court's consideration of the jurisdictional and other issues raised by these docket entries. Respondents intend to supplement the arguments and information contained herein at the April 23 hearing and, if permitted, in supplemental filings as contemplated by the April 18 Order.

FACTUAL AND PROCEDURAL BACKGROUND

Last Monday, April 14, 2025, Petitioner Mohsen Mahdawi was taken into custody by the Department of Homeland Security and served with a Notice to Appear ("NTA") in removal proceedings under the Immigration and Nationality Act ("INA"). The NTA alleges that Petitioner is removable because "[t]he Secretary of State has determined that your presence and activities in the United States would have serious adverse foreign policy consequences and would compromise compelling U.S. foreign policy interest." The NTA further alleges that Petitioner is subject to removal pursuant to 8 U.S.C. § 1227(a)(4)(C)(i), "in that the Secretary of State has reasonable

ground to believe that your presence or activities in the United States would have potentially serious adverse foreign policy consequences for the United States."

While he was in custody in Vermont, Petitioner filed a Petition for Writ of Habeas Corpus in this Court. ECF No. 1 ("Petition"). At the outset, the Petition explained, among other things, that "[t]his case concern's the government's retaliatory and targeted detention and attempted removal of Mr. Mahdawi for his constitutionally protected speech." *Id.*, ¶ 1. The Petition further alleges that Petitioner is subject to removal and detention in retaliation for his criticism of Israel's military campaign in Gaza, and for his role as an activist and organizer in student protests on Columbia University's campus until March 2024. *Id.*, ¶¶ 2, 21-31. The Petition further alleges that Petitioner's detention and potential removal are in furtherance of a policy "to retaliate and punish noncitizens for their speech and expressive conduct related to Palestine and Israel." *Id.*, ¶¶ 4, 32-57.

The Petition alleges that the government's "targeting and detention of" Petitioner violates the First and Fifth Amendments, the Administrative Procedures Act, and the non-delegation doctrine. *Id.*, ¶¶ 58-85. The Petition also asks the Court to release Petitioner under *Mapp v. Reno,* 241 F.3d 221 (2d Cir. 2001), pending the resolution of this litigation. ECF No. 1, ¶¶ 86-90.

The Petition asks this Court for various forms of relief, including: vacating the administration's "unlawful Policy of targeting noncitizens for removal based on First Amendment protected speech advocating for Palestinian rights;" and a declaration that Petitioner's arrest and detention violate the First and Fifth Amendments, as well as the Administrative Procedure Act and the non-delegation doctrine. The Petition also seeks Petitioner's "immediate release" "pending these proceedings." ECF No. 1, at 18.

Shortly after the Petition's filing, the Court issued an Order directing that Petitioner be neither removed from the Country, nor the District of Vermont. ECF No. 6.

THE COURT SHOULD DISMISS THIS ACTION

A. This Court Lacks Jurisdiction Under the INA

The Court lacks subject-matter jurisdiction over Petitioner's claims.[1] The jurisdiction-stripping provisions of 8 U.S.C. § 1252 deprive this Court of jurisdiction over Petitioner's claims, which are all, at bottom, challenges to his removal proceedings. Specifically, Petitioner's claims are barred by 8 U.S.C. § 1252(g), which deprives this Court of jurisdiction to review claims arising from the decision or action to "commence proceedings." Additionally, 8 U.S.C. §§ 1252(a)(5) and (b)(9), deprive this Court of jurisdiction to review actions taken or proceedings brought to remove aliens from the United States, and channel such challenges to the courts of appeals.

1. 8 U.S.C. § 1252(g) Bars Judicial Review of ICE's Decision to Commence Removal Proceedings Against Petitioner.

By its plain terms, 8 U.S.C. § 1252(g) eliminates district court jurisdiction over challenges to commencing removal proceedings. Petitioner seeks to challenge the government's decisions to charge him with removability and detain him, which arise "from the decision [and] action" to "commence proceedings." 8 U.S.C. § 1252(g); *see also* ECF No. 1, at ¶ 1 ("This case concern's the government's retaliatory and targeted detention and attempted removal of Mr. Mahdawi for his constitutionally protected speech."). Petitioner's claims echo the ones raised in *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) ("*AADC*"), where the Supreme Court unequivocally held that § 1252(g) barred review. Therefore, *AADC* specifically forecloses

[1] The jurisdiction of the federal courts is presumptively limited. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *see also Sheldon v. Sill*, 49 U.S. 441, 448 (1850) ("Congress, having the power to establish the courts, must define their respective jurisdictions."). They "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen*, 511 U.S. at 377 (internal citations omitted); *see also Sheldon*, 49 U.S. at 449 ("Courts created by statute can have no jurisdiction but such as the statute confers."). As relevant here, Congress divested district courts of jurisdiction to review challenges relating to removal proceedings and instead vested only the courts of appeals with jurisdiction over such claims.

review of Petitioner's claims here. Moreover, as the Second Circuit observed in *Ragbir v. Homan,* 923 F.3d 53, 64 (2d Cir. 2019), Petitioner cannot circumvent § 1252(g)'s jurisdiction-stripping effect by alleging that the challenged decisions were "made based on unlawful considerations." Thus, regardless of the styling of his claims, this Court does not have jurisdiction over Petitioner's challenges.

Section 1252(g), as amended by the REAL ID Act, specifically deprives courts of jurisdiction, including habeas corpus jurisdiction, to review "any cause or claim by or on behalf of an alien arising from the decision or action by [the Secretary of Homeland Security] to [1] *commence proceedings*, [2] adjudicate cases, or [3] execute removal orders against any alien under this chapter."[2] *Id.* (emphasis added). Section 1252(g) eliminates jurisdiction "[e]xcept as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title."[3] Though this section "does not sweep broadly," *Tazu v. Att'y Gen. United States*, 975 F.3d 292, 296 (3d Cir. 2020), its "narrow sweep is firm," *E.F.L. v. Prim*, 986 F.3d 959, 964-65 (7th Cir. 2021). Except as provided in § 1252, courts "cannot entertain challenges to the enumerated executive branch decisions or actions." *Id.*

Section 1252(g) is "directed against a particular evil: attempts to impose judicial constraints upon [certain categories of] prosecutorial discretion." *AADC*, 525 U.S. at 485 n.9.

---

[2] The Attorney General once exercised all of that authority, but much of that authority has been transferred to the Secretary of Homeland Security. *See Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005). Many of the INA's references to the Attorney General are now understood to refer to the Secretary. *Id.*

[3] Congress initially passed § 1252(g) in the IIRIRA, Pub. L. 104-208, 110 Stat. 3009. In 2005, Congress amended § 1252(g) by adding "(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title" after "notwithstanding any other provision of law." REAL ID Act of 2005, Pub. L. 109-13, § 106(a), 119 Stat. 231, 311.

Indeed, Section 1252(g) was designed to protect the Executive's discretion and avoid the "deconstruction, fragmentation, and hence prolongation of removal proceedings." *Id.* at 487; *see, e.g., Rauda v. Jennings*, 55 F.4th 773, 777-78 (9th Cir. 2022) ("Limiting federal jurisdiction in this way is understandable because Congress wanted to streamline immigration proceedings by limiting judicial review to final orders, litigated in the context of petitions for review."). Indeed, Section 1252(g)'s language protects the government's authority to make "discretionary determinations" over whether and when to commence removal proceedings against an alien, "providing that if they are reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed." *AADC*, 525 U.S. at 485.

The Supreme Court has held that a prior version of § 1252(g) barred claims similar to those brought here. *See AADC*, 525 U.S. at 487-92. In *AADC*, noncitizens alleged that the "INS was selectively enforcing the immigration laws against them in violation of their First and Fifth Amendment rights." *Id.* at 473-74. And the government admitted "that the alleged First Amendment activity was the basis for selecting the individuals for adverse action." *Id.* at 488 n.10. The noncitizens argued to the Supreme Court that a lack of immediate review would have a "chilling effect" on their First Amendment rights. *Id.* at 488. Nonetheless, the Supreme Court held that the "challenge to the Attorney General's decision to 'commence proceedings' against them falls squarely within § 1252(g)." *Id.* at 487; *see also Cooper Butt ex rel Q.T.R. v. Barr*, 954 F.3d 901, 908–09 (6th Cir. 2020) (holding that the district court did not have jurisdiction to review a claim that the plaintiffs' father "was removed 'based upon ethnic, religious and racial bias' in violation of the Equal Protection Clause of the Fifth Amendment").

Even under the current version of Section 1252(g), district courts lack subject-matter jurisdiction to statutory and constitutional claims because the provision bars review of "*any* cause

or claim" that arises from the commencement of removal proceedings. *See, e.g.*, *Tazu*, 975 F.3d at 296-98 (holding that any constitutional claims must be brought in a petition for review, not a separate district court action); *Elgharib v. Napolitano*, 600 F.3d 597, 602–04 (6th Cir. 2010) (noting that "a natural reading of 'any other provision of law (statutory or nonstatutory)' includes the U.S. Constitution" and finding additional support for the court's interpretation from the remainder of the statute). Indeed, the Second Circuit explained, "[w]hile the statute creates an exception for 'constitutional claim or questions of law,' jurisdiction to review such claims is vested exclusively in the courts of appeals and can be exercised only after the alien has exhausted administrative remedies." *Ajlani v. Chertoff*, 545 F.3d 229, 235 (2d Cir. 2008) (internal citations omitted); *see also id.* ("Accordingly, the district court lacked jurisdiction to review Ajlani's constitutional challenges to his removal proceedings, and it would be premature for this court to do so now."); 8 U.S.C. § 1252(a)(2)(D).

In Friday's ruling in *Ozturk v. Trump,* No. 2:25-cv-374 (ECF No. 104), Judge Sessions distinguished *AADC*, stating that *"AADC* was exclusively about removal, not detention." Slip. Op. at 41 n.5. The Court further reasoned that because Petitioner's "detention did not flow naturally as a consequence of her removal proceedings," the question of detention did not "arise from" the initiation of the removal action. *Id.* at 38. Here, the Petition makes clear at the outset, that "[t]his case concerns the government's retaliatory and targeted detention *and attempted removal* of Mr. Mahdawi for his constitutionally protected speech." (Emphasis added.) The plain language of § 1252(g) bars review of "any cause or claim by or on behalf of any alien arising from the decision *or action* by the Attorney General *to commence proceedings,* adjudicate cases, or execute removal orders against any alien under this chapter." (Emphasis added.) Accordingly, just as *AADC* applied § 1252(g) to bar jurisdiction to review removal orders, the statute similarly strips this court of

jurisdiction in this context. As the Second Circuit explained in *Ragbir,* the jurisdictional bar of § 1525(g) cannot be avoided by the "mere styling of [] claims." 923 F.3d at 64.

Accordingly, Petitioner's allegation that his arrest and the commencement of removal proceedings against him are in retaliation for his exercise of the First Amendment rights does not remove his claims from Section 1252(g)'s reach. *See, e.g., AADC*, 525 U.S. at 487-92 (holding that Section 1252(g) deprived district court of jurisdiction over claim that certain aliens were targeted for deportation in violation of the First Amendment.); *Ragbir,* 923 F.3d at 73 (finding habeas jurisdiction appropriate only because the opportunity to present the constitutional claim in a petition for review to the appropriate circuit court of appeals was no longer available); *Zundel v. Gonzales*, 230 F. App'x 468, 475 (6th Cir. 2007) (explaining that First Amendment challenge related to immigration enforcement action "is properly characterized as a challenge to a discretionary decision to 'commence proceedings' . . . [and] is insulated from judicial review"); *Humphries v. Various Fed. U.S. INS Emps.*, 164 F.3d 936, 945 (5th Cir. 1999) (ruling that § 1252(g) prohibited review of an alien's First Amendment claim based on decision to put him into exclusion proceedings); *Vargas v. United States Dep't of Homeland Sec.*, 2017 WL 962420, at *3 (W.D. La. Mar. 10, 2017) (claim that ICE "violated her First Amendment right to free speech by arresting her and initiating her removal after she made statements to the media . . . is barred by 8 U.S.C. § 1252(g)."); *Kumar v. Holder*, 2013 WL 6092707, at *6 (E.D.N.Y. Nov. 18, 2013) (claim of initiation of proceedings in retaliatory manner "falls squarely within Section 1252(g) . . . [and] [t]he pending immigration proceedings are the appropriate forum for addressing petitioner's retaliation claim in the first instance."). As such, judicial review of Petitioner's claims that the commencement of removal proceedings against him is unconstitutional is barred by Section 1252(g).

Petitioner's claims are really a challenge to *whether* and *when* to commence proceedings, which is also barred by section 1252(g). *See, e.g.*, *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 599 (9th Cir. 2002) ("We construe § 1252(g) . . . to include not only a decision in an individual case *whether* to commence, but also *when* to commence, a proceeding."); *Sissoko v. Rocha*, 509 F.3d 947, 950-51 (9th Cir. 2007) (holding that § 1252(g) barred review of a Fourth Amendment false arrest claim that "directly challenge[d] [the] decision to commence expedited removal proceedings."); *Obado v. Superior Ct. of New Jersey Middlesex Cnty.*, 2022 WL 283133, at *3 (D.N.J. Jan. 31, 2022) ("Because [p]etitioner challenges the decision to commence and adjudicate removal proceedings against him, the [c]ourt lacks jurisdiction to direct [respondents] to terminate [p]etitioner's NTA and/or halt his removal proceedings.").

The scope of § 1252(g) also bars district courts from hearing challenges to the *method* by which the Secretary of Homeland Security chooses to commence removal proceedings. *See, e.g.*, *Alvarez v. ICE*, 818 F.3d 1194, 1203 (11th Cir. 2016) ("By its plain terms, [§ 1252(g)] bars us from questioning ICE's discretionary decisions to commence removal" and also to review "ICE's decision to take him into custody and to detain him during removal proceedings"); *Saadulloev v. Garland*, 2024 WL 1076106, at *3 (W.D. Pa. Mar. 12, 2024) ("The Government's decision to arrest [petitioner], clearly is a decision to 'commence proceedings' that squarely falls within the jurisdictional bar of § 1252(g)."). The act of arresting an alien to serve a charging document and initiate removal proceedings is an "action . . . to commence proceedings" that this Court lacks jurisdiction to review. *See, e.g.*, *id.*; *Tazu*, 975 F.3d at 298-99 ("Tazu also challenges the Government's re-detaining him for prompt removal. . . . While this claim does not challenge the Attorney General's *decision* to execute his removal order, it does attack the *action* taken to execute that order. So under § 1252(g) and (b)(9), the District Court lacked jurisdiction to review it.").

2. 8 U.S.C. §§ 1252(a)(5) and (b)(9) Channel All of Petitioner's Challenges to the Courts of Appeals

Under the INA, removal proceedings generally provide the exclusive means for determining whether an alien is both removable from the United States and eligible for any relief or protection from removal. *See* 8 U.S.C. § 1229a. In 8 U.S.C. § 1252, Congress channeled into the statutorily prescribed removal process all legal and factual questions—including constitutional issues—that may arise from the removal of an alien, with judicial review of those decisions vested exclusively in the courts of appeals. *See AADC*, 525 at 483. District courts play no role in that process. Consequently, this Court lacks jurisdiction over Petitioner's claims, which are all, at bottom, challenges to removal proceedings. Petitioner must first raise all his challenges through the administrative removal proceedings, and then, if necessary, in the appropriate court of appeals.

To start, 8 U.S.C. § 1252(b)(9) eliminates this Court's jurisdiction over Petitioner's claims by channeling all challenges to immigration proceedings (and removal orders) to the courts of appeals:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, *arising from any action taken or proceeding brought to remove an alien* from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction . . . by any . . . provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

8 U.S.C. § 1252(b)(9) (emphasis added). Section 1252(b)(9) is an "unmistakable 'zipper' clause" that "channels judicial review of *all* [claims arising from deportation proceedings]" to a court of appeals in the first instance. *AADC*, 525 U.S. at 483. As the Second Circuit explained, § 1252(b)(9) requires claims like Petitioner's to be consolidated in one proceeding before the Court of Appeals:

> Congress enacted [8 U.S.C. § 1252(b)(9)] for the important purpose of consolidating all claims that may be brought in removal proceedings into one final

> petition for review of a final order in the court of appeals. . . . Before [8 U.S.C. § 1252(b)(9)], only actions attacking the deportation order itself were brought in a petition for review while other challenges could be brought pursuant to a federal court's federal question subject matter jurisdiction under 28 U.S.C. § 1331. Now, by establishing "exclusive appellate court" jurisdiction over claims "arising from any action taken or proceeding brought to remove an alien," all challenges are channeled into one petition.

Calcano-Martinez v. INS, 232 F.3d 328, 340 (2d Cir. 2000). By law, "the sole and exclusive means for judicial review of an order of removal" is a "petition for review filed with an appropriate court of appeals," that is, "the court of appeals for the judicial circuit in which the immigration judge completed the proceedings." 8 U.S.C. §§ 1252(a)(5), (b)(2).

Moreover, Section 1252(a)(5) reiterates that a petition for review is the exclusive means for judicial review of immigration proceedings:

> Notwithstanding any other provision of law (statutory or nonstatutory), . . . a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) [concerning aliens not admitted to the United States].

8 U.S.C. § 1252(a)(5). "Taken together, § 1252(a)(5) and § 1252(b)(9) mean that *any* issue—whether legal or factual—arising from *any* removal-related activity can be reviewed *only* through the [petition-for-review] process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016); *see id.* at 1035 ("§§ 1252(a)(5) and [(b)(9)] channel review of all claims, including policies-and-practices challenges . . . whenever they 'arise from' removal proceedings"); *accord Ruiz v. Mukasey*, 552 F.3d 269, 274 n.3 (2d Cir. 2009) (only when the action is "unrelated to any removal action or proceeding" is it within the district court's jurisdiction); *cf. Xiao Ji Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 151 n.3 (2d Cir. 2006) (a "primary effect" of the REAL ID Act is to "limit all aliens to one bite of the apple" (internal quotation marks omitted)).

Critically, "[§] 1252(b)(9) is a judicial channeling provision, not a claim-barring one." *Aguilar v. ICE*, 510 F.3d 1, 11 (1st Cir. 2007). Indeed, 8 U.S.C. § 1252(a)(2)(D) provides that

"[n]othing . . . in any other provision of this chapter . . . shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." *See also Ajlani*, 545 F.3d at 235 ("jurisdiction to review such claims is vested exclusively in the courts of appeals"). The petition-for-review process before the court of appeals thus ensures that aliens have a proper forum for claims arising from their immigration proceedings and "receive their 'day in court.'" *J.E.F.M.*, 837 F.3d at 1031-32; *see also Rosario v. Holder*, 627 F.3d 58, 61 (2d Cir. 2010) ("The REAL ID Act of 2005 amended the [INA] to obviate . . . Suspension Clause concerns" by permitting judicial review of "nondiscretionary" BIA determinations and "all constitutional claims or questions of law.").

In evaluating the reach of subsections (a)(5) and (b)(9), the Second Circuit has explained that "whether the district court has jurisdiction will turn on the substance of the relief that a plaintiff is seeking." *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011). Those provisions divest district courts of jurisdiction to review both direct and indirect challenges to removal orders, which includes any challenge that is inextricably intertwined with the final order of removal that precedes issuance of any removal order, *see id.*, as well as decisions to detain for purposes of removal or for proceedings, *see Jennings v. Rodriguez*, 538 U.S. 281, 294-95 (§ 1252(b)(9) includes challenges to "decision to detain [alien] in the first place or to seek removal," which precedes any issuance of an NTA). Here, Petitioner's claims challenge the government's ability to arrest and detain him in the first place and to place him in removal proceedings, which all arise from the government's efforts to remove him. *See, e.g., id.*, 538 U.S. at 294-95 (§ 1252(b)(9) includes challenges to "decision to detain [alien] in the first place or to seek removal," which precedes any issuance of an NTA); *see also Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020) (finding that 8 U.S.C. § 1226(e) did not bar review in that case because the petitioner did not challenge "his initial detention"); *Saadulloev*, 2024 WL 1076106, at *3 (recognizing that there is no judicial

review of the threshold detention decision). As such, the Court lacks jurisdiction over this action. *See, e.g.*, *Ali v. Barr*, 464 F. Supp. 3d 549, 557-58 (S.D.N.Y. 2020) (Buchwald, J.) (lack of jurisdiction over issues arising from removal proceedings); *Nikolic v. Decker*, 2019 WL 5887500, at *3 (S.D.N.Y. Nov. 12, 2019) (same); *P.L. v. ICE*, 2019 WL 2568648, at *2 (S.D.N.Y. June 21, 2019) (collecting cases) ("Where immigrants in removal proceedings directly or indirectly challenge removal orders or proceedings, the Second Circuit and district courts within the circuit have held district courts do not have jurisdiction."); *Selvarajah v. U.S. Dep't of Homeland Security*, 2010 WL 4861347, at *4 (S.D.N.Y. Nov. 30, 2010) ("challenges to actions that are part of [an ongoing] removal proceeding have been treated in the same manner as challenges to removal orders, for jurisdictional purposes"); *see also Taal v. Trump*, 2025 WL 926207, at *2 (N.D.N.Y. Mar. 27, 2025) ("Plaintiffs have not established that the Court has subject matter jurisdiction over Taal's claim for a temporary restraining order enjoining his removal proceedings."); *Sophia v. Decker*, 2020 WL 764279, at *2 (S.D.N.Y. Feb. 14, 2020) (applying § 1252(b)(9) to strip district court of jurisdiction over challenge to whether the petitioner was legally in removal proceedings); *cf. Qiao v. Lynch*, 672 F. App'x 134, 135 (2d Cir. 2017) ("Like the district court, we conclude that the IJ's challenged order reopening removal proceedings against Qiao is inextricably linked to the removal proceedings, as well as any removal order that may ultimately result from reopening those proceedings.").

The Third Circuit's decision in *Massieu v. Reno*, 91 F.3d 416 (3d Cir. 1996) (Alito, J.), is instructive. There, in a case concerning the same charge of removability (under the predecessor statute, 8 U.S.C. § 1251(a)(4)(C)(i)), the Third Circuit reversed a district court's order declaring the statute unconstitutional and enjoining deportation proceedings, because the petitioner was required to first exhaust administrative remedies through the immigration court and then file a petition for review. *Massieu*, 91 F.3d at 417. The court specifically noted that for "an alien

attempting to prevent an exclusion or deportation proceeding from taking place in the first instance," he must avail himself of the administrative procedures. *Id.* at 421. This case was decided prior to IIRIRA and the REAL ID Act, but as discussed above, those laws withdrew district court jurisdiction and made the courts of appeals the exclusive forum to hear such challenges. Thus, this Court should reach the same result as *Massieu*: Petitioner's claims should be dismissed for lack of jurisdiction; he must present his challenges in the administrative removal process, and then, if necessary, to the appropriate court of appeals.

3. Petitioner's Detention is Constitutionally Valid.

It is well settled that the public interest in the enforcement of the United States' immigration laws is significant. *See, e.g., United States v. Martinez-Fuerte,* 428 U.S. 543, 556-58 (1976); *Nken,* 556 U.S. at 435. There is "always a public interest in prompt execution of removal orders." *Nken,* 556 U.S. at 436. That principle extends to the prompt resolution of determining removability because "[t]he continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings IIRIRA established, and 'permit[s] and prolong[s] a continuing violation of United States law.'" *Id.* (quoting *AADC*, 525 U.S., at 490). Granting the relief that Petitioner seeks would impair the government's ability to carry out its official duties, which is contrary to the public interest.

By seeking an order preventing ICE from detaining him, Petitioner frustrates the public interest in enforcing the immigration laws and in determining his removability. Petitioner's detention by ICE has a valid statutory basis, *see* 8 U.S.C. § 1226(a) (authorizing ICE to arrest and detain an alien "pending a decision on whether the alien is to be removed from the United States"), and "detention during [removal] proceedings is a constitutionally valid aspect of the process," *Demore v. Kim,* 538 U.S. 510, 511 (2003) (citing *Wong Wing v. United States,* 163 U.S. 228, 235 (1896)); *accord Velasco Lopez,* 978 F.3d at 848 (same).

Relatedly, whether Petitioner poses a danger to the community or a flight risk is not the correct analysis; Congress has removed federal court jurisdiction over challenges to discretionary detention decisions. *See* 8 U.S.C. § 1226(e); *see also Jennings,* 583 U.S. at 295; *Demore,* 538 U.S. at 516; *cf. Arevalo-Guasco v. Dubois,* 788 F. App'x 25, 27 (2d Cir. 2019); *but see* footnote 4, below. In short, it is not the district court's judgment regarding risk of flight and danger to the community that governs whether ICE may permissibly detain an alien pending removal proceedings.

4. Petitioner's Other Claims Should Also Be Rejected.

Petitioner cannot invoke the APA because he has an adequate remedy at law: the petition for review process. The APA permits judicial review of agency action only when, *inter alia*, statutes do not "preclude judicial review," 5 U.S.C. § 701(a)(1), and "there is no other adequate remedy in a court." 5 U.S.C. § 704. Here, Congress barred district court review of Petitioner's claims in § 1252. Accordingly, no claim may lie under the APA. *See, e.g.*, *Delgado*, 643 F.3d at 55 (no APA claim because § 1252 barred judicial review). Moreover, Congress channeled into the statutorily prescribed administrative removal procedure review of all legal, constitutional, and factual questions that may arise from the removal of an alien, with judicial review of those decisions vested exclusively in the courts of appeals. As a petition for review provides an adequate remedy at law for Petitioner's claims, as set out in 8 U.S.C. § 1252(b)(9), an APA may not be asserted in this Court for that reason as well. *See Aguilar*, 510 F.3d at 11 ("[§] 1252(b)(9) is a judicial channeling provision, not a claim-barring one").

Furthermore, Petitioner's challenge to and request for the Court to vacate the Secretary of State's foreign policy determination invokes an unreviewable political question. The political question doctrine is an "exception" to the "general" rule that "the Judiciary has a responsibility to decide cases properly before it." *Zivtofsky v. Clinton*, 566 U.S. 189, 194-95 (2012). A

nonjusticiable political question occurs when "there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department[] or a lack of judicially discoverable and manageable standards for resolving it.'" *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). "In such a case," the political question doctrine deprives a court of "the authority to decide the dispute before it." *Zivtofsky*, 566 U.S. at 195.

The political question doctrine requires "a case-by-case inquiry." *Whiteman v. Dorotheum GmbH*, 431 F.3d 57, 70 (2d Cir. 2005). A claim is nonjusticiable if it satisfies any one of "six independent tests" the Supreme Court enumerated in *Baker v. Carr*:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Whiteman, 431 F.3d at 70 (quoting *Baker v. Carr*, 369 U.S. at 217); *see Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005) ("To find a political question, we need only conclude that one factor is present, not all.").

Here, Petitioner's challenge to the Secretary's foreign policy determination is non-justiciable. Necessarily, Petitioner's requested injunction sits at the intersection of two issues textually committed to the political branches of the government: (1) foreign affairs, *see State of California v. United States*, 104 F.3d 1086, 1091 (9th Cir. 1997) ("the issue of protection of the States from invasion implicates foreign policy concerns which have been constitutionally committed to the political branches"); *see also El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) ("The political question doctrine bars our review of claims that, regardless of how they are styled, call into question the prudence of the political

branches in matters of foreign policy or national security constitutionally committed to their discretion."); and (2) immigration policy, *see Mathews v. Diaz*, 426 U.S. 67, 81 (1976) ("the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government."). As observed by the Supreme Court, "any policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952).

There is simply no manageable standard on what constitutes "potentially serious adverse foreign policy consequences." 8 U.S.C. § 1227(a)(4)(C)(i). Nor is there a manageable standard on what constitutes a "compelling foreign policy interest." 8 U.S.C. § 1227(a)(4)(C)(ii). Petitioner is asking this Court to "displac[e] the Executive in its foreign policy making role" and to reverse a political decision that has already been made. *Gross v. German Foundation Indus. Initiative*, 456 F.3d 363, 389-90 (3d Cir. 2006). But second-guessing foreign policy decisions is exactly what the political doctrine was meant to insulate from judicial review. *Id.* at 390.

THE COURT SHOULD NOT RELEASE PETITIONER ON BAIL

A. The Court Lacks Authority to Order Petitioner's Release.

As explained above, the Court lacks habeas jurisdiction to consider the Petition. It is therefore also without power to order his release. Furthermore, under well-settled precedent, the detention of an alien during removal proceedings is "a constitutionally valid aspect of the deportation process." *Demore v. Kim,* 538 U.S. 510, 523 (2003) (quoting *Reno v. Flores,* 507 U.S. 292, 306 (1993)).

To be sure, where a district court does exercise habeas jurisdiction, it may have the inherent power to release the petitioner pending determination of the merits. *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001). The Second Circuit has cautioned, however, that any such power "is a limited one, to be exercised in special cases only." *Id.* Furthermore, "the standard for bail pending habeas litigation is a difficult one to meet: The petitioner must demonstrate that the habeas petition raises substantial claims and that extraordinary circumstances exist that make the grant of bail necessary to make the habeas remedy effective." *Id.* (brackets omitted) (quoting *Grune v. Coughlin,* 913 F.2d 41, 43-44 (2d Cir. 1990)).

Accordingly, the viability of *Mapp* relief in this context is in doubt. *But see Ozturk v. Trump,* No. 2:25-cv-374, ECF No. 104, at 43-44 ("release is authorized by *Mapp* provided the Court finds the habeas petition raises 'substantial claims' and that 'extraordinary circumstances' exist 'that make the grant of bail necessary to make the habeas remedy effective."); *id.* at 63-65.

Mapp was decided in 2001, before the REAL ID Act, and involved an alien challenging his deportation proceedings, but not the validity of his detention, through a district court habeas petition. Prior to passage of the REAL ID Act of 2005, aliens could seek review of their removal orders through the filing of a habeas petition in federal district court. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 311–14 (2001). The REAL ID Act removed habeas as a permissible avenue for challenging a removal order, stripped district courts of jurisdiction to review removal orders, and vested the courts of appeals with exclusive jurisdiction to review challenges to final removal orders. *See* 8 U.S.C. § 1252(a)(5). The Second Circuit recognized that it cannot override a statute to grant relief. *Mapp,* 241 F.3d at 227–29. Because a statute applies here, Mapp cannot create authority that is otherwise limited by statute.

Further, in *Mapp*, the Court qualified its holding that there is inherent authority to admit habeas petitioners to bail, as subject to limits imposed by Congress. *Mapp,* 241 F.3d at 223 (noting

"that this authority may well be subject to appropriate limits imposed by Congress"). "[I]n cases involving challenges to [ICE] detention, Congress's plenary power over immigration matters renders this authority readily subject to congressional limitation." *Id.* at 231. No such limitation was at issue in Mapp, but here 8 U.S.C. § 1226(e) is an "express statutory constraint[]" that limits the Court's authority in this context. *Mapp,* 241 F.3d at 231. Section 1226(e) restricts this Court's authority in two ways. First, Section 1226(e) provides a "clear direction from Congress," *Mapp,* 241 F.3d at 227, that "[n]o court may set aside any action or decision by [ICE] under [§ 1226] regarding the detention or release of any alien," 8 U.S.C. § 1226(e). Thus, this Court lacks authority to grant interim release to a habeas petitioner who is subject to detention under § 1226(a). Second, ICE's discretionary decision to detain the petitioner cannot readily be set aside through a *Mapp* motion. As the Second Circuit explained, where Congress provided for discretionary detention, federal courts may be further constrained from granting release on bail where the agency has exercised such discretion. *See Mapp,* 241 F.3d at 229 n.12 ("[W]hile it may be the case that had the INS exercised its discretion under § 1231(a)(6) and decided not to release Mapp on bail, we would be required to defer to its decision, where there has been no such consideration of a detainee's fitness for release, deference to the INS . . . is not warranted."); *see also Cinquemani v. Ashcroft,* 2001 WL 939664, at *6–8 & n.6 (E.D.N.Y. Aug. 16, 2001).

But, as noted above, the "discretionary judgment . . . regarding the detention or release of any [alien] or the grant, revocation, or denial of bond or parole" is not reviewable by the courts. 8 U.S.C. § 1226(e).[4] As determined by the Supreme Court, that statute precludes an alien from

---

[4] On Friday, in *Ozturk v. Trump,* No. 2:25-cv-374, Judge Sessions concluded that habeas review in that case was not barred by § 1226(e). *See slip. op.* at 29-33. The Court distinguished the Supreme Court's decision in *Jennings v. Rodriquez,* 583 U.S. 281 (2018), by construing that decision's limitation on habeas review over immigration detention to only to apply to aliens subject to detention under § 1226(c), and not § 1226(a). But *Jennings*'s holding appears to

"challeng[ing] a 'discretionary judgment' by the Attorney General or a 'decision' that the Attorney General has made regarding his detention or release." *Jennings,* 583 U.S. at 295 (quoting *Demore,* 538 U.S. at 516); *see also Hechavarria v. Whitaker,* 358 F.Supp.3d 227, 235 (W.D.N.Y. 2019) ("This provision 'precludes an alien from "challenging a discretionary judgment by the Attorney General or a decision that the Attorney General has made regarding his detention or release."'") (quoting *Jennings*); *Negusie v. Holder,* 555 U.S. 511, 517 (2009) (acknowledging that "[j]udicial deference" "is of special importance" where Congress has provided the Attorney General with discretion in making immigration decisions); *Sukwanputra v. Gonzales,* 434 F.3d 627, 632-33 (3d Cir. 2006) ("[t]he power to expel [noncitizens], being essentially a power of the political branches of government . . . may be exercised entirely through executive officers, with such opportunity for judicial review of their action as congress may see fit to authorize or permit").

Similarly, 8 U.S.C. § 1252(a)(2)(B)(ii) bars judicial review of discretionary decisions including bond determinations under § 1226(a):

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision . . . regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

§ 1252(a)(2)(B)(ii). Courts are precluded under § 1252(a)(2)(B)(ii) from reviewing any "decision or action" that is committed to the agency's discretion by statute. *See Kucana v. Holder,* 558 U.S. 233, 241-52 (2009). The "key to [section] 1252(a)(2)(B)(ii) lies in its requirement that the

---

extend to discretionary detention under § 1226(a). *See* 583 U.S. at 306. Further, in *Ozturk* this Court emphasized that § 1226(e) was not sufficiently clear to strip the Court of habeas jurisdiction. Even if § 1226(e) does not affect habeas jurisdiction, it appears to be a limit on the authority to release a petitioner on bail.

discretion giving rise to the jurisdictional bar must be specified by statute, and that whether such a specification has been made is determined by examining the statute as a whole." *Jilin Pharm. USA, Inc. v. Chertoff,* 447 F.3d 196, 200 (3d Cir. 2006) (internal quotations omitted).

B. Petitioner Cannot Meet *Mapp's* Difficult Standard for Release.

If the Court is to consider Petitioner's release pending the determination of this proceeding, under *Mapp*, he must "demonstrate that the habeas petition raises substantial claims and that extraordinary circumstances exist that make the grant of bail necessary to make the habeas remedy effective." *Mapp*, 241 F.3d at 226. Petitioner cannot make this showing.

First, his detention is consistent with statutory authority. He is a non-citizen. The Secretary of State has determined that he is subject to removal. Removal proceedings have been commenced. And he has been detained during the pendency of those proceedings. And all of his challenges are subject to Article III judicial review.

Second, he cannot show extraordinary circumstances that make the grant of bail necessary to make the habeas remedy effective. *Id.* at 230. While recognizing the seriousness of being detained, release must be for a reason other than the Petitioner's convenience. *See Elkimya v. Dep't of Homeland Sec.,* 484 F.3d 151, 154 (2d Cir. 2007) ("We see no reason, and Elkimya has proffered none other than convenience, why his continued detention by the INS would affect this Court's ultimate consideration of the legal issues presented in his petition for review.") Petitioner does not appear offer a health-related reason that rises to the level of extraordinary, tantamount to the worst of the COVID-19 crises. In *Graham v. Decker,* 454 F. Supp. 3d 347, 358 (S.D.N.Y. 2020), for example, the Court recognized that the COVID-19 pandemic was extraordinary and affected the Petitioner personally. But release was denied because he failed to demonstrate "that he personally faces a heightened risk of complications or that the conditions and procedures in place at the OCCF

are constitutionally deficient. The Court therefore denies his application for bail brought pursuant to Mapp."

The Petition offers two paragraphs specific to his request for release. First, it asserts that Petitioner "will be unable to speak freely" while he is in custody. ECF No. 1, ¶89. Second, it asserts that so "long as [Petitioner] is in detention, he will be punished for his disfavored speech, ratifying another constitutional violation that the government sought to achieve with his detention." ECF No. 1, ¶ 90. As noted above, while judicial review was still available under § 1252(b)(9), the presence of constitutional claims did not provide habeas jurisdiction.

CONCLUSION

For the above reasons, this Court lacks jurisdiction over the Petition and must therefore deny the request to issue a writ of habeas corpus.

Respectfully submitted,

Dated: April 22, 2025

By: */s/ Michael P. Drescher*
Michael P. Drescher
Assistant United States Attorney
District of Vermont