

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
Civil No. 25-cv-1576-JWB-DTS

MOHAMMED HOQUE,

Petitioner,

v.

DONALD J. TRUMP, *in his official capacity as President of the United States*; PAMELA BONDI, *in her official capacity as Attorney General of the United States*; PETER BERG, *in his official capacity as the St. Paul Field Office Director, U.S. Immigration and Customs Enforcement*; JAMIE HOLT, *in her official capacity as St. Paul Agent in Charge for Homeland Security Investigations for U.S. Immigration and Customs Enforcement*; TODD LYONS, *in his official capacity as Acting Director, U.S. Immigration and Customs Enforcement*; KRISTI NOEM, *in her official capacity as Secretary of the United States Department of Homeland Security*; MARCO RUBIO, *in his official capacity as Secretary of State*; RYAN SHEA, *in his official capacity as Freeborn County Sheriff*; and MIKE STASKO, *in his official capacity as Freeborn County Jail Administrator*,

**RESPONSE**

Respondents.

**INTRODUCTION**

Respondents respectfully submit this Response to the Petition filed in this case. ECF No. 1. The Department of State (DOS) revoked Hoque's student visa under 8 U.S.C. § 221(i) based on public safety concerns raised by his conduct. ICE arrested Hoque on March 28, 2025 and personally served Hoque with a Notice to Appear (NTA), thereby initiating removal proceedings. His arrest and detention under 8 U.S.C. § 1226(a) during those removal proceedings is constitutional.

Hoque's Petitioner suffers from multiple jurisdictional defects: 1) this Court cannot review the decision of the Secretary of State to revoke Hoque's visa; 2) the Immigration and Nationality Act prohibits district courts from entertaining challenges to removability, including the decision to commence removal proceedings; and 3) district courts lack jurisdiction to review the decision to detain, which is currently being litigated in immigration court.

Even if these jurisdictional hurdles could be overcome, this Court should still deny the Petition on the merits. Neither Hoque's First Amendment nor Fifth Amendment Due Process rights have been violated. The charges against Hoque were based on the revocation of his visa resulting from his criminal plea and public safety considerations, not his speech. Hoque has substantial due process in the immigration court proceedings both on the substance of the charges against him and whether he is entitled to bond, and those proceedings are moving quickly. His detention as those proceedings occur is not constitutional. The Government respectfully requests that the Court deny the habeas petition.

## **FACTUAL BACKGROUND**

### **I. Hoque's Immigration Status and Removal Proceedings**

Hoque is a citizen and national of Bangladesh. Hoque was first admitted to the United States on August 12, 2021 on an F-1 student, nonimmigrant visa. Declaration of Angela Minner ("Minner Decl.") ¶ 4, Ex. 1; Petition ¶ 48. Hoque most recent entry to the United States was on August 12, 2023. Minner Decl. ¶ 4; Petition ¶ 52.

On August 23, 2023, Hoque was convicted of Disorderly Conduct, in violation of

Minnesota Statute 609.72.1 (after a guilty plea) and was sentenced to 90 days, stayed for one year. Minner Decl. ¶ 5, Ex. 2. Hoque's information was run against criminal databases and was a verified match to a criminal history record for the conviction described above. Declaration of Andre Watson ("Watson Decl.") ¶ 7.

On Saturday, March 22, 2025, the U.S. Department of Homeland Security U.S. Immigration and Customs Enforcement (DHS ICE) transmitted written communication to the Department of State (the Department) seeking the Department's determination as to whether Hoque's nonimmigrant visa should be revoked pursuant to Section 221(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1201(i). DHS/ICE conveyed that Hoque had been charged with assault in the fifth degree and disorderly conduct and requested the Department's assessment as to whether Hoque's conduct represented a threat to public safety. Declaration of John Armstrong ("Armstrong Decl.") ¶ 4.

On Sunday, March 23, 2025, the State Department revoked Hoque's visa pursuant to Section 221(i) of the INA relying upon the underlying information and assessment provided by DHS/ICE that Hoque posed a threat to U.S. public safety, thereby implicating the Department's discretionary authority to determine whether to revoke that visa under Section 221(i) of the INA. Armstrong Decl. ¶ 5. Later on March 23, 2025, the State Department advised DHS ICE that the revocation of Hoque's visa was "effective immediately." Armstrong Decl. ¶ 6; Minner Decl. ¶ 6, Ex. 3.

On March 28, 2025, US Immigration and Customs Enforcement (ICE) officials arrested Hoque at his residence in Mankato. Minner Decl. ¶ 7; Petition ¶ 62. The arresting officers explained to Hoque that his visa was revoked and that he was being placed under

administrative arrest. The officers served Hoque a Warrant for Arrest of Alien (Form I-200) at the ICE office at Fort Snelling, MN, which Hoque signed. Minner Decl. ¶ 7, Ex. 4. The ICE officials who issued the warrant and arrested Hoque were not aware of any statements or pronouncements by Hoque, whether on social media or elsewhere, on any issue. Minner Decl. ¶ 8. There is no mention in the record of Hoque's removal proceedings or DHS's submissions of Hoque's prior speech. *See generally* Voss Decl., Exs. 3-4. The State Department did not make any determination under Section 237(a)(4)(C) of the INA (8 U.S.C. § 1227(a)(4)(C)) with respect to Hoque. Armstrong Decl. ¶ 5.

On March 28, 2025, ICE officials processed Hoque and served him a Notice to Appear (Form I-862) charging him under 237(a)(1)(C)(i) of the Immigration and Nationality Act, as amended, in that after admission as a nonimmigrant under Section 101(a)(15) of the Act, he failed to maintain or comply with the conditions of the nonimmigrant status under which he was admitted. Hoque signed for the NTA and requested a prompt hearing before an immigration judge. Minner Decl. ¶ 9, Ex. 5.

On April 9, 2025, an immigration judge held a hearing on Hoque's request for bond. The Immigration Judge issued a bond redetermination decision under 8 C.F.R. § 1003.19. Petition ¶ 72; Minner Decl. ¶ 13; Voss Decl., Ex. 3 at 4<sup>1</sup>. The IJ determined that Respondent was not a danger to persons or property, but that he did present a flight risk. Voss Decl., Ex. 3 at 8. The IJ set bond at \$7,500. *Id.*

On April 10, 2025, DHS filed a Notice of Intent to Appeal Custody Determination under 8 C.F.R. § 1003.19(i)(2), which has the effect of automatically staying the bond

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<sup>1</sup> Page cites are to the bates labels applied for this litigation: Voss Decl., Ex. # at page #.

decision of the IJ. Minner Decl. ¶ 14. Voss Decl., Ex. 3 at 18-19; Petition ¶ 73. That same day, DHS filed a Notice of Appeal of the IJ's bond decision to the BIA. Minner Decl., ¶ 14. Voss Decl., Ex. 3 at 13-16, 22-30. The automatic stay expires 90 days from the date of DHS's appeal. 8 C.F.R. § 1003.6(c)(3).

On April 16, 2025, the immigration court held a hearing on Hoque's removability. Voss Decl., Ex. 4 at 72. Petitioner was represented by counsel at that hearing and filed written pleadings in his defense. *E.g.*, Voss Decl., Ex. 4 at 7.

On April 17, 2025, the BIA issued a briefing schedule for the bond appeal. Voss Decl., Ex. 3 at 1. The parties' briefs are due simultaneously on May 8, 2025. *Id.*

On April 18, 2025, ICE Officials filed Additional Charges of Inadmissibility/Deportability, Form I-261, adding a charge under 8 U.S.C. § 1227(a)(1)(B), "in that after admission as a nonimmigrant under Section 101(a)(15) of the Act, your nonimmigrant visa was revoked under 221(i) of the Act." An additional allegation that "[o]n March 23, 2025, the United States Department of State revoked your F-1 student visa, effective immediately, pursuant to authority in section 221(i) of the Immigration and Nationality Act, 8 U.S.C. 1201(i)" was also added. ECF 10-2 at 22; Minner Decl. ¶ 10, Ex. 6.

Hoque is currently in ICE's detention in Freeborn County Jail in Albert Lea, Minnesota, pursuant to 8 U.S.C. § 1226(a). Minner Decl. ¶ 11.

On April 22, 2025, the State Department transmitted notification to Hoque (at the email address he provided) that his visa had been revoked pursuant to Section 221(i) of the INA. The March 23, 2025, revocation action described above predated the filing of this

lawsuit. At the request of interagency partners and for operational security reasons, the Department did not immediately send notification of the revocation to Hoque. Armstrong Decl. ¶¶ 7-8, Ex. 1.

On May 7, 2025, a hearing is scheduled in immigration court on Hoque's removal. Minner Decl. ¶ 16; Voss Decl., Ex. 4 at 161.

## **II. The Student and Exchange Visitor Information System (SEVIS)**

To facilitate oversight of nonimmigrant student admissions and status eligibility, Congress required that “[t]he [Secretary of Homeland Security], in consultation with the Secretary of State and the Secretary of Education, . . . develop and conduct a program to collect from approved institutions of higher education, other approved educational institutions, and designated exchange visitor programs in the United States [certain information] with respect to aliens who have the status, or are applying for the status, of nonimmigrants under subparagraph (F), (J), or (M) of section 1101(a)(15) of this title.” 8 U.S.C. § 1372(a)(1). This includes collecting the following information: (a) identity and current address in the United States; (b) nonimmigrant classification; (c) current academic status; (d) disciplinary action taken by the institution as the result of a criminal conviction or change in participation as a result of a criminal conviction; (e) the date of entry and port of entry; (f) enrollment date at an approved institution or program; (g) the degree program, if applicable, and field of study; and (h) the date of termination of enrollment and the reason for such termination. 8 U.S.C. § 1372(c).

Pursuant to this statutory mandate, DHS created SEVIS, a web-based system used “to maintain information on Student and Exchange Visitor Program sponsors and J-1 visa

Exchange Visitor Program participants.” See “ICE, Student and Exchange Visitor Information System,” available at: <https://www.ice.gov/sevis/overview> (last visited Apr. 21, 2025). Inherent in DHS’ broad authority to develop and conduct the oversight program is SEVP’s ability to maintain, update and change SEVIS records as needed (*e.g.*, from “active to “terminated”). See Watson Decl. ¶ 4. Based on Hoque’s criminal history, on March 28, 2025, SEVP amended Hoque’s SEVIS record to reflect this information by setting the record designation as “terminated.” Watson Decl. ¶ 9.<sup>2</sup>

SEVP’s termination of a SEVIS record does not, however, terminate that person’s nonimmigrant status in the United States. *Id.* at ¶ 10. Indeed, 8 U.S.C. § 1372 does not provide SEVP the authority to terminate nonimmigrant status by terminating a SEVIS record. *Id.* In Hoque’s case, his nonimmigrant status could be terminated through the entry of a final order of removal at the conclusion of his removal proceedings.<sup>3</sup>

### III. Legal and Statutory Authority for Detention

For more than a century, the immigration laws have authorized immigration officials to charge noncitizens as removable from the country, arrest noncitizens subject to removal, and detain noncitizens during their removal proceedings. See *Abel v. United*

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<sup>2</sup> Petitioner notes that the SEVIS termination originally noted that it was based on Sections 237(a)(1)(C)(i) and 237(a)(4)(C) of the INA. Petition ¶¶ 65-67. The second statutory citation is inconsistent with the State Department’s records related to the visa revocation. Armstrong Decl. ¶ 5; Minner Decl., Ex. 3. This information was corrected in SEVIS on April 8, 2025 to reflect the termination was because “Individual identified in criminal records check and/or has had their VISA revoked.” Petition ¶ 71.

<sup>3</sup> Petitioner’s claims and citations related to the grounds under which a student’s status may be revoked are simply not relevant to Hoque, who is in removal proceedings during which it will be determined whether he will lose his nonimmigrant status.

*States*, 362 U.S. 217, 232–37 (1960). In the INA, Congress enacted a multi-layered statutory scheme for the civil detention of noncitizens pending a decision on removal, during the administrative and judicial review of removal orders, and in preparation for removal. *See generally* 8 U.S.C. §§ 1225, 1226, 1231. “The rule has been clear for decades: “[d]etention during deportation proceedings [i]s ... constitutionally valid.” *Banyee v. Garland*, 115 F.4th 928 (8th Cir. 2024), *rehearing by panel and en banc denied*, *Banyee v. Bondi*, No. 22-2252, 2025 WL 837914 (8th Cir. Mar. 18, 2025) (citing *Demore v. Kim*, 538 U.S. 510, 523 (2003)); *see Demore*, 538 U.S. at 523 n.7 (“In fact, prior to 1907 there was no provision permitting bail for *any* aliens during the pendency of their deportation proceedings.”); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) (“Detention is necessarily a part of this deportation procedure.”). Indeed, removal proceedings ““would be [in] vain if those accused could not be held in custody pending the inquiry into their true character.”” *Demore*, 538 U.S. at 523 (quoting *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)).

Section 1226 “generally governs the process of arresting and detaining . . . aliens pending their removal.” *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). Section 1226(a) provides that “an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.” 8 U.S.C. § 1226(a). The Attorney General and the Department of Homeland Security (“DHS”) thus have broad discretionary authority to detain a noncitizen during removal proceedings.<sup>4</sup> *See* 8 U.S.C. § 1226(a)(1)

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<sup>4</sup> Although the relevant statutory sections refer to the Attorney General, the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002), transferred all immigration enforcement and administration functions vested in the Attorney General, with few exceptions, to the Secretary of Homeland Security. The Attorney General’s authority—delegated to immigration judges, *see* 8 C.F.R. § 1003.19(d)—to detain, or

(DHS “may continue to detain the arrested alien” during the pendency of removal proceedings); *Nielsen v. Preap*, 139 S. Ct. 954, 966 (2019) (highlighting that “subsection (a) creates authority for *anyone*’s arrest or release under § 1226—and it gives the Secretary broad discretion as to both actions”).

When a noncitizen is apprehended, a DHS officer makes an initial custody determination. *See* 8 C.F.R. § 236.1(c)(8). DHS “may continue to detain the arrested alien.” 8 U.S.C. § 1226(a)(1). “To secure release, the alien must show that he does not pose a danger to the community and that he is likely to appear for future proceedings.” *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2280–81 (2021) (citing 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8); *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1113 (BIA 1999)).

If DHS decides to release the noncitizen, it may set a bond or place other conditions on release. *See* 8 U.S.C. § 1226(a)(2); 8 C.F.R. § 236.1(c)(8). If DHS determines that a noncitizen should remain detained during the pendency of his removal proceedings, the noncitizen may request a bond hearing before an immigration judge. *See* 8 C.F.R. §§ 236.1(d)(1), 1003.19, 1236.1(d). The immigration judge then conducts a bond hearing and decides whether to release the noncitizen, based on a variety of factors that account for the noncitizen’s ties to the United States and evaluate whether the noncitizen poses a flight risk or danger to the community. *See Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006);<sup>5</sup> *see*

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authorize bond for noncitizens under section 1226(a) is “one of the authorities he retains . . . although this authority is shared with [DHS] because officials of that department make the initial determination whether an alien will remain in custody during removal proceedings.” *Matter of D-J-*, 23 I. & N. Dec. 572, 574 n.3 (A.G. 2003).

<sup>5</sup> The BIA has identified the following non-exhaustive list of factors the immigration judge may consider: “(1) whether the alien has a fixed address in the United States; (2) the alien’s

also 8 C.F.R. § 1003.19(d) (“The determination of the Immigration Judge as to custody status or bond may be based upon any information that is available to the Immigration Judge or that is presented to him or her by the alien or [DHS].”).

Section 1226(a) does not provide a noncitizen with a right to release on bond. *See Matter of D-J-*, 23 I. & N. Dec. at 575 (citing *Carlson*, 342 U.S. at 534). Nor does § 1226(a) explicitly address the burden of proof that should apply or any particular factor that must be considered in bond hearings. Rather, it grants DHS and the Attorney General broad discretionary authority to determine whether to detain or release a noncitizen during his removal proceedings. *See id.* If, after the bond hearing, either party disagrees with the decision of the immigration judge, that party may appeal that decision to the BIA. *See* 8 C.F.R. §§ 236.1(d)(3), 1003.19(f), 1003.38, 1236.1(d)(3).

Included within the Attorney General and DHS’s discretionary authority is a provision that allows DHS to invoke an automatic stay of any decision by an immigration judge to release an individual on bond when DHS files an appeal of the custody redetermination. 8 C.F.R. § 1003.19(i)(2) (“The decision whether or not to file [an automatic stay] is subject to the discretion of the Secretary.”). If an automatic stay is invoked, regulations require the BIA to track the progress of the custody appeal “to avoid

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length of residence in the United States; (3) the alien’s family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future; (4) the alien’s employment history; (5) the alien’s record of appearance in court; (6) the alien’s criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the alien’s history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the alien’s manner of entry to the United States.” *Guerra*, 24 I. & N. Dec. at 40.

unnecessary delays in completing the record for decision.” 8 C.F.R. § 1003.6(c)(3). The stay lapses in 90 days, unless the detainee seeks an extension of time to brief the custody appeal, 8 C.F.R. § 1003.6(c)(4), or unless DHS seeks, and the BIA grants, a discretionary stay. 8 C.F.R. § 1003.6(c)(5).

If the noncitizen’s circumstances change following his initial bond hearing, he may request a subsequent hearing, *see* 8 C.F.R. § 1003.19(e), and the outcome of that hearing is also appealable to the BIA, *see Matter of Uluocha*, 20 I. & N. Dec. 133, 134 (BIA 1989).

#### **IV. Procedural History**

Hoque filed his Petition for writ of habeas corpus on April 18, 2025. ECF No 1. In the Petition, he asserts four claims. First, he challenges the application of an alleged policy against him in retaliation for his exercise of his First Amendment rights, both retrospectively and prospectively. ECF No. 1 ¶¶ 83-88. Second, he alleges that his Fifth Amendment rights to due process were violated when the alleged policy was applied against him, when his SEVIS record was terminated, and when he was detained. ECF No. 1 ¶¶ 89-96. Third, he alleges a violation of the Administrative Procedures Act (APA) when his SEVIS record was terminated; in support of this claim, he asserts that he was detained because of his SEVIS record termination. ECF No. 1 ¶¶ 97-101. Finally, he asserts a claim requesting this Court use its “inherent” and “equitable” authority to authorize his release. ECF No. 1 ¶¶ 102-105.

Hoque requests sweeping relief in his Petition and this motion. He requests that this Court assume jurisdiction, enjoin Petitioner’s transfer outside of the district, grant release pending adjudication of the habeas petition, grant the habeas petition, enjoin his removal

during these proceedings, enjoin his removal “on the basis of a determination made under the Policy,” and aware costs and EAJA fees. ECF No. 1 at 32.

Hoque filed his Motion for a Temporary Restraining Order on April 21, 2025. This Court granted the motion on April 22, 2025. ECF 15.

## ARGUMENT

### **I. This Court does not have jurisdiction to review the Secretary of State’s discretionary decision to revoke Hoque’s student visa.**

This Court is not permitted to review the Secretary of State’s decision to revoke his visa, which is the basis for his arrest, detention, and the initiation of removal proceedings against him. Though Petitioner creatively describes his claims and asserts that this Court should review a broader “policy,” his claims, at their root, focus on whether the Secretary of State had the authority to revoke his visa. Petitioner’s visa was revoked under the discretionary authority lodged in the Department of State by statute pursuant to public safety concerns. Under 8 U.S.C. § 1201(i),

After the issuance of a visa or other documentation to any alien, the consular officer or the Secretary of State may at any time, in his discretion, revoke such visa or other documentation. Notice of such revocation shall be communicated to the Attorney General, and such revocation shall invalidate the visa or other documentation from the date of issuance....

That same section explicitly states that there “shall be no means of judicial review” including habeas review, mandamus review, and all writs act review, “except in the context of removal proceedings if such revocation provides the sole ground for removal.” 8 U.S.C. § 1201(i).

Here, ICE issued Petitioner a NTA initiating removal proceedings on account of the revocation of his visa, and therefore, Hoque can seek judicial review before the court of appeals if he is ordered removed. As explained by another district court when dismissing a habeas petition which challenged the revocation of a visa: “Congress has taken it out of my hands. . . . I cannot address this argument because I lack subject matter jurisdiction over the case. The legality of petitioner’s detention depends on the resolution of such issues as whether the government lawfully revoked his visa and whether he is removable from the United States and, as indicated above, I am precluded from reviewing those issues.” *Bolante v. Achim*, 457 F. Supp. 2d 898, 902 (E.D. Wis. 2006). The *Bolante* court also found that the Suspension Clause was not implicated because “the government has initiated removal proceedings” and a circuit court could review a challenge to the visa revocation upon a petition for review. *Id.* at 902-03, n.6.<sup>6</sup>

Other courts also routinely find themselves without jurisdiction to consider the merits of a visa revocation upon operation of 8 U.S.C. § 1201(i)’s language. *See e.g.*, *Aldabbagh v. Sec’y of State*, No. 6:21-CV-532-GAP-EJK, 2021 WL 6298664, at \*2 (M.D. Fla. Oct. 5, 2021) (Finding no jurisdiction over complaint that asked court to declare revocation of visa to be arbitrary and capricious, an abuse of discretion, and not in accordance of law.); *Tarlinsky v. Pompeo*, No. 3:19-CV-659 (VLB), 2019 WL 2231908,

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<sup>6</sup> Petitioner has argued that the immigration court has jurisdiction to review the Secretary of State’s determination to revoke Petitioner’s visa under section 221(g). *See Voss Decl.*, Ex. 4 at 107 (Respondents’ Motion to Terminate Removal Proceedings). The United States’ position is that the only court that can judicially review the Secretary of State’s decision to revoke are the circuit courts through the petition for review process. 8 U.S.C. § 1252 (b)(9).

at \*5 (D. Conn. May 23, 2019) (“As the basis for [the visa] revocation is expressly non-reviewability by statute, the [c]ourt lacks subject matter jurisdiction over” the complaint.). Petitioner’s claims are a direct request for this court to review the State Department’s revocation of his visa through this Petition. This Court lacks jurisdiction to consider his claims, which must be presented instead in the context of his removal proceedings through the petition for review process.

**II. This Court does not have jurisdiction to review ICE’s decision to initiate removal proceedings against Hoque.**

Section 1226(e) serves as yet another jurisdictional bar that precludes district court review of Hoque’s claim of “retaliatory detention that violates due process and the First Amendment.” ECF 1 ¶¶ 83-88. The decision to detain Hoque is governed by 8 U.S.C. § 1226(a), which is the discretionary detention statute that authorizes detention pending a final decision in removal proceedings. *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”). The INA explicitly bars judicial review of the discretionary decision over whether to detain someone placed in removal proceedings. Section 1226(e) provides that: “The Attorney General’s discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention of any alien or the revocation or denial of bond or parole.” 8 U.S.C. § 1226(e).

Section 1226(e) covers the initial decision to detain Hoque. *See Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020) (finding that § 1226(e) did not bar review because the petitioner did not challenge “his initial detention”); *see also Ortega v. Bonnar*, 415 F.

Supp. 3d 963, 969 (N.D. Cal. 2019) (not applying § 1226(e) because the petitioner did not challenge the “*initial detention* or bond decision”) (emphasis added); *Mayorga v. Meade*, No. 24-CV-22131, 2024 WL 4298815, at \*7 (S.D. Fla. Sept. 26, 2024) (applying § 1226(e) to hold that a § 1226(a) detainee “failed to establish that his detention is subject to review”); *Saadulloev*, 2024 WL 1076106, at \*3 (recognizing that there is no judicial review of the threshold detention decision).

### **III. Section 1252(b)(9) bars relief and review.**

The proper path for reviewing the propriety of a removal order—including whether the application of immigration law to the petitioner—is through the petition for review process set out in 8 U.S.C. § 1252. Despite this statute, Hoque presses forward in a habeas action that his removability charge is a result of alleged First Amendment discrimination and that his detention violates due process. He must bring those challenges through a petition for review. *E.g.*, *Jama v. I.N.S.*, 329 F.3d 630, 632 (8th Cir. 2003), *aff’d sub nom. Jama v. ICE*, 543 U.S. 335, 125 S. Ct. 694, 160 L. Ed. 2d 708 (2005) (Eighth Circuit retains jurisdiction to review “consider substantial constitutional challenges to the Immigration and Nationality Act.”). This Court lacks jurisdiction over the matter and therefore should not deny the petition.

In passing the REAL ID Act, Congress prescribed a single path for judicial review of orders of removal: “a petition for review filed with an appropriate court of appeals.” 8 U.S.C. § 1252(a)(5). The REAL ID Act further provides that, “[j]udicial 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.” 8 U.S.C. § 1252(b)(9) (emphasis added). Read in conjunction with section 1252(b)(9), section 1252(a)(5) expresses Congress’s intent to channel and consolidate judicial review of every aspect of removal proceedings into the petition-for-review process in the courts of appeals. H.R. Conf. Rep. No. 109-72, at 174–75; *see also Flores v. Hartnett*, No. CIV. 10-2159 ADM/AJB, 2010 WL 3283491, at \*3 (D. Minn. Aug. 18, 2010) (highlighting that section 1252 “was designed to consolidate and channel review of all legal and factual questions, including constitutional and statutory challenges, that arise from the removal of aliens into the administrative process, with judicial review of those decisions vested exclusively in the courts of appeals”).

In fact, “most claims that even relate to removal” are improper if brought before the district court. *Reno v. Am.-Arab Anti-Discrimination Comm.* (“AADC”), 525 U.S. 471, 483 (1999) (labeling section 1252(b)(9) an “unmistakable zipper clause,” and defining a zipper clause as “[a] clause that says ‘no judicial review in deportation cases unless this section provides judicial review.’”). That should resolve this case. Hoque can challenge his removal in front of an IJ, who will determine whether he is removable. 8 U.S.C. §§ 1229a(a), (c). The government must show by clear and convincing evidence that Hoque is removable. 8 U.S.C. § 1229a(c)(3). Hoque then has a right to appeal an adverse order from the IJ to the BIA. 8 U.S.C. § 1229a(c)(5). If he is unsuccessful with his administrative appeal, he can obtain Article III judicial review by filing a petition for review with the appropriate court of appeals. 8 U.S.C. § 1252(a)(5). As important, during immigration proceedings, and then later before the court of appeals, Hoque will have the ability to press

his constitutional claims, along with any other bases he wishes to raise to contest his detention and/or removal. *See* 8 U.S.C. § 1252(b)(9) (preserving judicial review of “interpretation and application of constitutional and statutory provisions” for courts of appeals but stripping all other courts of jurisdiction, including under habeas, to review such questions of law and fact).

The decision to detain Hoque and his removability are unquestionably intertwined and confirms the importance of Hoque pursuing this challenge before an IJ first. Should a district court second-guess that decision, it would necessarily vacate the removability charge, and this is exactly the sort of piecemeal litigation the INA meant to avoid. Congress specifically preserved judicial review of “constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals[.]” 8 U.S.C. § 1252(a)(2)(D). The Supreme Court recognized that § 1252(a)(2)(D) was intended to preserve the kind of review traditionally available in a habeas proceeding, including review of the “erroneous application or interpretation of statutes.” *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 232 (2020). Per that recognition, courts of appeals have routinely reviewed constitutional and legal challenges to removability. *See, e.g., Chavez-Castillo v. Holder*, 771 F.3d 1081, 1082 (8th Cir. 2014) (reviewing Fourth and Fifth Amendment claims in context of petition for review); *Mocevic v. Mukasey*, 529 F.3d 814, 817 (8th Cir. 2008) (“This Court reviews de novo constitutional claims and questions of law, which are properly raised in a petition for review.”); *Yusupov v. Att’y Gen. of U.S.*, 650 F.3d 968, 981, 992–93 (3d Cir. 2011) (reviewing the agency’s determination that there were “reasonable grounds to believe that the alien is a danger to the security of the United States”

and holding that the government had not met its burden); *McAllister v. Att’y Gen. of U.S.*, 444 F.3d 178, 186 (3d Cir. 2006) (analyzing the alleged terrorist ground of inadmissibility and concluding that it was “[neither] vague nor overbroad in that it [did] not infringe on constitutionally protected behavior”); *Rezai v. I.N.S.*, 62 F.3d 1286, 1291 (10th Cir. 1995) (reviewing whether the Board violated petitioner’s First Amendment rights by declining to usurp another agency’s authority and reopen deportation proceeding on the basis of an unadjudicated visa petition); *Marquez-Reyes v. Garland*, 36 F.4th 1195, 1205–07 (9th Cir. 2022) (reviewing if inadmissibility statute can withstanding First Amendment scrutiny); *Islas-Veloz v. Whitaker*, 914 F.3d 1249, 1250 (9th Cir. 2019) (assessing whether the statutory phrase, “crime involving moral turpitude” is unconstitutionally void for vagueness).

Hoque can obtain meaningful Article III review of his removability through a petition for review. That path remains available, and therefore, § 1252(b)(9) bars this Court’s review.

#### **IV. Hoque’s Petition runs afoul of § 1252(g).**

Hoque’s claims and request for relief also run headlong in the independent jurisdictional bar contained in § 1252(g). He challenges the Government’s decisions to charge him with removability and then detain him, which arise “from the decision [and] action” to “commence proceedings.” 8 U.S.C. § 1252(g). Regardless of his framing, this Court does not have jurisdiction to entertain such a challenge, and Hoque must do so through a petition for review. *Tostado v. Carlson*, 481 F.3d 1012, 1014 (8th Cir. 2007).

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 any alien arising from the decision or action by the Attorney General to [1] commence proceedings, [2] adjudicate cases, or [3] execute removal orders against any alien under this chapter.” 8 U.S.C. § 1252(g). Section 1252(g) eliminates jurisdiction “[e]xcept as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory).”<sup>7</sup> *Id.* Section 1252(g) was “‘directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion,’” to protect “‘no deferred action’ decisions and similar discretionary decisions.” *AADC*, 525 U.S. at 485). This limitation exists for “good reason: so “[a]t each stage the Executive has discretion to abandon the endeavor.” *AADC*, 525 U.S. at 483–84.

In *Silva v. United States*, 866 F.3d 938, 941 (8th Cir. 2017), the Eighth Circuit recently affirmed the district court’s holding that it lacked jurisdiction over a challenge to a final order of removal under 8 U.S.C. § 1252(g). This District has routinely rejected challenges seeking to review removal orders; Hoque’s challenge to whether the charges brought make him removable is analogous. *See, e.g., Adan v. Sessions*, 17-cv-5328 (MJD/BRT), Docket No. 13; *Mohamed v. Sessions*, 17-cv-5331 (DSD/BRT), Docket No

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<sup>7</sup> Congress initially passed § 1252(g) in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 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. After Congress enacted the Homeland Security Act of 2002, § 1252(g)’s reference to the “Attorney General” includes the Secretary of Homeland Security. 6 U.S.C. § 202(3); *see also Enriquez-Perdomo v. Newman*, 54 F.4th 855, 863 & nn.3–4 (6th Cir. 2022) (explaining the historical development of § 1252(g)).

19; *Ibrahim v. Sessions*, 17-cv-5333 (DSD/TNL), Docket No. 16; *Sheikh v. Sessions*, 17-cv-5330 (JNE/HB); *Gopar v. Dep't of Homeland Security*, 17-cv-356 (PJS/TNL), 2017 WL 2222409, \*2 (D. Minn. Apr. 19, 2017), Report and Recommendation adopted, 2017 WL 2222913 (D. Minn. May 19, 2017); *Ruiz v. Johnson*, 14-cv-1721 (MJD/TNL), 2014 WL 2511094, \*3 (D. Minn. June 4, 2014) (“Fundamentally, Petitioner is challenging the validity of the immigration judge's removal order. This Court lacks subject matter jurisdiction to consider her claims, which must be raised in the appropriate circuit court of appeals.”); *Alonso v. Office of Counsel/Immigration and Customs Enforcement*, 13-cv2514 (MJD/JJK), 2013 WL 5999485, \*4 (D. Minn. Nov. 12, 2013) (“[T]he REAL ID Act prohibits a federal district court from entertaining such claims in a habeas corpus proceeding, and mandates that such claims must be brought in the apposite federal circuit court.”); *Mehighlovesky v U.S. Dept. of Homeland Security*, 12-cv-902 (RHK/JJG), 2012 WL 6878901, \*4 (D. Minn. Dec. 7, 2012) (same); *Buezo v. Banieke*, 08-cv-206 (DWF/RLE), 2008 WL 312808, \*3 (D. Minn. Feb. 1, 2008) (same); *Ukofia v. Mukasey*, 2008 WL 5432254, \*1 (D. Minn. Dec. 5, 2008).

Section 1252(g) also prohibits district courts from hearing challenges to decisions and actions about *whether* and *when* to commence removal proceedings. See *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.”). Circuit courts, including the Eighth Circuit, have held § 1252(g) applies to the discretionary decision to execute a removal order. *Camerena v. Director, ICE*, 988 F.3d 1268, 1272, 1274 (11th Cir. 2021) (holding that § 1252(g) bars

review of challenges to the discretionary decision execute a removal order); *Arce v. United States*, 899 F.3d 796, 800 (9th Cir. 2018) (finding that § 1252(g) would bar claims asking the Attorney General to delay the execution of a removal order); *Hamama v. Homan*, 912 F.3d 869, 874 (6th Cir. 2018) (“Under a plain reading of the text of the statute, the Attorney General’s enforcement of long-standing removal orders falls squarely under the Attorney General’s decision to execute removal orders and is not subject to judicial review.”). Under the plain text of § 1252(g), the provision must apply equally to decisions and actions to *commence* proceedings that ultimately may end in the execution of a final removal order. *See Jimenez-Angeles*, 291 F.3d at 599; *see also 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”); *Humphries v. Various Fed. USINS Emps.*, 164 F.3d 936, 945 (5th Cir. 1999) (determining that § 1252(g) prohibited review of an alien’s First Amendment retaliation claim based on the Attorney General’s decision to put him into exclusion 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 Alvarez v. U.S. 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 thus necessarily prevents us from considering whether the agency should have used a different statutory procedure to initiate the removal process.”); *Saadulloev v. Garland*, No. 3:23-CV-00106, 2024 WL 1076106, at \*3 (W.D. Pa. Mar. 12, 2024) (“The Government’s decision to arrest Saadulloev on April 4, 2023, clearly is a decision to

‘commence proceedings’ that squarely falls within the jurisdictional bar of § 1252(g).”). Arresting Hoque to commence removal proceedings is an “action . . . to commence proceedings” that this Court lacks jurisdiction to review. *See Tazu v. Att’y Gen. United States*, 975 F.3d 292, 298-99 (3d Cir. 2020) (“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.”). Under the same reasoning, § 1252(g) bars review of *where* to commence proceedings. And choosing to commence proceedings in Louisiana is a decision or action not subject to review. *See Tercero v. Holder*, 510 F. App’x 761, 766 (10th Cir. 2013) (“Accordingly, the Attorney General’s discretionary decision to detain Mr. Tercero and others in New Mexico is not reviewable by way of a habeas petition.”).

That Hoque raises First and Fifth Amendment claims does not change the analysis. *See 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 Supreme Court held that a prior version of § 1252(g) barred claims like those brought here. *See AADC*, 525 U.S. at 487–92. In *AADC*, the respondents had alleged that the “INS was selectively enforcing immigration laws against them in violation of their First and Fifth Amendment rights.” *Id.* at 473–74. The Supreme Court noted “an admission by the Government that

the alleged First Amendment activity was the basis for selecting the individuals for adverse action.” *Id.* at 488 n.10. The respondents 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. Further, the Court found that “[a]s a general matter—and assuredly in the context of claims such as those put forward in the present case—an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation.” *Id.* at 488; *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”).

Notably, the Northern District of New York recently affirmed that § 1252(g) bars claims that closely mirror those brought by Hoque. *See Taal v. Trump*, No. 3:25-CV-335 (ECC/ML), 2025 WL 926207, at \*2-3 (N.D.N.Y. Mar. 27, 2025). There, plaintiffs sought to enjoin two executive orders and attempted to prevent Taal’s placement in removal proceedings and indeed conceded that Taal would have an opportunity to raise his constitutional challenges before immigration courts and the appropriate court of appeals. *Id.* at \*2. So Taal was not foreclosed from obtaining judicial review, and the court recognized the importance of that notion. *Id.*

Hoque will be able to obtain review, just not before this Court in the first instance. This Court should follow *AADC* and find that § 1252(g) bars district-court review and relief.

**V. This Court likewise has no jurisdiction to order Hoque be detained at any location.**

This Court also lacks jurisdiction over ICE’s discretionary decision concerning where to detain aliens in immigration detention, and thus the Court lacks authority to enjoin Hoque’s potential transfer to a different location. This argument (*e.g.*, ECF 1 at 32) amounts to a challenge to the commencement of removal proceedings over which this Court lacks jurisdiction under 8 U.S.C. § 1252(g) because decisions relating to commencement of proceedings necessarily includes the method by which they are commenced. *See Alvarez v. ICE*, 818 F.3d 1194, 1202 (11th Cir. 2016) (recognizing that the three actions listed Section 1252(g)—commence proceedings, adjudicate cases, and execute removal orders—“represent the initiation or prosecution of various stages in the deportation process,” and “[a]t each stage the Executive has discretion to abandon the endeavor” for any number of reasons) (citing *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483 (1999)).

The commencement of proceedings requires ICE to determine whether, when, and where to commence such proceedings, meaning that Section 1252(g) bars this Court’s review of ICE’s decision where to initiate removal proceedings. *See, e.g., Alvarez*, 818 F.3d at 1203 (“The challenge to ICE’s decision, made by its counsel, Defendant Emery,

essentially asks this Court to find that the agency should have chosen a different method of commencing proceedings. The district court was correct to find that Section 1252(g) strips us of the power to entertain such a claim.”); *Arostegui v. Holder*, 368 F. App’x 169, 171 (2d Cir. 2010) (holding, upon a petition for review of a final removal order: “Whether and when to commence removal proceedings is within the discretion of DHS, and we do not have jurisdiction to review such decisions, unless petitioner raises constitutional claims or questions of law.”) (citing 8 U.S.C. § 1252(g)).

Additionally, the Executive’s authority under 8 U.S.C. § 1231(g) to decide the location of detention for individuals detained pending removal proceedings falls within the review bar in 8 U.S.C. § 1252(a)(2)(B)(ii). That is because, under Section 1231(g), ICE “necessarily has the authority to determine the location of detention of an alien in deportation proceedings,” including whether to change that location during the pendency of proceedings. *Gandarillas-Zambrana v. Bd. Immigration Appeals*, 44 F.3d 1251, 1256 (4th Cir. 1995); *see, e.g., Wood v. United States*, 175 F. App’x 419, 420 (2d Cir. 2006) (holding that the Secretary “was not required to detain [Plaintiff] in a particular state” given the Secretary’s “statutory discretion” under Section 1231(g)).

A district court may not exercise jurisdiction over ICE’s decision to detain an alien in a given location and may not order ICE to transfer an alien from one location to another. *See, e.g., Salazar v. Dubois*, No. 17-cv-2186 (RLE), 2017 WL 4045304, at \*1 (S.D.N.Y. Sept. 11, 2017) (concluding that the district court “does not have authority to issue an order to change or keep [an alien] at any particular location”); *Zheng v. Decker*, No. 14-cv-4663 (MHD), 2014 WL 7190993, at \*15-16 (S.D.N.Y. Dec. 12, 2014) (denying petitioner’s

request that the Court order ICE not to transfer him to another jurisdiction, holding that Section 1231(g) transfer authority “is among the [Secretary of Homeland Security’s] discretionary powers. The INA precludes judicial review over such discretionary decisions. *See* 8 U.S.C. § 1252(a)(2)(B)(ii) (barring district courts from exercising subject matter jurisdiction over “any . . . decision or action of the Attorney General . . . the authority for which is specified under this subchapter [8 U.S.C. §§ 1151-1381] to be in the discretion of the Attorney General . . .”).

Notwithstanding the above, Hoque’s removal proceedings are taking place within Minnesota. Counsel represented to the Court that there is no immediate plan to transfer Hoque outside of the district and to inform the Court if those facts change. There is no legal or factual basis for the Court to consider this argument. To the extent the Court reaches the issue, it should deny habeas relief.

**VI. Hoque’s Administrative Procedures Act claim is ill-suited to habeas and should be dismissed.**

**a. Hoque’s habeas claim goes well beyond the bounds of habeas.**

Habeas is at its core a remedy for unlawful executive detention.” *Munaf v. Geren*, 553 U.S. 674, 693 (2008). The writ of habeas corpus and its protections are “strongest” when reviewing “the legality of Executive detention.” *INS v. St. Cyr.*, 533 U.S. 289, 301 (2001). Therefore, the traditional function of the writ is to seek one’s release from unlawful detention. *Dep’t of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 117 (2020) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973)). Hoque may seek “simple release”. *See Thuraissigiam*, 591 U.S. at 119 (“Claims so far outside the core of habeas may not be pursued through habeas.”) (internal quotations and citations omitted).

Hoque seeks more than just release; he seeks vacatur of the Secretary of State's determination and an end to his removal proceedings based on an alleged undefined amorphous policy. That is simply a misapplication of the Great Writ and an attempt to work around his administrative proceedings. Hoque can obtain review related to his removal proceedings from of an IJ, the BIA, and then ultimately the court of appeals. He has obtained a custody determination in front of the IJ as to whether he is properly subject to his removal provision.

Hoque must pursue his claims regarding his removability in the right forum. *Reiter v. Cooper*, 507 U.S. 258, 269 (1993) (“Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed.”); *Mathena v. United States*, 577 F.3d 943, 946 (8th Cir. 2009); *Arroyo v. Fikes*, No. 21-CV-2489 (KMM/BRT), 2022 WL 2820405, at \*2 (D. Minn. May 5, 2022). While “[t]here is no statutory requirement that a habeas petitioner exhaust his administrative remedies before challenging his immigration detention [in federal court],” *Araujo- Cortes v. Shanahan*, 35 F. Supp. 3d 533, 538 (S.D.N.Y. 2014), exhaustion should be required as a prudential matter, *accord Paz Nativi v. Shanahan*, No. 16 Civ. 8496 (JPO), 2017 WL 281751, at \*1 (S.D.N.Y. Jan. 23, 2017) (“[B]efore immigration detention may be challenged in federal court. . . exhaustion is generally required as a prudential matter.” (collecting cases)).

**b. Hoque's APA claim fails on its merits.**

Petitioner fails to demonstrate any merit to his claims brought under the APA and *Accardi v. Shaughnessy*, 347 U.S. 260 (1954). The APA provides a right to judicial review of “final agency action for which there is no other adequate remedy.” *Bennett v. Spear*, 520 U.S. 154, 175 (1997). In short, the APA provides the cause of action for claimants to enforce an agency’s duty, as set forth in the *Accardi* doctrine, to adhere to its own rules. *E.g.*, *Biron v. Carvajal*, No. 20-CV-2110 (WMW/ECW), 2021 WL 3047250, at \*29 (D. Minn. July 20, 2021), *report and recommendation adopted*, No. 20-CV-2110 (WMW/ECW), 2021 WL 4206302 (D. Minn. Sept. 16, 2021), *aff’d*, No. 21-3615, 2022 WL 2288534 (8th Cir. June 24, 2022). An *Accardi* claim requires an actual injury and the alleged policy at issue must involve substantive, not procedural rights. *Id.* Petitioner must show, which he cannot based on the facts of this case, that the alleged policy exists and applied to him.

Section 701(a)(2) of the APA precludes judicial review where agency action is committed to agency discretion by law. As such, judicial review of the State Department’s revocation of Petitioner’s visa is precluded since 8 U.S.C. § 1201(i) vests such revocation in the Secretary of State and precludes judicial review aside from in removal proceedings. *See Mansur v. Albright*, 130 F. Supp. 2d 59, 61 (D.D.C. 2001) (“Without such statutory or regulatory limitation, there is no law to apply to the Secretary’s discretionary revocation, and this court lacks jurisdiction to review the revocation ...”). Similarly, ICE’s decisions to commence removal proceedings and arrest and detain Petitioner were all discretionary decisions not subject to APA review by this Court. *See Gicharu v. Carr*, 983 F.3d 13, 20 (1st Cir. 2020) (“Having concluded that Gicharu’s APA claim and habeas claim both arise

from his removal proceedings, we hold that the district court lacked subject matter jurisdiction over those claims under section 1252(b)(9).”).

But, even if considered on their merits, under long-standing principles limiting APA claims, Petitioner’s *Accardi* claim, must fail because it fails to challenge any agency action cognizable under the APA, let alone the “final” agency action required for APA review. Where “no other statute provides a private right of action, the ‘agency action’ complained of must be ‘final agency action.’” *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61–62 (2004) (citing 5 U.S.C. § 704). Petitioner fails to identify a final agency action on which to base his APA claim. *See Bennett*, 520 U.S. at 177–78 (requiring a final agency action to “mark the consummation of the agency’s decisionmaking process” and “the action must be one by which “rights or obligations have been determined,” or from which “legal consequences will flow”).

Even if Petitioner could identify a final agency action, that agency action would be directly tied to the ICE’s decision to initiate removal proceedings against him and the validity of those charges, which must be brought in removal proceedings. *See* 8 U.S.C. § 1252(b)(9). Judge Tunheim rejected a similar claim in *Lopez v. Barr*, No. CV 20-1330 (JRT/BRT), 2021 WL 195523, at \*3 (D. Minn. Jan. 20, 2021), stating, “The purpose of this provision is to protect particular administrative determinations . . . from judicial review until after a final order has issued.” The *Lopez* case also concerned the exercise of prosecutorial discretion to commence immigration proceedings. Petitioner’s *Accardi* claim fails for because, at bottom, Petitioner challenges the Government’s decision to initiate removal proceeding against him. To the extent that the claim is not barred by §§ 1202(i)

and 1252(g), it must be brought through Petitioner's removal proceedings and raised in a petition for review of a final order of removal if entered.

Petitioner also complains that DHS terminated his SEVIS record improperly. Petitioner notes that the SEVIS termination originally noted that it was based on Sections 237(a)(1)(C)(i) and 237(a)(4)(C) of the INA. Petition ¶¶ 65-67. This information was corrected on April 8, 2025 to reflect the termination was because "Individual identified in criminal records check and/or has had their VISA revoked." Petition ¶ 71.

This claim is without merit. Respondents have not alleged that Hoque is subject to removal under INA Section 237(a)(4)(C)(i). The SEVIS record was corrected to conform with the charges brought against Hoque and the basis for the revocation of his visa, as stated originally in the Secretary of State's March 23, 2025 memorandum. Minner Decl. ¶ 6, Ex. 3. The SEVIS termination has no independent collateral consequences. *See generally*, Watson Declaration. And SEVIS does not create a property interest that is enforceable here. *Bakhtiari v. Beyer*, No. 4:06-CV-01489(CEJ), 2008 WL 3200820, at \*3 (E.D. Mo. Aug. 6, 2008) ("The Court finds that neither the SEVIS regulations nor the enabling legislation on which they are based demonstrate that Congress intended to create a private right of action or intended to benefit a class of which plaintiff is a member."). In rejecting a section 1983 claim against a school official based upon an inaccurate SEVIS record, the Minnesota Court of appeals said, "We acknowledge that *Bakhtiari* is not binding upon this court, but its reasoning is persuasive . . . The regulations do not provide to any clear right of enforcement to a nonimmigrant student . . .". *Hollingsworth v. State*, No. A14-1874, 2015 WL 4877725, at \*4 (Minn. Ct. App. Aug. 17, 2015).

**VII. Hoque's detention is constitutional, and his habeas petition should be denied.**

In his Petition, Hoque asserts claims that his detention violates the First Amendment directly, violates the Fifth Amendment due to the alleged deprivation of his First Amendment rights, and independently violates the Fifth Amendment. Hoque's claims fail as a matter of law because his removal proceedings and detention follow from the revocation of his visa by the Secretary of State based upon his criminal record. He is receiving all the process that is due to him under the statutory and regulatory scheme set out by Congress in 8 U.S.C. § 1226(a). Hoque is not in prolonged detention. He has been in detention for less than one month and during that time he has had hearings on both his custody and the underlying merits of the charges of removability brought against him. *See generally* Voss Declaration, Exs. 3-4.

Hoque has no right to be released during the pendency of his immigration proceedings. *See Reno v. Flores*, 507 U.S. 292, 306 (1993) ("Congress eliminated any presumption of release pending deportation, committing that determination to the discretion of the Attorney General."). Importantly, "when the Government deals with deportable [noncitizens], the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." *Demore*, 538 U.S. at 528. And as the Supreme Court has ruled, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation and quotation marks omitted). Due process demands only that the government provide "'adequate procedural protections' to ensure that the government's asserted justification for physical confinement 'outweighs the individual's constitutionally

protected interest in avoiding physical restraint.” *Prieto-Romero v. Clark*, 534 F.3d 1053, 1065 (9th Cir. 2008) (quoting *Zadvydas v. Davis*, 533 U.S. 679, 690-91 (2001)).

During their removal proceedings, noncitizens like Hoque who are detained under § 1226(a) receive numerous procedural safeguards. See, *supra*, Factual Background, § III. Hoque is next scheduled to appear before an immigration judge on May 7, 2025. He will have the opportunity to present the merit-based arguments he has to contest his removability. He has not been denied due process, and his Petition should be dismissed.

“Detention of aliens pending their removal in accordance with the INA is constitutional and is supported by legitimate governmental objectives.” *Hope*, 972 F.3d at 328–29 (citing *Demore*, 538 U.S. at 531, and *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)). Indeed, the Supreme Court “has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens.” *Demore*, 538 U.S. at 522. Because “any policy toward 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.” *Id.* at 522–23. Accordingly, the Supreme Court has long held that “detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process.” *Id.* at 522–23. This has resulted in the Supreme Court ruling that individuals held during the pendency of removal proceedings may be detained even without an individualized determination as to flight risk or dangerousness. See, e.g., *Carlson v. Landon*, 342 U.S. 524, 528–34, 538

(1952); *Wong Wing*, 163 U.S. at 235 (holding deportation proceedings “would be vain if those accused could not be held in custody pending the inquiry into their true character.”).

Instead of addressing this line of cases, Hoque argues that mitigating flight risk and preventing danger to the community can be the only legitimate purposes for immigration detention. Petition ¶¶ 82, 94. That is incorrect. “The enforcement of our immigration laws is the government’s sovereign prerogative, and detention is *necessarily* a part of the removal procedure.” *Miranda v. Garland*, 34 F.4th 338, 366 (4th Cir. 2022) (emphasis added). *Carlson* is particularly instructive here. There, four petitioners had been arrested and charged with being members of the Communist Party of the United States. *Id.* at 529. The petitioners challenged their detention without bond while in custody during the pendency of consideration of their deportability. *Id.* The Supreme Court upheld their detention without bond, recognizing that “evidence of membership plus personal activity in supporting and extending the Party’s philosophy concerning violence gives adequate ground for detention.” *Id.* at 535. Hoque is charged as removable because the Secretary of State revoked his visa on public safety grounds. “It cannot be expected that the Government should be required in addition to show specific acts of sabotage or incitement to subversive action.” *Id.* at 535. Therefore, Hoque is wrong, Petition ¶ 94, and his current detention is not punishment for protected speech.

Hoque has not shown, and this Court should not find, that his detention is based upon his speech. Hoque’s case is distinguishable in many ways from the high-profile student cases he cites. In each of those cases, the United States invoked foreign policy as a basis for visa revocation and/or removability. *E.g.*, ECF No. 10-1 at 13, 40, 43, 62. The

rationale for his arrest and detention has not changed. Moreover, the speech of the plaintiffs in those cases was renown. *E.g.*, ECF No. 10-1 at 25. Here, Petitioner does not plead any facts to show that DHS has ever mentioned his speech, or even that they were aware of Hoque's alleged speech. *See generally* Petition ¶ 2(alleging upon information and belief that the arrest and detention are in retaliation for his speech); Minner Decl. ¶ 8. His speech is not mentioned in the record of proceedings in the immigration court. Voss Decl., Exs. 3-4. The alleged policy Petitioner cites related to scouring social media post-dates the visa revocation in this case. ECF 10-2 at 2.

*Zadvydas v. Davis*, 533 U.S. 679 (2001), is not controlling here. Petition ¶¶ 93-94. In *Zadvydas*, the detention statute at issue, § 1231, concerns post-removal hearing detention where indefinite detention without the possibility of removal posed a "serious constitutional problem." 533 U.S. 678, 690 (2001). But § 1226 does not pose those same problems. The statute authorizes detention until the end of one's removal proceedings.

In *Farass Ali v. Brott, et al.*, No. 19-1244, 2019 WL 1748712 (8th Cir. Apr. 16, 2019), the Court held that the language of 1226(a), which allows for detention during removal proceedings, was clear. Farass Ali had been taken into ICE custody in May 2017 and charged with removability based on fraud or misrepresentation at the time of his entry. *Id.* at \*1. Because he was detained under § 1226(a), Ali received a bond hearing, which the IJ denied. In September 2018, after over a year in detention, Ali filed a habeas petition arguing his detention was unconstitutional. *Id.* The district court granted Ali's petition and ordered him released, reasoning the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001) (which governs § 1231 post-removal order detention), and the doctrine

of constitutional avoidance required the Court to read a “reasonableness limitation” into the time an alien could be detained during removal proceedings. *Id.* at \*2.

The Eighth Circuit reversed and remanded. The court reasoned, citing *Jennings*, that § 1226 is not susceptible to more than one construction as to the length of detention.

In contrast to the statute analyzed in *Zadvydas*, § 1226(a) limits the period of detention to the period “pending a decision on whether the alien is to be removed from the United States.” While this is not subject to precise calculation, it is, nonetheless, a defined period that does have an end.

*Id.* at \*3. With respect to § 1226(c), the *Ali* court continued:

It is significant the Supreme Court has found unambiguous the language of § 1226(c), which requires mandatory detention until a decision regarding removal is reached, and therefore has refused to use constitutional avoidance to read an extra-textual “reasonableness” limitation into the statute. We see no principled basis for viewing § 1226(a)’s text regarding the length of detention any differently.

*Id.* at \*4. Even if this Court were to consider the merits of the detention question here, there is no question that this short period of detention, coupled with the process afforded Petitioner, Voss Decl., Exs. 3, 4, is valid.

The fact that ICE has invoked the automatic stay provision to keep Hoque detained during his bond appeal does not change the constitutionality of his detention. Judge Davis recently rejected a constitutional challenge to another provision of the regulations implementing the exercise of the Secretary’s discretion under § 1226(a). Order, *Ernesto Ruben Barajas Farias v. Garland, et al.*, No. 24-cv04366 (MJD/LIB) (Dec. 6, 2024) (ECF No. 18, hereinafter Order Denying Petition). There, Judge Davis was considering a challenge 8 C.F.R. § 1003.19(h)(2)(i)(C), which allowed DHS to exempt a category of individuals from receiving any bond hearing under 1226(a).

Judge Davis explained the statutory structure of immigration detention as set out in Section 1226 and the accompanying DOJ regulations. Order to Show Cause, 24-cv-4366 (MJD/LIB) (Dec. 4, 2024) (ECF No. 14, hereinafter “Order to Show Cause”). Congress’s scheme in 1226 clearly gave discretion to the Attorney General under 1226(a) to make detention decisions for the individuals in removal proceedings. Judge Davis wrote:

In exercising that discretion, the Attorney General has decided that some detainees . . . will not be released on bond, while other detainees will be given a more granular determination. This appears entirely consistent with the delegation of authority to the Attorney General effected by 1226(a).

Order to Show Cause at 3. Judge Davis recognized that this statutory structure was like one Congress set up for the Bureau of Prisons that the Supreme Court upheld in *Lopez v. Davis*, 531 U.S. 230 (2001). Order to Show Cause at 3-4. There, the Supreme Court upheld a BOP regulation categorically denying a sentence reduction provision to a category of inmates, as an exercise of discretion given to it by Congress. Order to Show Cause at 4 (citing *Lopez*, 531 U.S. at 233, 244).

In his Order Denying the Petition, Judge Davis carefully considered and rejected several arguments made by the petitioner. Judge Davis’s reasoning focused on the text of section 1226, “which expressly commits” detention authority to the Attorney General’s discretion. Order Denying Petition at 4. The Attorney General’s further delegation, via regulation, to immigration judges is constrained by the Attorney General’s finding that for individuals charged under section 1227(a)(4), no IJ review is allowed. *Id.* at 5. Judge Davis rejected an argument that *Lopez* was not applicable because this detention is in the civil context. *Id.* at 6-7.

Finally, Judge Davis highlighted the Eighth Circuit's very recent precedent in *Banyee v. Garland*, 115 F.4th 928 (8th Cir. 2024), *rehearing by panel and en banc denied*, *Banyee v. Bondi*, No. 22-2252, 2025 WL 837914 (8th Cir. Mar. 18, 2025). The *Banyee* decision rejects a constitutional challenge to mandatory detention under 1226(c) for the length of an individual's removal proceedings. 115 F. 4th at 931 ("The rule has been clear for decades: '[d]etention during deportation proceedings [i]s ... constitutionally valid.'") (citing *Demore*, 538 U.S. at 523). *Banyee* and *Farass Ali* (see ECF 10 at 16-17) make clear that the Eighth Circuit reads section 1226 to allow for constitutional detention during removal proceedings, and this Court's review of the detention is constrained. Judge Davis distinguished and disagreed with out-of-district authority to the contrary. *Id.* at 7. This Court should adopt his reasoning and find that Hoque's detention is constitutional as his removal proceedings progress. His Petition should be denied.

#### **VIII. Petitioner's First Amendment claim fails.**

Hoque spends most of his efforts trying to fit his case into a box not applicable to him. His case is legally distinguishable from *Khalil* and *Ozturk* and the other cases he cites. His focus on undermining some undefined policy, arguing that it is retaliatory and viewpoint discrimination, is not relevant. His contentions on this point only further confirm why the challenge must first be exhausted through the congressionally created scheme, ultimately culminating in a petition for review before the appropriate court of appeals. But even if the Court were to consider the merits of Hoque's First Amendment challenge, his claim fails.

Contrary to Hoque's assertion that the Government's arrest and detention of him are retaliatory, the Government initiated removal proceedings against Hoque based on the Secretary of State's determination that Hoque's criminal activities create a public safety risk, and therefore his visa was revoked under 8 U.S.C. § 221(g). *See* Minner Decl., Exs. 3, 5, 6 and ¶ 8. The revocation of his visa is a facially valid reason to initiate removal proceedings and preclude Hoque from demonstrating that his arrest and detention violate his rights under the First Amendment. *See, e.g., Nieves v. Bartlett*, 587 U.S. 391, 402 (2019) (explaining that the presence of "probable cause" will overcome the allegation that an officer's arrest of a suspect was retaliatory); *Nieters v. Holtan*, 83 F.4th 1099, 1110 (8th Cir. 2023), *cert. denied*, 144 S. Ct. 1349, 218 L. Ed. 2d 424 (2024); *Just v. City of St. Louis, Missouri*, 7 F.4th 761, 769 (8th Cir. 2021); *Williams v. City of Carl Junction, Missouri*, 480 F.3d 871, 876–77 (8th Cir. 2007).

Hoque makes no attempt to show that similarly situated individuals were not detained and did not have removal proceedings initiated against them. As explained above, Hoque focuses entirely on a class of students whose visa revocations were factually distinct. *See, supra*, pg. 33.<sup>8</sup> In each of those cases, the United States invoked foreign policy as a basis for visa revocation and/or removability. *E.g.*, ECF No. 10-1 at 13, 40, 43, 62. This Court cannot draw any inference to support Petitioner's prima facie case of First

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<sup>8</sup> The court in Khalil has not granted release. *See* Voss Decl., Ex. 1. An April 20, 2025 docket entry reflects the denial of a motion by Khalil based on the grounds that "Among other things, the second Lucas/Landano factor is not satisfied." *Landano v. Rafferty*, 970 F.2d 1230 (3d Cir.1992) is "the leading case in this Circuit regarding the standards for the grant of bail for petitioners seeking a Writ of Habeas Corpus." *Vega v. United States*, 514 F. Supp. 2d 767, 769 (W.D. Pa. 2007)

Amendment retaliation based on these alleged comparator cases. *Gonzalez v. Trevino*, 602 U.S. 653, 658, 144 S. Ct. 1663, 1667, 219 L. Ed. 2d 332 (2024) (comparator evidence does not have to be exact to support a First Amendment retaliation claim, but there must be some objective, not subjective evidence). Petitioner's supposition that he was targeted for his speech is not objective and certainly not enough to overcome the record set forth above.

Hoque fundamentally misapprehends how the First Amendment applies in this context. Although “[f]reedom of speech and of press is accorded aliens residing in this country,” *Bridges v. Wixon*, 326 U.S. 135, 148 (1945), these rights are “less robust than those of citizens in certain discrete areas,” *Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281, 287 (D.D.C. 2011) (three-judge panel) (Kavanaugh, J.) (citing *Harisiades*, 342 U.S. at 591–92), *aff’d*, 565 U.S. 1104 (2012). *Harisiades* is instructive. There, the Supreme Court reviewed a First Amendment challenge to removal. The petitioners were ordered deported because they associated with or were members of the Communist Party. *Harisiades*, 342 U.S. at 582-83. Specifically, each petitioner was found deportable because of membership in an organization which advocates overthrow of the Government by force and violence. *Id.* at 582-83. The petitioners all raised in part that their deportation abridged the freedom of speech and assembly protected by the First Amendment. *Id.* at 584. The Supreme Court ruled that the First Amendment did not “prevent the deportation of these aliens” just on membership alone. *Id.* at 582-83, 592.

The Supreme Court has explained that a removal proceeding “is a purely civil action to determine eligibility to remain in the country,” and is not meant to punish for past conduct. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). With respect to the

Government's charges of removability against him, Hoque's "[p]ast conduct is relevant only insofar as it may shed light on . . . [his] right to remain [in the United States]." *Id.* Hoque's First Amendment allegations are a red herring, and there is an independent basis to justify the initiation and prosecution of removal proceedings sufficient to foreclose Hoque's constitutional claim here.<sup>9</sup>

That Hoque also challenges some undefined policy does not change the analysis. He does not point to any consummated decision that itself affects rights and obligations. *See Lujan v. Nat'l Wildlife Federation*, 497 U.S. 870, 890 (1990) ("The term 'land withdrawal review program' (which as far as we know is not derived from any authoritative text) does not refer to a single [Bureau of Land Management] order or regulation, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which petitioners have occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by the FLPMA. It is no more an identifiable 'agency action'—much less a 'final agency action'—than a 'weapons procurement program' of the Department of Defense or a 'drug interdiction

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<sup>9</sup> First Amendment claims alleging retaliatory arrest and detention are most frequently brought via a standalone section 1983 claim, not in habeas. That is the proper way to raise the claim. The United States is aware that the Eighth Circuit's decision in *Sheldon v. Hundley*, 83 F.3d 231, 232 (8th Cir. 1996) has been interpreted to stand for the proposition that a first amendment violation that results in the extension of detention (in the context of a disciplinary proceeding) can state a claim in habeas. But that does not apply here. Hoque's First Amendment claim is defeated by the presence of probable cause to arrest him, the fact that the decision was based on public safety, not his speech, the lack of factual support for his claim, and the long-recognized discretion of the executive to detain someone during their removal proceedings. His First Amendment claim should not result in his release from detention.

program' of the Drug Enforcement Administration."); *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (requiring a final agency action to “mark the consummation of the agency's decisionmaking process” and “the action must be one by which “rights or obligations have been determined,” or from which “legal consequences will flow”).

## CONCLUSION

For all of the forgoing reasons, the Federal Respondents respectfully request that the Petition be dismissed.<sup>10</sup>

Dated: April 25, 2025

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<sup>10</sup> The Federal Respondents do not believe an evidentiary hearing is necessary in this matter, as the submissions, including the declaration and exhibits, of the Federal Respondents provide the Court with a sufficient record upon which to adjudicate Hoque's Petition.