UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JEAN REMARQUE, A [redacted] Petitioner	)	
vs.	)	Case No.
CRAIG A. LOWE, Warden of Pike County Correctional Facility, Respondent.	)	

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS AND RELEASE FROM DETENTION

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INTRODUCTION

Petitioner, Jean Buteau Remarque, (hereinafter "Mr. Remarque or "Petitioner") an immigration detainee currently held at the Clinton County Correctional Facility, appearing pro se, hereby petitions this Court for a Writ of Habeas Corpus under 28 U.S.C. § 2241 and seeks declaratory and injunctive relief to challenge the validity of the order of removal for his detention by the United States Department of Homeland Security ("DHS"), Immigration and Customs Enforcement ("ICE") for reasons which appear on the face of the record as distinguished from review of administrative procedures and findings. Petitioner would be released but for ICE's enforcement of an unlawful order of removal issued by the Board of Immigration Appeals (BIA). The order of removal is void on its face because the Board of

Immigration Appeals ("BIA") in defiance of Congressional intent and its own precedential case law simply refused to apply the categorical approach in determining whether a conviction under the statute involved a crime involving moral turpitude (CIMT) pursuant INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) or child abuse pursuant to INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i), instead the BIA applied a "realistic probability test." The minimum conduct covered by the statute is possession of computer-generated material that does not involve any actual child and that does not match the definition of the generic crime. See 18 U.S.C. § 2256(8). As such, the offense is neither a CIMT nor a crime of child abuse for immigration purposes. By applying a realistic probability test, the BIA applied the wrong legal standard and displayed a fundamental misunderstanding of the categorical approach. Petitioner was removed when he should not have been and clearly suffered prejudice. If the order of deportation is unlawful, so is the detention.

Accordingly, the Petition for Writ of Habeas Corpus should be granted; and the petitioner should be forthwith discharged by respondent District Director of Immigration from custody pursuant to the order of deportation herein the Court should adjudge void. Petitioner submits this Memorandum of Law in Support of the Petition for a Writ of Habeas Corpus.

SUMMARY OF ARGUMENT

Petitioner has been ordered removed to Haiti by an Immigration Judge. The order of removal was affirmed by the Board of Immigration Appeals (BIA). The order of removal is void on its face because the Board of Immigration Appeals ("BIA") in defiance of Congressional intent and its own precedential case law simply refused to apply the categorical approach in determining whether a conviction under the statute involved a crime involving moral turpitude

(CIMT) or child abuse. Petitioner was removed when he should not have been and clearly suffered prejudice. If the order of deportation is unlawful, so is the detention.

In an immigration removal proceedings case, ordinarily habeas corpus is not available when there is another remedy in the regular course. However, one of the recognized exceptions occurs in the case where the judgment under which petitioner is held is wholly void. See Varga v. Rosenberg, 237 F. Supp. 282, 1964 U.S. Dist. LEXIS 8793 (S.D. Cal. 1964). Whether a petitioner's failure to exhaust administrative remedies precludes the issuance of a writ of habeas corpus involves a question of law and in such cases the utilization of each successive administrative step is not a condition precedent to jurisdiction since a review of neither the removal proceedings nor the findings of fact is involved.

QUESTIONS PRESENTED

Whether Petitioner's conviction under 18 U.S.C. § 2252A(a)(2)(A) renders him deportable pursuant to INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) for a crime involving moral turpitude committed within five years of admission; (4) INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i) as an alien who at any time after admission has been convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment to subject him to lawful immigration detention.

JURISDICTION

The substantive issue in this case is precisely the sort of question of law over which courts have repeatedly held they have jurisdiction. See Varga v. Rosenberg, 237 F. Supp. 282, 1964 U.S. Dist. LEXIS 8793 (S.D. Cal. 1964); see also Ferreira v. Ashcroft, 382 F3d 1045382 F.3d 1045 (9th Cir. 2004). Thus, this Court has jurisdiction under 28 U.S.C. § 2241, the Suspension Clause, U.S. Const. art. I § 9, cl. 2, and 28 U.S.C. § 1331, as Petitioner is presently in custody

under the color of the authority of the United States, and Petitioner's custody is in violation of the Constitution, laws, or treaties of the United States. That jurisdiction extends to noncitizens in immigration detention. See Demore v. Kim, 538 U.S. 510, 517 (2003); Zadvydas v. Davis, 533 U.S. 678, 688 (2001). This Court may grant relief under 28 U.S.C. § 2241 (habeas corpus), 5 U.S.C. § 702 (establishing the right of review for a person suffering a legal wrong due to agency action), 28 U.S.C. § 1651 (All Writs Act), 28 U.S.C. 1331 (federal question jurisdiction), and 28 U.S.C. § 1361 (jurisdiction over actions for mandamus).

At present, no remedy but habeas corpus exists. Petitioner does not have the ability to challenge his detention in a BIA proceeding or file a petition for review. Here, Petitioner challenges the validity of the order for his detention for reasons which appear on the face of the record as distinguished from review of administrative procedures and findings. Whether Mr. Remarque is removable is a purely legal question regarding whether his statute of conviction is categorically a crime involving moral turpitude and/or a crime of child abuse.

VENUE

Venue in the Middle District of Pennsylvania is appropriate under 28 U.S.C. § 1391(e)(1) and because the Petitioner is being held in detention in the Middle District of Pennsylvania.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Petitioner is a native and citizen of Haiti who was admitted to the United States on August 7, 2017, as a conditional lawful permanent resident. On December 20, 2021, he was found guilty by a jury of violating the PROTECT Act, 18 U.S.C. § 2252A(a)(2)(A) and (a)(5)(B) which criminalizes, in part, the knowing receipt and possession of child pornography, defined to include visual depictions of sexually explicit conduct the production of which, "involves the use

of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(A). § 2256(8), however, also defines child pornography to include digital or computer-generated images "that [are], or are indistinguishable from, that of a minor engaging in sexually explicit conduct" and images created to appear that an identifiable minor is engaging in sexually explicit conduct." Sections 2256(8)(B) and (C).

Petitioner's Superseding Indictment simply alleges receipt and possession of any child pornography as defined in section 2256(8) that encompasses real, computer-generated and morphed visual depictions without specificity. (See Exhibit A- Pet's Superseding Indictment). Mr. Remarque was convicted under a legal theory of receipt that consider filename of screen shot as the *actus reus* of § 2252A(a)(2)(A) which was never been used in any prosecution and never been tested in any federal court. The jury verdict rests on hearsay, speculation, conjecture, legal conclusions, and unsupported facts. The Petitioner has at all times maintained his innocence. He unsuccessfully appealed his conviction to the Fourth Circuit and the U.S. Supreme Court. Actually, Mr. Remarque collaterally attacks the constitutionality and validity of his 2021 conviction via a Motion under 28 U.S. C. § 2255 filed in the U.S. District Court for the District of Maryland by presenting new forensic evidence withheld by the prosecution showing that the purported images found on a thumb drive did not involve a real child and were actually planted by his then-wife/immigration sponsor to maliciously obtain his removal from the United States. Petitioner had no prior involvement in anything of such nature. His motion to vacate under. § 2255 is now ripe for consideration. See Remarque v. United States, Case Nos. SAG-19-39; SAG-24-2920 (D. Md., Dec. 24, 2025).

1. The Removal Proceedings

On August 15, 2023, DHS/ICE instituted removal proceedings by personally serving Mr. Remarque with a Notice to Appear (NTA) establishing jurisdiction and venue at the Baltimore Immigration Court, Maryland. *(See Exhibit B – Original Baltimore NTA).* However, unbeknownst to Mr. Remarque, DHS filed a different NTA on August 23, 2023, commencing the removal proceeding in the Philadelphia Immigration Court. The second NTA improperly designated the Philadelphia Immigration Court as venue. *(See Exhibit C – Philadelphia NTA).* Both NTAs charged Mr. Remarque as removable under four provisions of the INA: (1) INA § 237(a)(2)(A)(iii) [8 U.S.C. § 1227(a)(2)(A)(iii)] for having been convicted of an aggravated felony; (2) INA § 237(a)(1)(D)(i), 8 U.S.C. § 1227(a)(1)(D)(i) due to termination of the conditional resident status; (3) INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) for a crime involving moral turpitude committed within five years of admission; (4) INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i) as an alien who at any time after admission has been convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment.

Petitioner appeared pro se throughout his immigration proceedings. He filed several motions to challenge different aspects of the removal proceedings as well as his removability, including a motion to terminate the removal proceedings. Mr. Remarque argued before the Immigration Judge William McDermott ("IJ") that his conviction under the PROTECT Act, 18 U.S.C. § 2252A(a)(2)(A) did not categorically qualify as an aggravated felony under INA § 101(a) (43) (I), which applies to offenses relating to production, distribution, receipt, and possession of child pornography under 18 U.S.C. § 2251, 2251A, or 2252 that involved only real children. Id. DHS did not oppose the Petitioner's motion. In proceedings on March 5, 2024, the

IJ agreed and granted the motion to dismiss the aggravated felony charge. *(See Exhibit D – IJ's Decision)*

DHS and the IJ resisted the Petitioner's request to produce a copy of his Alien file (A-file) and Shephard documents necessary to determine if he was charged under § 2256(8)(A) for being in possession of an image involving a minor. As a result, Mr. Remarque had to file a Freedom of Information Act ("FOIA") request on or about June 2024. Surprisingly, the FOIA request revealed the existence of a second NTA filed by DHS, but concealed from Petitioner during the entire removal proceedings. The second NTA includes a falsified certificate of service and established jurisdiction and venue with the Philadelphia Immigration Court. *(See Exhibit C – Philadelphia NTA)*. As a result of that discovery, Mr., Remarque promptly filed additional motions to terminate the removal proceeding with prejudice challenging ICE's affirmative misconduct, the legitimacy of the removal proceedings and the sustainability of the remaining charges. Id.

The FOIA request yielded exculpatory evidence resolving the case against removability. During internal deliberation and review of the sufficiency of the NTA, Counsel for DHS acknowledged on the record that the removability charges filed against Mr. Remarque, specially the crime involving moral turpitude and termination of the conditional resident status, were likely unsustainable. *(See Exhibit E – Exculpatory Evidence Obtained by FOIA).*

However, despite clear and convincing evidence that Mr. Remarque's removability charges are unsustainable, the IJ reached an inconsistent ruling dismissing the aggravated felony charge because the statute of conviction is overbroad, thus, does not categorically match the aggravated felony definition under INA § 101(a)(43) (I), but he nonetheless found that Mr. Remarque was removable under INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) for a crime

involving moral turpitude committed within five years of admission; INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i) as an alien who at any time after admission has been convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment. At the same time, the IJ has flatly refused to adjudicate the termination of the conditional resident status charge under INA § 237(a)(1)(D)(i), 8 U.S.C. § 1227(a)(1)(D)(i) nor did he review Mr. Remarque's form I-751 (petition to remove conditions on legal permanent resident status). The IJ further denied without an evidentiary hearing Mr. Remarque's subsequent motions for equitable estoppel or alternatively to terminate with prejudice based on improper service and affirmative misconduct consisting of filing a fraudulent certificate of service to initiate the removal proceedings, finding no legal or factual basis to invalidate the Notice to Appear or terminate proceedings. Id.

Mr. Remarque declined to pursue any other form of immigration relief maintaining that it was clear under the INA he was not removable as charged. Mr. Remarque would have had the conditions on his permanent resident status removed and released from immigration detention but for the Immigration Judge's arbitrary and capricious decision refusing to adjudicate his Form-751 (petition to remove conditions on legal permanent resident status). The Form-751 was the only form of relief against removal available to Mr. Remarque under the INA. Consequently, the IJ ordered him removed to Haiti through an administrative adjudication that was fundamentally unfair and biased. The written opinion and order of removal were issued on October 2, 2024. *(See Exhibit D – IJ's Decision).*

Mr. Remarque timely filed a pro se appeal of the IJ's decision sustaining his charges of removability with the BIA on November 12, 2024. Id. On May 4, 2025, the BIA issued Petitioner a final order of removal, dismissed his appeal. The BIA adopted and affirmed the IJ's

decision and wrote separately only to address issues raised on appeal. *(See Exhibit F – BIA's Decision)*. On May 25, 2025, appearing pro se, Mr. Remarque filed a petition for review of the BIA's removal determination to the Third Circuit, with a motion for stay, and the Third Circuit granted Petitioner a temporary stay of removal. see Remarque v. Attorney General, No. 25-2019 (3d Cir.), Dkt. # 1.). On June 5, 2025, the Attorney General opposed Mr. Remarque's motion to stay removal. On August 11, 2025, the Third Circuit denied the stay motion without an opinion and failed to serve Mr. Remarque with a copy of the decision. See Remarque v. Attorney General, 25-2019, Dkt 17.

Petitioner also filed a motion for reconsideration with the BIA. On October 3, 2025, the BIA denied Petitioner's motion for reconsideration of the Board's underlying decision. *(See Exhibit G – BIA's Second Decision).* As a result, Petitioner filed a second petition seeking the review of the BIA's October 3, 2025, decision denying his Motion for Reconsideration of the Board's May 14, 2025 dismissal of his appeal with a second request for a stay of removal. See Remarque v. Attorney General, No. 25-3021, Dkt. # 1.). The same day, the Third Circuit issued a temporary stay of removal that remained in place and consolidated Petitioner's petitions for review. *(See Exhibit H – 3d Cir. Consolidated Docket Sheet).* On January 6, 2026, the Motion for a Stay of Removal was denied by the Third Circuit.

Mr. Remarque also filed a motion to reconsider the Third Circuit's denial of his motion for a stay of removal for lack of notice and insufficient justification that remained actually pending. *See Remarque v. Attorney General, No. 25-3021 (3d Cir.), Dkt. # 14.).* On November 25, 2025, Mr. Remarque filed his Pro Se Informal Brief. (Dkt. # 15). On December 17, 2025, the Attorney General United States of America requested an extension of time to file an Answering

Brief for 30 days. (Dkt. # 15). The motion was granted by the Court on December 22, 2025. (Dkt. # 18).

2. Post-Removal Proceedings

Petitioner was released from federal prison to supervised release on November 20, 2025. Upon his release, he was immediately taken into custody by ICE and detained in the Clinton County Correctional Facility ("CCCF"), Pennsylvania. Subsequently, he was transferred to Pike County Correctional Facility, Pennsylvania, where he has since remained.

EXHAUSTION

Although § 2241 does not contain an exhaustion requirement, "ordinarily, federal prisoners are required to exhaust their administrative remedies prior to seeking a writ of habeas corpus pursuant to § 2241" Gambino v. Morris, 134 F.3d 156, 171 (3d Cir. 1998). However, "exhaustion is not required when the petitioner demonstrated that it is futile." Gambino, 134 F.3d at 171. Here, exhaustion is futile for the following reasons:

1. The INA mandates exhaustion in order to challenge "final orders of removal." 8 U.S.C. § 1252(d)(1). However, this provision does not cover challenges to preliminary custody or bond determinations, which are quite distinct from "final orders of removal[1]."

2. Mr. Remarque's challenge is ultimately constitutional and statutory interpretation-one that presumably presents a question of law for this Court's independent review, and an exception to the exhaustion requirement has been carved out for constitutional

[1] 1. Congress requires exhaustion for certain types of habeas petitions, but not for those petitions brought under 28 U.S.C. § 2241. See James v. Walsh, 308 F.3d 162, 167 (2d Cir. 2002).

to Agency procedures and statutory interpretation of federal criminal statute because the BIA has no jurisdiction to adjudicate constitutional issues. See Gill v. I.N.S., 420 F.3d 82, 89 (2d Cir. 2005). Because Mr. Remarque has raised a good-faith argument that he is not in fact deportable under the statute, to mandatorily detain him under would violate his rights to due process under the law. His predicate statutory argument regarding his deportability is that he was not "convicted" for purposes of INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (crime involving moral turpitude committed within five years of admission) or child abuse pursuant to INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i). If the order of deportation is unlawful, so is the detention. Varga v. Rosenberg, 237 F. Supp. 282 (D.C.S.D. Cal 1964). This involves a question of law and in such cases the utilization of each successive administrative step is not a condition precedent to jurisdiction since a review of neither the procedure nor the findings of fact are involved. Gonzales v. Williams, 192 U.S. 1, 24 S. Ct. 177, 48 L. Ed. 317 (1903).

3. The BIA has already interpreted the statute of conviction as a CIMT or crime of child abuse in this case by dismissing Mr. Remarque's appeal and denying his motion for reconsideration. Id. Thus, it would be futile for Petitioner to argue that the BIA's decision in this case is incorrect to the same agency that issued the erroneous decision twice.

Accordingly, Mr. Remarque does not have to exhaust any administrative remedy.

CONSTITUTIONAL, STATUTORY AND REGULATORY FRAMEWORK

All persons, including aliens, residing in the United States are protected by the Due Process Clause of the Fifth Amendment to the United States Constitution. See Zadvydas v. Davis, 533 U.S. 678, 693 (2001); Plyler v. Doe, 457 U.S. 202, 210 (1982). The Due Process

Clause of the Fifth Amendment provides that "[n]o person shall be … deprived of life, liberty, or property, without due process of law." U.S. Const., amend. V. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." Zadvydas, 533 U.S. at 690. This protection extends also to an alien subject to a final order of removal. Id. at 693-94. Detention by BICE puts at risk an individual's protected liberty interest. Id. at 680, 690.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." Mathews v. Eldridge, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). "The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." Id. at 333.

ARGUMENT

GROUND ONE:

STATUTORY VIOLATION: The BIA's Order of Removal is Facially Void and the Detention of Petitioner is Unlawful

Petitioner is being mandatorily detained in violation of the Constitution of the United States and the Immigration and Nationality Act ("INA") because his criminal conviction under 18 U.S.C. § 2252A(a)(2)(A) does not trigger any of the enumerated grounds of removability under the INA. In particular, this conviction does not constitute a crime involving moral turpitude ("CIMT") or a crime of child abuse. The BIA's order of removal is void on its face because the Board in defiance of congressional intent and its own precedential case law simply refused to apply the categorical approach in determining whether a conviction under the statute

involved a crime involving moral turpitude (CIMT) pursuant INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) or child abuse pursuant to INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i). Petitioner was removed when he should not have been and clearly suffered prejudice. If the order of deportation is unlawful, so is the detention.

a. The BIA Rewrote the Statutory Framework to Unlawfully Obtain a Predetermined Outcome

During his removal proceedings, Petitioner argued before the Immigration Court and the BIA that his statute of conviction, 18 U.S.C. S. 2252A(a)(2) encompasses both actual and computer-generated or altered images of child pornography, which rendered his conviction categorically overbroad because the least culpable conduct under the statute doesn't involve neither moral turpitude nor child abuse. Id. See 18 U.S.C.S. 2256(8). The Board acknowledged Petitioner's argument that the plain language of the statute criminalizes receipt of computer-generated and altered images of child pornography and would thus seemingly permit a conviction for receiving completely computer-generated images of child pornography. See Exhibit F. But then the BIA turned around and explained that "the Supreme Court decision in Free Speech Coalition rendered moot that portion of the statutory language, as it expressly held that possession of virtual child pornography is not a criminal offense. (citing Ashcroft v. Free Speech Coalition, 535 U.S. 234, 239-40, 258 (2002)). Therefore, the Immigration Judge properly found that, regardless of the plain language of the statute, there was no realistic probability that the statute would apply in cases not involving actual children."

It is a well-established principle that when applying criminal laws, courts generally "must follow the plain and unambiguous meaning of the statutory language. '[O]nly the most extraordinary showing of contrary intentions' in the legislative history will justify a departure

from that language." Salinas v. United States, 522 U.S. 52, 57 (1997) (quoting United States v. Albertini, 472 U.S. 675, 680 (1985)) (internal quotation mark omitted) (alteration in Salinas). A statute is unambiguous if it is "plain to anyone reading the Act" that the statute encompasses the conduct at issue. Salinas, 522 U.S. at 60 (quoting Gregory v. Ashcroft, 501 U.S. 452, 467 (1991)). "No rule of construction . . . requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope." Id. at 59 (quoting United States v. Raynor, 302 U.S. 540, 552 (1938)) (internal quotation marks omitted). Section 2252A, however, is extremely broad in scope. See United States v. Payne, 394 Fed. Appx. 891, 896 (3d Cir. 2010).

In this case, the BIA violated a basic principle of statutory construction by usurping Congress's legislative role and violated separation of powers principles by effectively rewriting the statutory definitions of child pornography under the PROTECT Act, 18 U.S.C. § 2256(8) to fit their policy preference, specifically by disregarding two subsections of the statute § 2256(8)(B) and § 2256(8)(C)[2], which refer to non-photographic and computer-generated depictions, relying on Free Speech Coalition to circumvent or avoid the categorical approach. The BIA demonstrates a profound misunderstanding of Free Speech Coalition and the subsequent response provided by Congress.

The BIA cannot invalidate or ignore provisions of a duly enacted statute, that power lies with the courts. Free Speech struck down portions of the CPPA as unconstitutional, but did not erase section 2256(8)(B) of the PROTECT Act altogether. The BIA's role is to apply the law, not rewrite it based on perceived Congressional intent or policy preferences. Separation of powers

[2] Free Speech Coalition struck down as unconstitutional the words "or appears to be" from the definition of child pornography contained in § 2256(8)(B) and the entire definition of child pornography in § 2256(8)(D). Contrary to the BIA's contention, it left intact the ban on morphed child pornography § 2256(8)(C). 122 S. Ct. at 1406.

principles here forbid such usurpation. Wood v. Hoy, 266 F.2d 825 (9th Cir. 1959), (the BIA's interpretation of the statute improperly rewrote "the statute as if it read 'single criminal act). "Rewriting the statute, however, is the job for the U.S. Congress, if it is so inclined, and not for this court." H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 249 (1989). Such manipulation of the statutory framework by administrative fiat undermines both the integrity of the administrative adjudication, fundamental due process and equal protection under the law.

b. The BIA Attempted to Avoid the Categorical Approach and to Override the Conclusion that § 2252A(a)(2) is Not a CIMT and/or a Crime of Child Abuse

Petitioner's statute of conviction is overbroad with respect to the visual depictions covered by the statute which criminalizes the receipt of "any child pornography" as defined in section 2256(8), which established multiple alternative factual means of committing a single element. That definition encompasses both real and virtual child pornography, as Congress itself recognized prior to the PROTECT Act amendments. Nothing in the statutory text post-amendment explicitly limits the offense to "actual minors." Consequently, the least culpable conduct covered by the statute includes depictions not involving the exploitation and abuse of a minor-conduct falling outside the generic definition of a CIMT [or child abuse] and thus not categorically a crime involving moral turpitude or child abuse.

Notably, neither the IJ nor BIA had taken note of the Third Circuit's numerous binding Supreme Court, Third Circuit's decisions and its own precedent on the issue. Rather, they relied instead on the Supreme Court decision in Free Speech Coalition, for the proposition that the categorical approach does not apply to § 2252A(a)(2)(A). The IJ and the BIA explained that due to the Supreme Court ruling in Free Speech Coalition that "possession of virtual child pornography cannot constitute a criminal offense," the government had the burden of proving beyond a reasonable doubt that pornographic images were of actual children and not computer-

generated images. See Exhibit F. Furthermore, the BIA speculated that Petitioner's conviction for receipt of child pornography pursuant to 18 U.S.C. § 2252A(a)(2)(A) was categorically a crime involving moral turpitude [or child abuse] because there was no realistic probability that the statute would apply in cases not involving actual children. Id. Furthermore, the BIA also found that the Immigration Judge did not err by not applying the categorical analysis to Petitioner's statute of conviction. Id. The Board reiterated that "Free Speech Coalition rendered moot the statutory language criminalizing the receipt of computer-generated or altered images of child pornography, which would otherwise have been the least culpable conduct necessary to sustain a conviction under section 2252A(a)(2)(A). Id.

However, Free Speech Coalition is readily distinguishable from the facts presently before this Court. Free Speech Coalition does not involve the statute of conviction at issue here. Free Speech Coalition involved a constitutional challenge under the First Amendment to the Constitution to two provisions of the Child Pornography Prevention Act. There, the Court struck down, as overbroad and unconstitutional, two subsections of the CPPA that were part of the statutory definition of "child pornography." Free Speech Coalition, 535 U.S. at 256, 258. Those provisions were 18 U.S.C. § 2256(8)(B), which prohibits any visual depiction, including a computer-generated image, that "is, or appears to be, of a minor engaging in sexually explicit conduct," and 18 U.S.C. § 2256(8)(D) , which prohibits any sexually explicit image that was "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" of depicting "a minor engaging in sexually explicit conduct." 3 Id. Free Speech Coalition held that the "virtual pornography" prohibited by these provisions is speech that is protected under the First Amendment. United States v. Destio, 153 Fed Appx 888, 2005 U.S. App. LEXIS 24488 (3d Cir. 2005). In 2003, Congress repealed 18 U.S.C. § 2256(8)(D) and

amended 18 U.S.C. § 2256(8)(B) to include a "visual depiction" that "is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct." See Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act, Pub. L. No. 108-21, § 502(a)(1), (a)(3), 117 Stat. 650, 678 (2003). Free Speech Coalition, therefore, has no impact on prosecutions under the PROTECT Act, 18 U.S.C.§ 2252A(a)(2).

As such, there is no mystery here, no ambiguity, no occasion for clever interpretation, no need to consider policy, no excuse for plumbing the depths of legislative history, nothing at all that would justify this outburst of administrative creativity. Consequently, the BIA erred in collapsing the two statutes to obtain a predetermined outcome or to suit the immigration judges' own predilections while taking refuge in Free Speech Coalition to avoid applying the categorical approach.

Unlike Free Speech Coalition, the statutory provisions struck down by the Supreme Court have no bearing on the inquiry presently before this Court in an immigration removal proceeding. It did not address the unique vesting question we confront here. The relevant question before this Court is whether § 2252A(a)(2), as defined in § 2256(8) categorically proscribe computer-generated images defined as child pornography but that do not involve the use of a minor engaging in sexually explicit conduct.

i. Methodological Direction

The BIA's failure to apply the categorical approach in determining a CIMT requires reversible error per se and renders the order of removal void. It is well established that to determine whether a petitioner's conviction is a CIMT [or crime of child abuse], the federal

courts must apply the categorical and modified categorical approaches articulated by the Supreme Court in Taylor v. United States, 495 U.S. 575, 599-602 (1990); Moncrieffe v. Holder, 569 U.S. 184, 190-95(2013) (citing Carachuri-Rosendo v. Holder, 560 U.S. 563, 580 (2010) (noting the word "conviction" is "the relevant statutory hook" requiring application of the categorical approach)); Matter of Moradel, 28 I&N Dec. 310, 316–17 (BIA 2021). In Descamps, the Supreme Court emphasized the necessity of looking to the elements of the crime under the categorical approach, rather than to the underlying circumstances or motivations. See id. at 2285. The Court said that a "circumstance-specific review is just what the categorical approach precludes." Id. at 2292.

In the immigration context, that approach is tethered to one term in the Immigration and Nationality Act as amended - the word 'convicted,' see 8 U.S.C. § 1227(a)(2)(A); Pereida v. Wilkinson, 592 U.S. 224, 233 (2021) - and it examines whether all possible convictions for an identified offense, even those under the least culpable circumstances, would satisfy the relevant federal standard, which, here, is status as a CIMT [or crime of child abuse]. See Borden v. United States, 593 U.S. 420, 424 (2021) (explaining that the categorical approach asks whether of the acts criminalized, "even the least culpable" satisfies the federal standard); Partyka, 417 F.3d at 411 ("[W]e read the applicable statute to ascertain the least culpable conduct necessary to sustain a conviction under the statute."); Sasay v. Att'y Gen., 13 F.4th 291, 296 (3d Cir. 2021) (same); Larios, 978 F.3d at 69 (same); Francisco-Lopez v. Att'y Gen., 970 F.3d 431, 435 (3d Cir. 2020) (same); Jean-Louis v. Att'y Gen., 582 F.3d 462, 470 (3d Cir. 2009) (same); Knapik v. Ashcroft, 384 F.3d 84, 88 (3d Cir. 2004) (same). Thus, while means and elements are distinct legal concepts, for a prior conviction to qualify as a CIMT under the categorical approach, every means of committing that offense must satisfy the two CIMT elements - reprehensible conduct

and a culpable mental state. See Jean-Louis, 582 F.3d at 471 ("As a general rule, a criminal statute defines a crime involving 'moral turpitude only if all of the conduct it prohibits is turpitudinous.'" (quoting Partyka, 417 F.3d at 411)); see also Larios, 978 F.3d at 67. So, rather than using a "circumstance-specific thrust," the categorical approach does not depend on the actual factual basis for the predicate convictions. See Rosa v. Att'y Gen., 950 F.3d 67, 73 (3d Cir. 2020).

ii. The BIA Arbitrarily and Capriciously Bypassed the Legal Framework to Issue a Wholly Void Order of Removal

Here, the BIA improperly bypassed the legal framework established by the Supreme Court and the Third Circuit, which requires strict analysis of the statutory elements, to instead apply a policy-based interpretation of section 2256(8), and misapplied the realistic probability test contrary to controlling precedent. See Singh v. Att'y Gen., 839 F.3d 273 (3d Cir. 2016). The categorical approach requires a comparison of statutory elements, not an evaluation of underlying conduct or policy concerns. The least culpable conduct under the statute of conviction criminalizes receipt, possession or distribution of purely computer-generated image (such as A.I.-generated images) that does not involve the sexual abuse or exploitation of any minor in its production. But the BIA tries to avoid this obvious and commonsensical conclusion by invoking the "realistic probability" test. But the Third Circuit repeatedly emphasized that the realistic probability test does not apply when the statute is facially overbroad. See Larios v. AG of the United States, 978 F.3d 62, 67 (3d Cir. 2020); Jean-Louis v. Att'y Gen., 582 F.3d 4623 (3d Cir. 2009). Here, the statutory text itself establishes overbreadth. See sections 2256(8)(B) and (C), that is the end of inquiry as both the Board and a court must give effect to the intent of Congress.

The BIA's heavy reliance on Free Speech Coalition is misplaced and belied by inconsistencies in its own reasoning. As stated above, that case was interpreting a statutory provision not at issue in this case. The categorical approach requires analyzing the PROTECT Act as it existed at the time of conviction, not as previous judicial decisions may have construed its predecessor (CPPA). See Moncrieffe v. Holder, 569 U.S. 184 (2013). The BIA's reasoning improperly imports ante-hoc judicial narrowing that was never codified by Congress and disregards cardinal principal of statutory construction. Such logical fallacy created by the IJ and the BIA must be rejected by the Court.

c. BIA Misconstrued Circuit Precedent for the Realistic Probability Exception to the Categorical Approach

The Supreme Court has invoked realistic probability only twice, and in both cases it noted that the realistic probability is a check on the application of "legal imagination" to the criminal statute. See Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007); Moncrieffe v. Holder, 569 U.S. 184, 206 (2013). See Ndungu v. Att'y Gen., 126 F.4th 150, 171 (3d Cir. 2025). Where no "legal imagination" is required to demonstrate overbreadth—for example, where the express language terms of the statute cover conduct outside of the removability provision—a realistic probability showing is not required at all. Requiring a realistic probability showing in these circumstances would severely undermine the categorical approach and its least-acts-criminalized presumption. Gonzalez v. Wilkinson, 990 F.3d 654, 660 (8th Cir. 2021) (explaining that the government's rule is "at odds with the categorical approach itself" because it focuses on the underlying facts and not "the language of the statutory offense") Jack v. Barr, 966 F.3d 95, 98 (2d Cir. 2020) (finding that by applying a realistic probability test, "the BIA applied the wrong legal standard and displayed a fundamental misunderstanding of the categorical approach").

The Third Circuit has correctly adopted, in precedential decisions, the rule that the realistic standard does not apply if the express terms of the criminal statute cover conduct outside of the INA removability provision. See e.g. Larios v. Att'y Gen., 978 F.3d 62, 72 (3d Cir. 2020) (the realistic probability test never applies when assessing crimes of moral turpitude under the categorical (or modified approaches); see also Jean-Louis v. Att'y Gen., 582 F.3d 462, 477 (3d Cir. 2009) ("We seriously doubt that the logic of the Supreme Court in Duenas-Alvarez … is transferable to the CIMT context."). This rule is consistent with the Supreme Court precedent and the categorical approach.

Therefore, the BIA's contrary rule applied in Mr. Remarque's case should not apply in this Circuit. See Matter of U. Singh, 25 I&N Dec. 670, 672 (BIA 2012) ("We apply the law of the circuit in cases arising in that jurisdiction, but we are not bound by a decision of a court of appeals in a different circuit."). Notably, the BIA specified that its interpretation of the realistic probability requirement as articulated in Navarro Guadarrama "should be applied in any circuit that does not have binding legal authority requiring a contrary interpretation." 27 I&N Dec. 560, 565-67 (BIA 2019). The Board in defiance of its own binding precedent arbitrarily and capriciously did exactly the opposite-it violated every binding precedent from the Third Circuit to reach its conclusion.

Here, although the plain language of the statute itself establishes a realistic probability that the Government would prosecute conduct that falls outside the Federal definition of CIMT and crime of child abuse, to obtain a categorical match between Petitioner's federal offense and the removability provisions, the BIA relied on a distinct variation of realistic-probability considerations. It examined whether "the minimum conduct [for which Petitioner had] a realistic probability of being prosecuted under the statute entails 'reprehensible conduct' to warrant

treatment as a CIMT [or a crime of child abuse]." Id. The BIA found that because there is "no realistic probability" of prosecuting computer-generated or morphed child pornography under 2256(8)(B)-(C), the statute of conviction is limited to real minors. Id. That reverses the analytical sequence mandated by Duenas-Alvarez, 549 U.S. at 183. But this Court has not applied realistic-probability considerations that way. In Singh v. Attorney General, 839 F.3d 273 (3d Cir. 2016), this Court recognized that in both Duenas-Alvarez and Moncrieffe, the elements of the state crime and its counterpart federal offense were identical. Id. at 286 n.10. And on that ground, Singh limited the realistic-probability analysis to instances in which the elements of the state crime and the federal offense were identical. Id. Subsequent cases have followed that narrow application of realistic-probability principles. See Salmoran v. Att'y Gen., 909 F.3d 73, 81 (3d Cir. 2018) (recognizing that this Court's precedent "takes [an] alternative approach" in which the realistic probability analysis in Moncrieffe does not apply unless the elements of the state and federal offenses were identical); Zhi Fei Liao v. Att'y Gen., 910 F.3d 714, 724 (3d Cir. 2018) (declining to apply a realistic probability analysis when the elements of the offense "leave nothing to the legal imagination" (internal quotation omitted)); see also United States v. Jenkins, 68 F.4th 148, 154 (3d Cir. 2023); Cabeda v. Att'y Gen., 971 F.3d 165, 176 (3d Cir. 2020).

The BIA is required to respect those decisions and move on. That is, in Petitioner's humble judgment, what the law requires.

Rather than abide by that limitation, the BIA applied realistic-probability considerations as a means of arriving at a categorical match - not to negate or preserve a preexisting match. The BIA's "realistic-probability considerations may have improperly demanded proof of actual prosecutions under the broader statutory scope, a higher bar than required. Accordingly, it was

not permissible for the BIA to rely on realistic-probability considerations as it did. See Salmoran, 909 F.3d at 81. According the order of removal is void on its face.

d. This Case Does Not Require an Exercise of Imagination

Put another way: the thrust of the BIA's decision is that Mr. Remarque cannot make a showing that the federal government actually prosecutes the minimum conduct that Mr. Remarque claims is covered by the statute of conviction and that does not match the definition of the generic crime. Id. However, contrary to the BIA's contention, this case does not require an exercise of imagination, merely mundane legal research skills. To wit, we have precedent from numerous federal courts post-Free Speech Coalition, confirming that defendants can be convicted under the minimum conduct statutory that the BIA impermissibly has declared "moot." See United States v. Gonzalez, 2023 U.S. Dist. LEXIS 111851, Case No. 19-003 (DRD) (D.P.R. 2016)(defendant charged and convicted for possessing child pornography pursuant to Sections 2252A(a)(5)(B) and (b)(2), as defined in section 2256(8)(B); see also United States v. Cuadrado-Tolentino, 2016 U.S. Dist. LEXIS 156667, Criminal No. 15-595 (CCC) (D.P.R. 2016)(same); see also United States v. Smelko, 2023 U.S. LEXIS 125773, Criminal No. 22-146 (W.D. Pa. 2023)(defendant convicted for possessing morphed child pornography as defined in section 2256(8)(C). For that reason, under this Court's precedent, the BIA erred in not applying the categorical approach and relying on the realistic probability test.

Because the least culpable conduct criminalized by the statute of conviction is not a crime involving moral turpitude or a crime of child abuse. Mr. Remarque's conviction does not provide a legal basis neither for his removal nor for his detention under the INA.

e. Petitioner's Detention is Unlawful

Petitioner was not convicted of a violation of a law relating to a CIMT or a crime of child abuse within the meaning of the INA. It follows that the order of deportation is void on its face and the detention of petitioner is unlawful. At present, no remedy but habeas corpus exists, the petition for review to the Court of Appeals for the Third Circuit does not address the issue of Petitioner's unlawful detention. Resort to writ of habeas corpus is not barred by failure to have utilized remedies which are unavailable if the petitioner challenges the validity of the order for his detention for reasons which appear on the face of the record as distinguished from review of administrative procedures and findings.

GROUND TWO:

PROCEDURAL DUE PROCESS VIOLATION: There is a Gap in the Immigration Statutory Framework Giving Rise to a Due Process Violation to Those Affected

Under the Due Process Clause of the United States Constitution, an alien is entitled to a timely and meaningful opportunity to demonstrate that he should not be detained. The Petitioner in this case has been denied that opportunity as there is no administrative mechanism in place for the Petitioner to demand a decision, ensure that a decision will ever be made, or appeal a custody decision that violates the framework set forth by the Supreme Court in Zadvydas.

Section 1226(c) mandates that the Attorney General "shall take into custody any alien who" has committed an enumerated crime or act of terrorism "without regard to whether the alien is released on parole, supervised release, or probation . . . ." The Supreme Court has explained that detention of a noncitizen pursuant to 1226(c) "must continue 'pending a decision on whether [he] is to be removed from the United States.'" Jennings v. Rodriguez, 138 S. Ct. 830, 846, 200 L. Ed. 2d 122 (2018) (quoting 8 U.S.C. 1226(a)). The only statutory exception to

detention under section 1226(c) is if the Attorney General decides that release is "necessary for witness-protection purposes and that the alien will not pose a danger or a flight risk." Id.

A noncitizen detained under section 1226(c) is permitted to challenge the basis for his detention before an IJ in a "Joseph hearing." 8 C.F.R. 1003.19(h)(2)(ii); Matter of Joseph, 22 I. & N. Dec. 799 (BIA 1999). At a Joseph hearing, a noncitizen "may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of [a] predicate crime, or that the government is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention." Jennings, 138 S. Ct. at 838 n.1 (quoting Demore, 538 U.S. at 514 n.3). In cases such as Mr. Remarque's involving the removal of noncitizens who were admitted into the United States, DHS bears the burden of establishing removability "by clear and convincing evidence[.]" 8 U.S.C. 1229a(c)(3)(A).

Once a decision has been made to remove a noncitizen from the United States, a separate statutory provision specifies that noncitizens must be detained during their "removal period." 8 U.S.C. 1231(a)(2). Once the ninety-day removal period ends, the Attorney General still retains authority to detain noncitizens with administratively final orders of removal but may release a noncitizen under conditions of supervision. 8 U.S.C. 1231(a)(3), (a)(6); see Zadvydas, 533 U.S. at 688-689. Courts have held that the authority to detain a noncitizen under 8 U.S.C. 1231(a)(2) does not begin "if an alien files a timely petition for review and requests a stay" until the court of appeals: "(1) denies the motion for a stay or (2) grants the motion and finally denies the petition for review." See 8 U.S.C. 1231(a)(1)(B) (establishing when the "removal period" commences).

In this case, Petitioner have been denied a timely and meaningful opportunity to demonstrate that he is unlawfully detained because his conviction was not related to a CIMT or

crime of child abuse within the INA's meaning, thus, his order of removal is facially void and deprived him of his right to liberty in violation of the due process.

There is no administrative mechanism in place for noncitizens like Petitioner who seek to challenge their detention where the final administrative judgment under which they are held is wholly void and do not receive a stay of removal from the court of appeals which is reviewing the final administrative order of removal. Thus, the Immigration Statutory Framework establishes a system of "detention by default" by depriving noncitizens subject to detention based an unlawful final administrative order of removal of any avenue to challenge their unlawful detention during the pendency of their petition for review. When such a fundamental right is at stake, however, the Supreme Court has insisted on heightened procedural protections to guard against the erroneous deprivation of that right. In particular, the Supreme Court has time and again rejected laws that place on the individual the burden of protecting his or her fundamental rights."); Diop v. ICE/Homeland Security, 656 F.3d 221, 231, n.8 (3d Cir. 2011).

In such a scenario, noncitizens have the only option of sitting in jail for a long period of time until their detention is unreasonably prolonged to file for habeas corpus to obtain an individualized bond hearing while also facing the threat of an imminent wrongful removal prior judicial review of their administrative order of removal.

GROUND THREE:

SUBSTANTIVE DUE PROCESS VIOLATION: Petitioner's Substantive Due Process is Violate Because the Judgment Under Which He is Held is Wholly Void

Petitioner's detention violates his right to substantive due process by depriving him of his core liberty interest to be free from bodily restraint. See, e.g., Tam v. INS, 14 F.Supp.2d 1184 (E.D. Cal 1998) (aliens retain substantive due process rights). The Due Process Clause requires

that the deprivation of petitioner's liberty be narrowly tailored to serve a compelling government interest. See Reno v. Flores, 507 U.S. 292, 301-02 (1993). While the respondent would have a compelling government interest in detaining petitioner in order to effect his deportation, that interest does not exist if Petitioner cannot be deported under the INA. See Kay v. Reno, 94 F.Supp.2d 546, 551 (M.D. Pa. 2000) (granting writ of habeas corpus because petitioner's substantive due process rights were violated, and noting that "If deportation can never occur, the government's primary legitimate purpose in detention--executing removal--is nonsensical").

Petitioner's unlawful detention and the likelihood of his imminent wrongful removal prior a judicial review of his order of removal constitute a violation of substantive due process by depriving him of his core liberty interest to be free from bodily restraint. Upon his custody, ICE misclassified Petitioner as a "post-removal detainee" (although a stay of removal was in place) to prevent me from securing a bond hearing or a Joseph hearing to show that I was not subject to mandatory detention, which forced him to remain in custody. After his stay of removal was lifted by the Third Circuit, ICE actively tried to remove me to impede his access to judicial review. Here, the prejudice is clear: Petitioner was removed and detained when he should not have been. See, e.g., United States v. Camacho-Lopez, 450 F.3d 928, 930 (9th Cir. 2006) ("[Defendant's] Notice to Appear charged him as removable only for having committed an aggravated felony . . . [because his] prior conviction did not fit that definition [, he] was removed when he should not have been and clearly suffered prejudice.").

CONCLUSION

In conclusion, Petitioner's mandatory detention violates the detention statute and is unconstitutional. Petitioner respectfully requests that this Court Order Respondents to show cause why the writ should not be granted "within seven days unless for good cause additional

time, not exceeding twenty-one days, is allowed," and set a hearing on this Petition within five days of the return, pursuant to 28 U.S.C. § 2243 and grant the Writ of Habeas Corpus ordering Respondents to immediately release from their custody under an order of supervision.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays this Honorable Court to grant the following relief:

1. Issue an Order Declaring that Petitioner's statute of conviction does not involve a crime involving moral turpitude nor a crime of child abuse under the categorical approach;

2. Petitioner's Writ of Habeas Corpus should be granted; and the petitioner should be forthwith discharged by respondent District Director of Immigration from custody pursuant to the order of deportation herein the Court should adjudge void;

3. Grant any other and further relief this Court may deem appropriate.

Dated: Lords Valley, Pennsylvania
January 15, 2026

Respectfully submitted,

By: _____
Jean Remarque
Petitioner, pro se
[redacted]
Pike County Correctional Facility
175 Pike County Blvd.
Lords Valley, PA 18428

VERIFICATION

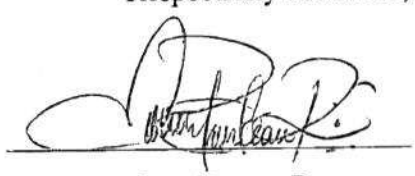
Jean Remarque, under penalty of perjury, states the following:

1. That I am the Petitioner in the foregoing Verified Petition for a Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief.

2. That I affirm the truth of the contents thereof upon my personal knowledge, information and belief, and I believe the same to be true, and I further state that the sources of my information and belief are documents or electronic communications provided to him by the Department of Homeland Security (DHS), Immigration and Customs Enforcement ("ICE").

Dated: Lords Valley, Pennsylvania
January 15, 2026

Respectfully submitted,



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