IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BADAR KHAN SURI, *Petitioner*, v. DONALD J. TRUMP, *et al.*, *Respondents*.	Case No. 1:25-cv-00480 (PTG/WBP)

RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION FOR RELEASE ON BOND

INTRODUCTION

Respondents (hereafter "the Government") submit this response in opposition to Petitioner Badar Khan Suri's ("Suri's") motion for release pending review of his habeas petition. This Court does not have jurisdiction to issue habeas relief in this matter, and therefore lacks the authority to grant bail or release in aide of providing habeas relief. The grant of release on bail is appropriate in habeas cases only where habeas relief is available in the first place.

Even if the Court had jurisdiction—which it does not—to justify bail on its own terms, a petitioner must demonstrate: (1) "substantial constitutional claims upon which he has a high probability of success"; and (2) "exceptional circumstances making a grant of bail necessary for the habeas remedy to be effective." *United States v. Eliely*, 276 F. App'x 270 (4th Cir. 2008); *Landano v. Rafferty*, 970 F.2d 1230, 1239 (3d Cir. 1992) (similar). The motion falls short on both counts. Suri fails to raise a substantial constitutional claim upon which he has a high probability of success, and he further fails to show that extraordinary circumstances exist making the grant of bail necessary to render the habeas remedy effective. This Court should deny Suri's motion for release.

BACKGROUND

I. Suri's Immigration History and Detention.

Suri is a nonimmigrant visitor, and is not a lawful permanent resident of the United States. *See* Declaration of Deputy Field Office Director, ERO Virginia Field Office, Joseph Simon ("Simon Decl.") (ECF #26-1) ¶ 5. On March 17, 2025, ICE Special Agents from Homeland Security Investigations ("HSI") arrested Suri at 9:30 p.m. in Arlington, Virginia pursuant to an I-200, Warrant of Arrest. *Id.* ¶ 7. HSI transported Suri to the ICE Enforcement and Removal Operations ("ERO") Washington office in Chantilly, Virginia for the purpose of initial processing. *Id.*

ICE's ERO Washington office made detention arrangements while Suri was in Virginia. *Id.* ¶¶ 9-12. Due to the lack of detention space available at the Farmville Detention Center or the Caroline

Detention Facility, those arrested by ICE in that area of responsibility (AOR) are often detained at facilities in other AORs, which is an operational necessity to prevent overcrowding at ICE facilities. *Id.* ¶¶ 8-9. On the evening of March 17, 2025, while processing Suri, ERO Washington requested and obtained bedspace for Suri from the ERO Dallas. *Id.* ¶ 9. Upon confirmation that bedspace was available at the Prairieland Detention Facility in Alvarado, Texas, ERO Washington determined that Suri would be detained there. *Id.*

While at the ERO Washington office, Suri was issued a Notice to Appear ("NTA"), which charged him as removable pursuant to 8 U.S.C. § 1227(a)(4)(C)(i). *Id.*; *see also* NTA (exhibit to Simon Decl.). HSI also served Suri with a Notice of Custody Determination, notifying him that his detention was governed by 8 U.S.C. § 1226(a) (immigration custody during removal proceedings). *Id.* ¶¶ 6-7. The NTA also notified him that he would be detained at the Prairieland Detention Center, located at 1209 Sunflower Lane, Alvarado, Texas and that his removal proceedings would take place while at that facility. Simon Decl., Exh. 1. The NTA indicates his first hearing will take place remotely from Prairieland Detention Center on May 6, 2025 at 8:30 a.m. before an immigration judge from the Post Isabel Immigration Court. *Id.*

At approximately 2:35 a.m. on March 18, 2025, Suri arrived at the Farmville Detention Center ahead of his flight to Louisiana. On March 18, 2025, Suri was transported from the Farmville Detention Center to the ERO Washington office in Chesterfield, Virginia. *Id.* ¶ 11. He arrived at that office at approximately 7:50 a.m. that day. *Id.* Suri was brought to the airport in Richmond, Virginia to be transported to Alexandria, Louisiana. *Id.* The flight departed Richmond, Virginia at 2:47 p.m. on Tuesday, March 18, 2025. *Id.* He arrived in Alexandria, Louisiana at approximately 5:03 p.m. EDT (4:03 p.m. CDT) on March 18, 2025. *Id.*

Suri was then transported to the Alexandria Staging Facility in Alexandria, Louisiana. *Id.* at ¶¶ 11-12. The Alexandria Staging Facility holds male detainees at various security classification levels for

less than 72 hours.[1] Suri spent transit time at the Alexandria facility because it is on the standard flight path of the transporting aircraft. From Alexandria he was transported by ground transport to the Prairieland Detention Facility. Simon Decl. ¶ 12.

On March 21, 2025, Suri was transported to the Prairieland Detention Facility in Alvarado, Texas, where he remains. *Id.* ¶ 13. As noted previously, he is scheduled to appear in a remote hearing from Prairieland Detention Center on May 6, 2025 at 8:30 a.m. before an immigration judge from the Post Isabel Immigration Court. Simon Decl., Exh. 1.

II. Suri's Habeas Petition

According to Suri, on Tuesday, March 18, 2025 at 5:59 p.m., Suri's counsel filed the instant habeas petition under 28 U.S.C. § 2241 (ECF #6 at 6), while Suri was physically present in Louisiana en route to Texas. Simon Decl. ¶ 9-11. Suri's petition challenges his current immigration detention as unlawful, and he seeks an order from this Court requiring ICE to immediately release him. Pet. (ECF #1). He alleges he was arrested by ICE and charged with removability under 8 U.S.C. § 1227(a)(4)(C) due to his support for Hamas—a designated Tier I foreign terrorist organization. *See generally*, Petition (ECF #1). The Petition brings a claim under the First Amendment (Count I), alleging that the Government was motivated by his familial and ideological connections to Hamas, and took action to discourage him from speaking out in the future, *see* Petition at 12-13; and the Due Process Clause of the Fifth Amendment (Count Two), alleging that his detention was unjustified, punitive, and bears no "reasonable relation" to any legitimate government purpose, *id.* at 14–15.

Suri also brings a claim under the Administrative Procedure Act ("APA") and the *Accardi* Doctrine (Count Three), alleging that the U.S. Government's "policy" of targeting aliens for removal based on speech advocating for Palestinian rights and its "determination" that his "presence or

[1] https://www.ice.gov/doclib/foia/odo-compliance-inspections/alexandriaStagingFac_AlexandriaLA_Aug27-29_2024.pdf

activities would potentially have serious adverse foreign policy consequences for the United States" and "would compromise a compelling United States foreign policy interest" are arbitrary and capricious, an abuse of discretion, contrary to constitutional right, contrary to law, and in excess of statutory jurisdiction. *Id.* at 14-15. Finally, he brings a claim for release on bail pending adjudication of his habeas petition (Count Four), alleging that he raised substantial constitutional and statutory claims regarding his detention and showed that extraordinary circumstances exist, because of his certain personal hardships, that make a grant of bail necessary for habeas relief to be effective. *Id.*

Suri requests that this Court assume jurisdiction over this matter and vacate Respondents' "policy" of targeting noncitizens for removal based on their First Amendment-protected speech and "determination" that his presence and activities would have potentially serious adverse foreign policy consequences. *Id.* at 17. He further requests that this Court order his immediate release pending these proceedings, or order his release, and declare that Respondents' actions to arrest and detain him violated the First Amendment and Due Process Clause of the Fifth Amendment. *Id.*

On March 27, 2025, Suri brought the instant motion for release under the Second Circuit's opinion in *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001). *See* ECF #21 (Petitioner's Memorandum of Law in Support of Motion for Release on Bond ("Mot.")). He argues that he raised substantial claims and a clear case for habeas relief and that his personal circumstances presented a case of extraordinary circumstances that make the grant of bail necessary to make habeas relief effective. *See Id.* at 12-21.

LEGAL ARGUMENT

I. The Court Should Defer Decision on this Motion

The Court should defer on deciding this motion until it decides the Government's pending motion to dismiss or transfer. *See* ECF #25-27. As the Government's motion explains, Suri brings this habeas action under 28 U.S.C. § 2241, and he must bring it against his immediate custodian and in the district of his confinement. *See id.* Because the Court lacks habeas jurisdiction over the petition,

it necessarily lacks authority to grant bail or release. *Romero v. Evans*, 280 F. Supp. 3d 835, 842-843 (E.D. Va. 2017) ("Filing a petition… where neither the petitioner nor any proper respondent is located does not satisfy the limitation in the habeas statutes, which only allow courts to grant habeas petitions within their respective jurisdictions."), *rev'd on other grounds sub nom. Johnson v. Guzman Chavez*, 594 U.S. 523 (2021).

There is a second and separate reason to exercise restraint, which is that Suri will have an opportunity to secure his own release on bond in removal proceedings. Thus, at the very least, the Court should await exhaustion of that process before wading into the extraordinary waters of release on bond during immigration proceedings. As noted below, Suri cites no case—and Respondents have found none—where an opposed motion[2] for release on bond pending adjudication of a habeas petition has been granted by any district court in the Fourth Circuit in the seventeen years since *Eliely* was issued.

II. The Court Lacks the Authority to Grant Interim Release.

Along with this Court lacking habeas jurisdiction to even consider Suri's petition, this Court also lacks jurisdiction under the federal immigration laws to act upon it.

Suri relies primarily on *Mapp*, *Eliely*, and *Lucas v. Hadden*, 790 F.2d 365 (3d Cir. 1986), for the proposition that this Court may grant bail pending habeas review in an immigration case. Neither *Eliely* nor *Lucas* involved immigration proceedings. Further, while the federal courts may have a general inherent authority to grant bail or release in certain circumstances, that authority can be conditioned by statute. *Cf. Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327–28 (2015) ("The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory

[2] As explained *infra*, two *unopposed* motions for release pending adjudication were granted in Fourth Circuit district courts under circumstances far different than those at issue here, *infra* p. 27-28 (explaining *Brooks v. Wilson*, No. 3:16CV857, 2018 U.S. Dist. LEXIS 248077, *4 (E.D. Va. June 14, 2018) and *Young v. Antonelli*, No. 0:18-1010-CMC, 2021 U.S. Dist. LEXIS 2899, at *2-*3 (D.S.C. Jan. 7, 2021)). Suri relies heavily on those two cases.

limitations. Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.") (cleaned up); *Principe v. Ault*, 62 F. Supp. 279, 284 (N.D. Ohio 1945) ("As was pointed out by Lord Russell in the case of *The Queen v. Spilsbury*, we are not to conclude that the court is without power because no power was expressly granted, but we are to conclude that the court has the power to admit to bail unless we find that the exercise of such power is forbidden by statute.").

The Immigration and Nationality Act ("INA") bars such relief here. Tellingly, Suri does not even attempt to address binding federal immigration laws.

A. Bail Pending Habeas Review is Only Appropriate Where Habeas Review is Available.

Even taking *Mapp* as good law, a prerequisite to obtaining relief under that line of cases is an appropriate habeas claim upon which the Court is likely to grant relief. Suri's habeas claims, however, face several jurisdictional hurdles that prevent him from litigating these claims in district court, and similarly eliminate this Court's authority to grant bail pending an adjudication on these claims. For the same reasons, Suri is not able to show a high probability of success on the merits because his claims must be brought first in immigration court and litigated through the process set forth in the INA.

1. Section 1252(b)(9) Applies to Suri's Claims

Suri's habeas claims challenge removability and the Secretary of State's designation, which he acknowledges serve as the basis for his detention. He asks this Court to declare these acts unlawful, vacate the removability charges and thereby release him from custody. Pet., Prayer for Relief. But "[f]or an alien challenging his removal," the appropriate jurisdictional "path begins with a petition for review of his removal order, not a habeas petition." *Tazu v. Att'y Gen.*, 975 F.3d 292, 294 (3d Cir. 2020); *Johnson v. Whitehead*, 647 F.3d 120, 124 (4th Cir. 2011) ("Congress has specifically prohibited the use of habeas corpus petitions as a way of obtaining review of questions arising in removal proceedings.").

Congress has 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); *Johnson*, 647 F.3d at 124. The immigration laws further provide 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). "This section, known as the 'zipper' clause, consolidates review of matters arising from removal proceedings 'only in judicial review of a final order under this section,' and strips courts of habeas jurisdiction over such matters." *Afanwi v. Mukasey*, 526 F.3d 788, 796 (4th Cir. 2008), *vacated on other grounds*, 558 U.S. 801 (2009). 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.

In fact, "most claims that even relate to removal" are improper if brought before the district court. *E.O.H.C. v. Sec. U.S. Dep't of Homeland Sec.*, 950 F.3d 177, 184 (3d Cir. 2020); *see also 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.'"); *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) ("Taken together, § 1252(a)(5) and § 1252(b)(9) mean that any issue – whether legal or factual – arising from any removal-related activity can be reviewed only through the [petition-for-review] process."); *Afanwi*, 526 F.3d at 796. Suri is currently in removal proceedings, which means his challenge to removability based on First Amendment or other grounds is "inextricably linked" to his removal proceedings and its conclusion. *Delgado v. Quarantillo,* 643 F.3d 52, 55 (2d Cir. 2011).

Indeed, the Fourth Circuit requires that Suri present removability issues to an immigration judge before there is any Article III review. In *Johnson v. Whitehead*, a habeas petitioner had challenged

his ICE detention on the grounds that he claimed to have acquired derivative U.S. citizenship and therefore was entitled to protection from ICE custody. *See Johnson v. Whitehead*, No. PJM-08-1872, 2009 U.S. Dist. LEXIS 145965, *2 (D. Md. May 14, 2009).[3] The district court dismissed the habeas petition, finding that "in removal proceedings he can claim citizenship as a defense, and if the immigration judge rejects the defense and orders removal, the person can, after properly exhausting administrative channels, petition the Court of Appeals for review of the final order of removal, including for review of the citizenship claim." *Id.* at *11-12.[4] The Fourth Circuit affirmed, ruling "the district court was without jurisdiction to consider the citizenship issues raised in the habeas petition" because "[p]etitions for review are the appropriate vehicle for judicial review of legal and factual questions arising in removal proceedings." *Johnson v. Whitehead*, 647 F.3d at 124 (citing § 1252(a)(5), (b)(9)), *cert. denied*, 565 U.S. 1111 (2012).

Further, then-Judge Alito—writing for the Third Circuit—articulated that a petitioner like Suri would be required to present removability issues to an immigration judge before there is any Article III review. In *Massieu v. Reno*, a petitioner had challenged the predecessor to Suri's deportability ground,[5] arguing that it violated the Due Process Clause because it was impermissibly vague. 91 F.3d

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[3] Another jurist in this district attempted to distinguish *Johnson*'s holdings on § 1252(a)(5) and (b)(9) in part on the grounds that "[Johnson] did not simultaneously raise an unlawful detention claim[.]" *Lopez v. Doe*, 681 F. Supp. 3d 472, 483 (E.D. Va. 2023), *appeal filed*, No. 24-2651 (4th Cir.). But Mr. Johnson *did* bring an unlawful detention claim. *Johnson*, 2009 U.S. Dist. LEXIS 145965 at *2. In any event, Respondents also respectfully disagree with the conclusion reached in *Lopez*, and have asserted those issues in the pending *Lopez* appeal. And it bears noting that—in circumstances more closely analogous to those presented here—the same jurist reached a different conclusion on the application of §§ 1252(a)(5) and (b)(9) in *Trabelsi v. Crawford*, No. 1:24-cv-1509 (RDA/LRV), 2024 U.S. Dist. LEXIS 241753, *16 (E.D. Va. Dec. 2, 2024).

[4] Citizenship claims can also be reviewed under § 1503(a) by a final administrative denial of a right of privilege as a citizen of the United States, except when they "arose by reason of, or in connection with any removal proceeding under the provisions of this chapter or any other act, or is in issue in any such removal proceeding." 8 U.S.C. § 1503(a). This part of the *Johnson v. Whitehead* rulings has no bearing here.

[5] Previously found at 8 U.S.C. § 1251(a)(4)(C)(i).

416, 417 (3d Cir. 1996) (Alito, J.). In reversing the district court's order declaring the provision unconstitutional and enjoining deportation proceedings against the petitioner, *Massieu* held that a petitioner must first exhaust their administrative remedies before the immigration court and the petition-for-review process. *Id.* The *Massieu* court specifically noted that for "an alien attempting to prevent an exclusion or deportation proceeding from taking place in the first instance," he must avail himself of the administrative procedures. *Id.* at 421.

Because of this precedent, this Court should conclude that Suri must bring his First and Fifth Amendment claims as challenges to his removability charge in removal proceedings, not in federal district court. *See Johnson*, 647 F.3d at 125; *Massieu*, 91 F.3d at 422 (recognizing that the court of appeals could review the final removal order and "'all matters on which the validity of the final order is contingent.'") (quoting *INS v. Chadha*, 462 U.S. 919, 937–39 (1983)); *id.* at 423 (reaffirming that district court review is not appropriate and review of removal is not meaningfully precluded when "the challenge by the aliens is neither procedural nor collateral to the merits").

Suri cannot use *Mapp* as a means to obtain release directly from this Court and improperly "upset the scheme created by Congress to provide plaintiff with a faster decision." *Id.* at 424.

2. Suri cannot overcome the jurisdictional bar in section 1252(g).

Suri also cannot show a high probability of success because his claims run headlong into the jurisdictional bar in § 1252(g). He seeks to challenge the decision to commence proceedings via habeas petition, but Congress prohibited a district court from reviewing such an action.

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)."[6] *Id.* Though this section "does not sweep broadly," *Tazu*, 975 F.3d at 296, its "narrow sweep is firm," *E.F.L. v. Prim*, 986 F.3d 959, 964–65 (7th Cir. 2021). Except as provided by § 1252, courts "cannot entertain challenges to the enumerated executive branch decisions or actions." *Id.*

The statute was "'directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion,'" to protect "'no deferred action' decisions and similar discretionary decisions." *Tazu*, 975 F.3d at 297 (quoting *AADC*, 525 U.S. at 485). This particular limitation exists for "good reason": "[a]t each stage the Executive has discretion to abandon the endeavor." *AADC*, 525 U.S. at 483–84. In addition, through § 1252(g) and other provisions of the INA, Congress "aimed to prevent removal proceedings from becoming 'fragment[ed], and hence prolong[ed].'" *Tazu*, 975 F.3d at 296 (alterations in original) (quoting *AADC*, 525 U.S. at 487); *see Rauda v. Jennings*, 55 F.4th 773, 777–78 (9th Cir. 2022) ("Limiting federal jurisdiction in this way is understandable because Congress wanted to streamline immigration proceedings by limiting judicial review to final orders, litigated in the context of petitions for review.").

Section 1252(g) 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 Fourth Circuit, have held § 1252(g) applies to the discretionary decision to execute a removal order. *Loera*

[6] 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)).

Arellano v. Barr, 785 F. App'x 195 (4th Cir. 2019); *see also Tazu*, 975 F.3d at 297–99 ("The plain text of § 1252(g) covers decisions about *whether* and *when* to execute a removal order."); *Rauda*, 55 F.4th at 777–78 ("No matter how [petitioner] frames it, his challenge is to the Attorney General's exercise of his discretion to execute [his] removal order, which we have no jurisdiction to review."); *E.F.L.*, 986 F.3d at 964–65 (holding that § 1252(g) barred review of the decision to execute a removal order while an individual sought administrative relief); *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 State*s, 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).

Indeed, on multiple occasions, the Fourth Circuit readily concluded § 1252(g) bars review of the exercise of discretion to institute removal proceedings. *See*, *e.g.*, *Diaz-Portillo v. Garland*, No. 22-1900, 2023 U.S. App. LEXIS 29130, *3 (4th Cir. Nov. 2, 2023); *Pineda-Perez v. Garland*, No. 22-1212, 2023 U.S. App. LEXIS 23769, *4 (4th Cir. Sep. 7, 2023); *Don v. Garland*, 855 F. App'x 158, 159 (4th Cir. 2021); *Mehr v. Gonzales*, 246 F. App'x 211, 212 (4th Cir. 2007); *Malik v. Gonzales*, 213 F. App'x 173,

174 (4th Cir. 2007); *Solomon v. Gonzales*, 182 F. App'x 170 (4th Cir. 2006); *Villanueva-Herrera v. Ashcroft*, 33 F. App'x 145 (4th Cir. 2002). Another jurist in this district also recently held that § 1252(g) barred review over a habeas petition where "Petitioner challenges the government's decision to commence removal proceedings at all, as each habeas count argues that the commencement of removal proceedings is itself a violation of Petitioner's rights" and thus "[b]ecause each of Petitioner's claims arises from the government's decision to commence removal proceedings…, this Court also lacks jurisdiction to review Petitioner's habeas claims pursuant to Section 1252(g)." *Trabelsi*, 2024 U.S. Dist. LEXIS 241753 at *17-18.

In addition to barring challenges to *whether* and *when* to commence proceedings, § 1252(g) 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."); *Carrero v. Farrelly*, 270 F. Supp. 3d 851, 877 (D. Md. 2017) ("Plaintiff seeks to hold the government liable for the… decision to arrest her based on a final order of removability—this claim falls squarely within the jurisdictional bar of § 1252(g)."). Arresting Suri to commence removal proceedings is an "action . . . to commence proceedings" that this Court lacks jurisdiction to review. *See Tazu*, 975 F.3d at 298–99 ("Tazu also challenges the Government's re-detaining him for prompt removal. . . . While this claim does not challenge the Attorney General's *decision* to execute his removal order, it does attack the *action* taken to execute that order. So under § 1252(g) and (b)(9), the District Court lacked jurisdiction to review it."); *Carrero*, 270 F. Supp. 3d at 877. Under the same logic, § 1252(g) bars review of *where* to commence proceedings. And choosing to commence proceedings in Texas is a decision or action not subject to review. *See Tercero v. Holder*, 510 F. App'x 761, 766 (10th Cir. 2013) ("[T]he Attorney General's

discretionary decision to detain Mr. Tercero and others in New Mexico is not reviewable by way of a habeas petition.").

That Suri raises First and Fifth Amendment claims does not restore the jurisdiction of this Court. *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 similar to those brought here. *See AADC*, 525 U.S. at 487–92. In *AADC*, aliens 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 aliens 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"); *Don*, 855 F. App'x at 159 ("Don contends that the DHS's decision to initiate removal proceedings against him was improper and violated his due process rights… we

lack jurisdiction to consider this claim." (citing § 1252(g))); *Mehr*, 246 F. App'x at 212; *Malik*, 213 F. App'x at 174.

Suri alleges that his initial and, at this point, short detention violates the APA, the Due Process Clause, and the *Accardi* principle. Pet. ¶¶ 38–46. But courts have rejected the notion that a petitioner could avoid the jurisdictional limitations of § 1252(g) by asserting certain claims or through clever drafting of a petition. *See E.F.L.*, 986 F.3d at 965; *Tazu*, 975 F.3d at 297–98 ("Any other rule would gut § 1252(g). Future petitioners could restyle any challenge to the three actions listed in § 1252(g) as a challenge to the Executive's general lack of authority to violate due process, equal protection, the Administrative Procedure Act, or some other federal law."); *Sharif v. Ashcroft*, 280 F.3d 786, 787 (7th Cir. 2002) ("§ 1252(g) does not differentiate among kinds of relief."). "Section 1252(g) precludes judicial review of 'any' challenge to 'the decision or action by [DHS] to [commence proceedings].'" *E.F.L.*, 986 F.3d at 964–65. This prohibition "includes challenges to DHS's 'legal authority.'" *Id.* (noting that, "[o]therwise, § 1252(g) would be a paper tiger; any petitioner challenging the execution of a removal order could characterize his or her claim as an attack on DHS's 'legal authority' to execute the order and thereby avoid § 1252(g)'s bar."). Therefore, this Court lacks jurisdiction under § 1252(g) to review any claim from Suri that the Secretary of Homeland Security lacked a lawful basis to commence proceedings against him. Suri may raise these claims first in immigration court and before a circuit court on a petition for review, but not before this Court in the first instance. *Arellano v. Barr*, No. 2:19-cv-1233-RMG, 2019 U.S. Dist. LEXIS 207399, *7 (D.S.C. May 13, 2019) ("[A]n individual may not seek to avoid [§ 1252's] provisions by fashioning their motion as a TRO or a stay of removal instead of an appeal to the BIA or circuit court."), *aff'd*, 785 F. App'x 195 (4th Cir. 2019); *see Tazu*, 975 F.3d at 300 (requiring that the challenges to the act of executing a removal order must go through a petition for review); *Massieu*, 91 F.3d at 417 (holding that a district court did not have jurisdiction to

hear a challenge to the constitutionality of § 241(a)(4)(C)(i) of the INA, 8 U.S.C. § 1251(a)(4)(C)(i), as applied to an alien in deportation proceedings).

Suri's reliance on *Coreas v. Bounds*, No. TDC-20-0780, 2020 U.S. Dist. LEXIS 171386 (D. Md. Sep. 18, 2020) is inapposite and, in any event, unhelpful to him. The *Coreas* matter dealt with ICE detainees who were challenging the conditions of their confinement and sought release via a habeas petition. *Id.* at *54 ("[T]his Court finds that it has the authority to engage in bail reviews for class members on the question of whether they should not be subjected to continued detention during the pendency of this case in light of … the COVID-19 pandemic[,]… [s]uch determinations are not reviews of the original discretionary bail determinations by the Attorney General under the INA but would instead consist of examining the conditions of the Detention Facilities"). That stands in contrast to a situation, such as this one, challenges the decision to institute removal proceedings and to detain him pending removal proceedings. And, ultimately, *Coreas* denied release on bond under circumstances more compelling than those here. *Id.*

B. Inherent Authority Does Not Allow Release Outside of the INA's Express Limitations.

Even if Suri's challenges to the Government's decision to initiate removal proceedings could be brought in a habeas petition—and they cannot—the INA restricts this Court's review of detention decisions. Importantly, Suri does not challenge the length of his detention. Instead, he challenges ICE's decision to detain him at all, and that claim is not available. *See Toure v. Hott*, 458 F. Supp. 3d 387, 401 n.4 (E.D. Va. 2020) (recognizing that "The Government has identified a statutory limitation precluding release as a form of relief. Plaintiffs Don, Andaso, and Aguilon are each detained by 8 U.S.C. § 1226(a), and therefore subject to § 1226(e)"). The decision to detain Suri 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 or not to detain someone placed in removal proceedings. Section 1226(e) provides that: "The Attorney General's discretionary judgment regarding the application of [§ 1226] 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 or release of any alien or the grant, revocation, or denial of bond or parole." 8 U.S.C. § 1226(e); *Toure*, 458 F. Supp. 3d at 401 n.4.

Suri relies almost exclusively on the Second Circuit's decision in *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001). But that out-of-circuit case does not provide this Court with authority to grant interim release. *Mapp*, decided in 2001, was a pre-REAL ID Act case where an alien had challenged his deportation proceedings, but not the validity of his detention, through a district court habeas petition. Prior to passage of the REAL ID Act of 2005, aliens could seek review of their removal orders through the filing of a habeas petition in federal district court. *See*, *e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 311–14 (2001). The REAL ID Act removed habeas as a permissible avenue for challenging a removal order, stripped district courts of jurisdiction to review removal orders, and vested the courts of appeals with exclusive jurisdiction to review challenges to final removal orders. *See* 8 U.S.C. § 1252(a)(5). The Second Circuit recognized that it cannot override a statute to grant relief. *Mapp*, 241 F.3d at 227–29. Because a statute applies here, *Mapp* cannot create authority that is otherwise limited by statute.

In reaffirming that federal courts have inherent authority to admit habeas petitioners to bail, even in the immigration context, the Second Circuit qualified this holding as subject to limits imposed by Congress. *Id.* at 223 (noting "that this authority may well be subject to appropriate limits imposed by Congress"). *Mapp* "acknowledge[d] that, in cases involving challenges to [ICE] detention, Congress's plenary power over immigration matters renders this authority readily subject to congressional limitation." *Id.* at 231. No such limitation was at issue in *Mapp*, but here § 1226(e) is an "express statutory constraint[]" that limits the Court's authority in this context. *Id.*

Section 1226(e) restricts this Court's authority in two ways. First, Section 1226(e) provides a "clear direction from Congress," *Mapp*, 241 F.3d at 227, that "[n]o court may set aside any action or decision by [ICE] under [§ 1226] regarding the detention or release of any alien," 8 U.S.C. § 1226(e).[7] Thus, this Court lacks authority to grant interim release to a habeas petitioner who is subject to detention under § 1226(a). Second, ICE's discretionary decision to detain the petitioner cannot readily be set aside through a *Mapp* motion. As the Second Circuit explained, where Congress provided for discretionary detention, federal courts may be further constrained from granting release on bail where the agency has exercised such discretion. *See Mapp*, 241 F.3d at 229 n.12 ("[W]hile it may be the case that had the INS exercised its discretion under § 1231(a)(6) and decided not to release Mapp on bail, *we would be required to defer to its decision*, where there has been no such consideration of a detainee's fitness for release, deference to the INS… is not warranted."). ICE did so here. *See* Simon Decl. ¶ 7. Thus, this Court cannot supplant ICE's discretionary decision to detain in this context.

Accordingly, the Court lacks authority to grant the petitioner's request for interim release during the pendency of this action. *Mapp*, 241 F.3d at 227–29; *accord Bolante v. Keisler*, 506 F.3d 618, 620–21 (7th Cir. 2007) ("Even if in the absence of legislation a federal court could grant bail to an alien challenging a removal order, it cannot do so if Congress has forbidden it.").[8]

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[7] This is not to say that district courts lack jurisdiction at all over the release of an alien in immigration habeas proceedings, but under the circumstances here, that authority may be exercised only at the *conclusion* of the habeas case and upon a merits determination that the petitioner's detention is unlawful. That is not the inquiry that Suri seeks here in his motion for release, which instead seeks to put the cart before the horse and order release *before* any determination that Suri's detention is unlawful.

[8] That does not mean Suri is unable to challenge his custody determination. Suri may seek review as to whether he is properly subject to his removal provision. 8 C.F.R. § 1003.19(h)(2)(ii). If adverse, Suri may seek appeal of that determination. 8 C.F.R. § 1003.19(f). But Suri does not allege to have done so, and that poses a separate hurdle that this Court could use to justify dismissal his habeas claim. *See Rodriguez v. Ratledge*, 715 F. App'x 261, 265 (4th Cir. 2017) ("Prior to hearing a § 2241 petition, federal courts require exhaustion of alternative remedies, including administrative appeals."). "The exhaustion requirement is a prudential restraint, not a statutory requirement" and "allows agencies to exercise autonomy and discretion and prevents premature judicial intervention." *Id.*; *see also Williams v.*

III. Suri's Petition Fails on the Merits

Given the jurisdictional hurdles discussed above, there is no precedent supporting bail-pending-habeas in the immigration context. But even applying the general standard for bail-pending-habeas to this specific context, Suri has failed to establish either a substantial constitutional claim or exceptional circumstances to warrant the exceptional form of relief he requests under *Mapp*. The Fourth Circuit—albeit in unpublished authority—has indicated that courts may grant bail pending review of a petition for habeas corpus in very limited and extraordinary circumstances. *See Eliely*, 276 F. App'x at 270-71; *see also Landano*, 970 F.2d at 1239 (reversing the district court's decision and holding that there was insufficient basis for bail for the state prisoner pending habeas review where no extraordinary circumstances existed); *Lucas*, 790 F.2d at 367 (reversing the district court's decision and holding that bail for a federal prisoner pending habeas review was not appropriate because he had not made a showing of extraordinary circumstances). "[A] preliminary grant of bail is an exceptional form of relief in a habeas corpus proceeding." *Landano*, 970 F.2d at 1239. There is a presumption against such extraordinary relief. *See Salerno v. United States*, 878 F.2d 317, 317 (9th Cir. 1989).

Specifically, the grant of release on bail is appropriate in habeas cases only where the petitioner demonstrates: "substantial constitutional claims on which he has a high probability of success, and exceptional circumstances making a grant of bail necessary for the habeas remedy to be effective." *Eliely*, 276 F. App'x at 270-71. The standard is conjunctive; that is, a petitioner must establish a substantial constitutional claim upon which he has a high likelihood of success, extraordinary circumstances, and that immediate "bail [is] necessary for the habeas remedy to be effective." *See, e.g.*, *Coreas*, 2021 U.S. Dist. LEXIS 13713 at *22 (finding class of ICE detainees challenging conditions of confinement failed to establish either prong); *United States v. Aigbekaen*, No. JKB-15-0462, 2021 U.S.

Reed, 145 S. Ct. 465, 471 (2025) ("…a plaintiff who asserts a due process claim without exhausting will usually lose because of the requirement that the challenged procedural deprivation must have already occurred…" (marks omitted))

Dist. LEXIS 124589, *4 (D. Md. July 1, 2021) ("Even if Aigbekaen had met his burden of establishing substantial constitutional claims on which he has a high probability of success, [his] motions would very likely fail on the second prong because he does not demonstrate exceptional circumstances that necessitate a grant of bail to make the habeas remedy effective"); *Rhodes v. Dobbs*, No. 1:20cv1725, 2020 U.S. Dist. LEXIS 183199, *3 (D.S.C. Oct. 2, 2020) (state prisoner failing to establish extraordinary circumstances, even considering the COVID-19 pandemic), *aff'd*, 836 F. App'x 163 (4th Cir. 2021). In other words, a petitioner seeking bail pending habeas review must meet a "demanding standard" to justify the request. *Blumeyer v. Johns*, No. 5:11-HC-2023-FL, 2011 U.S. Dist. LEXIS 75787, *2 (E.D.N.C. July 11, 2011). And even if this demanding standard is met, the decision whether to grant bail pending review is discretionary. *United States v. Aigbekaen*, No. JKB-15-0462, 2021 U.S. Dist. LEXIS 153177, *2 (D. Md. Aug. 12, 2021) (citing *Jenkins v. Harvey*, 634 F.2d 130, 132 n.3 (4th Cir. 1980)).

Here, Suri fails the *Eliely* test. He cannot show: (1) he has raised "substantial constitutional claims upon which he has a high probability of success" nor can he show (2) "extraordinary or exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective." *Landano*, 970 F.2d at 1239. On Prong 1, Suri first runs into multiple jurisdictional bars over this habeas petition. *See supra* § II. But he also cannot show that, even if jurisdiction exists, there is a high probability of success on the merits. On Prong 2, his case is not one of the limited exceptions that warrant relief, and he does not show that "bail *must* be granted in order for a potential habeas remedy to be effective." *Aigbekaen*, 2021 U.S. Dist. LEXIS 124589 at *4.

C. Suri Has Not Shown a High Probability of Success on his APA and *Accardi* claims.

As a threshold matter, Suri's APA claims do not qualify for the *Eliely* test, which is expressly limited to "substantial *constitutional* claims on which he has a high probability of success[.]" *Eliely*, 276

F. App'x at 270 (emphasis added). His APA and *Accardi* claims should thus not be considered in applying the *Eliely* test. *See id.*

Regardless, Suri 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). The APA permits challenges to agency action that is arbitrary, capricious, and contrary to law, *see* 5 U.S.C. §§ 702, 706(2), and the *Accardi* doctrine provides that "an agency's failure to follow their own 'existing valid regulations' when coming to an agency decision may render that decision arbitrary or capricious." *SPLC v. U.S. DHS*, No. 18-0760 (CKK), 2023 U.S. Dist. LEXIS 43726, *13 (D.D.C. Mar. 15, 2023); *see also Bd. of Curators v. Horowitz*, 435 U.S. 78, 92 n.8 (1978) (acknowledging that *Accardi* "enunciate[d] principles of federal administrative law, other than of constitutional law binding on the States."). Many courts have generally recognized this connection between *Accardi* and the APA. *See SPLC*, 2023 U.S. Dist. LEXIS 43726, *13 ("[A]n *Accardi* claim is simply a subset of claims for relief cognizable under the APA"); *Ams. for Immigrant Just. v. U.S. DHS*, No. 22-3118 (CKK), 2023 U.S. Dist. LEXIS 17017, *54 (D.D.C. Feb. 1, 2023) (same). 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. *See id.*

Under long-standing principles limiting APA claims, Suri's *Accardi* claim, which he brings under the APA, is unlikely to succeed 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). The APA defines "agency action" as including "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(3). The Supreme Court has interpreted this to mean: (1) taking one of the "circumscribed, discrete agency actions" listed under §

551 (and their equivalents); (2) saying no to a request to take one of those actions; or (3) omitting to take one of those actions. *Norton*, 542 U.S. at 62. The only agency action that can be compelled under the APA is action "legally required." *Id.* at 63.

Here, Suri's APA claim is unlikely to succeed on either count. Suri fails to identify a final agency action on which to base his APA claim. *See* Mot. 14-15; ECF #1 at ¶ 46. Indeed, he does not allege that DHS took, denied, or failed to take any of the actions covered by § 551. *See* Mot. at 14. At most, Suri objects to an alleged general policy regulating enforcement priorities. ECF #1 at 14-15; Mot. at 14-15. But even taken on its terms, that sort of overarching policy goal is definitionally not subject to APA review, which requires a 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'… is simply the name by which petitioners have occasionally referred to the continuing (and thus constantly changing) operations of the [Bureau of Land Management]… 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 program' of the Drug Enforcement Administration."); *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"). A "broad attack" on agency operations that "does not center on any individual, discrete determination of rights or responsibilities" is not cognizable under the APA under an *Accardi* theory. *SPLC*, 2023 U.S. Dist. LEXIS 43726 at *16.

Even if Suri's APA could be liberally construed as challenging the Secretary of State's § 1227(a)(4)(C) determination, that agency action would be directly tied to the Secretary's decision to initiate removal proceedings against him and the validity of those charges, which must be brought in

removal proceedings. 8 U.S.C. § 1252(b)(9). Because Suri has an alternative, mandatory forum for his claim, it is not cognizable under the APA. *See Bennett*, 520 U.S. at. 175–77.

Suri's *Accardi* claim is unlikely to succeed for the same reasons: at bottom, Suri challenges the Government's decision to initiate removal proceeding against him. *See* Mot. at 16–17. To the extent that the claim is not barred by § 1252(g), it must be brought through Suri's removal proceedings and raised in a petition for review of his final order of removal. *See* 8 U.S.C. §§ 1252(a)(5), (b)(2), (b)(9); *Nasrallah v. Barr*, 590 U.S. 573, 580 (2020) ("The REAL ID Act clarified that final orders of removal may not be reviewed in district courts, even via habeas corpus, and may be reviewed only in the courts of appeals.") (citation omitted). Moreover, Suri's reliance on the DHS, Memorandum of Kevin McAleenan (May 17, 2019), fails to support his claim. *See* Mot. at 15. The Memorandum restricts only the collection of documents and does not prevent the initiation of removal proceedings. Thus, even if Suri had pleaded a violation of a document retention policy, the remedy would not provide relief for Suri's claims; an administrative claim is insufficient to support Suri's request for *Eliely* relief. *See Eliely*, 276 F. App'x at 270-71.

D. Suri Has Not Shown a High Probability of Success on His Due Process Clause Claim.

Suri alleges that his due process rights were violated because the Government had not demonstrated that he needed to be detained, but he has not made a clear case for habeas relief. *See* Mot. at 17-19; *Lucas*, 790 F.2d at 367. "Detention of aliens pending their removal in accordance with the INA is constitutional and is supported by legitimate governmental objectives." *Hope v. Warden York Cnty. Prison*, 972 F.3d 310, 328–29 (3d Cir. 2020) (citing *Demore v. Kim*, 538 U.S. 510, 531 (2003), and *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)); *SPLC*, 2023 U.S. Dist. LEXIS 43726, *10 ("[I]mmigration detention is presumptively constitutional."). 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.").

Here, Suri unpersuasively asserts that his detention is punitive, "wholly unjustified," and "bears no 'reasonable relation' to any legitimate government purpose." Mot. at 14. But, Congress "empowers the Secretary of Homeland Security [through 8 U.S.C. § 1226(a)] to arrest and hold an alien 'pending a decision on whether the alien is to be removed from the United States.'" *Nielsen v. Preap*, 586 U.S. 392, 397 (2019) (quoting 8 U.S.C. § 1226(a)). Congress also empowers the Secretary with "the discretion either to detain the alien or to release him on bond or parole." *Id.*; *Miranda v. Garland*, 34 F.4th 338, 356 (4th Cir. 2022). These congressional objectives held constitutional by the Supreme Court—detention of aliens in removal proceedings and mandatory detention of criminal aliens—thus render unsound Suri's allegations that his civil detention (or detention of those in removal proceedings generally) is tantamount to punishment. *See Nielsen*, 586 U.S. at 397; *see also* 8 U.S.C. § 1226(c) (mandatory detention for those convicted of crimes of moral turpitude, controlled substances offenses, and terrorism offenses); 8 U.S.C. § 1231(a)(2) (mandatory detention for certain aliens ordered removed); 8 U.S.C. § 1231(a)(6) (detention beyond removal period for aliens ordered removed and determined a risk to the public or not likely to comply with the order); *Harvey v. Chertoff*, 263 F. App'x 188, 191 (3d Cir. 2008) (noting that "an immigration detainee is akin to that of a pretrial detainee").

To the extent that Suri is basing his claim on *Black v. Decker*, 103 F.4th 133, 143 (2d Cir. 2024) and *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), the two cases cited in his brief (*see* Mot. 13), those claims take time to mature, and are not available until immigration detention exceeds a minimum of six months. *Zadvydas*, 533 U.S. at 693 (adopting six months as a presumptively reasonable period of detention following a final order of removal); *Black*, 103 F.4th at 143 (declining to adopt a rule that detention exceeding six-month brightline is per se unconstitutional). And even then, the claim is far from automatic. *Jennings v. Rodriguez*, 583 U.S. 281, 311-14 (2018). Suri has been detained for two weeks since March 17, 2025, *see* Simon Decl., and is not able to show a reasonable likelihood of success on any of the claims contemplated by the cases cited. *Contra Miranda*, 34 F.4th at 361 ("[D]etention under § 1226(a) is pending an alien's removal hearing. Accordingly, just like in *Demore*, the detention here is of a much shorter duration than the indefinite and potentially permanent detention in *Zadvydas*.").

E. Suri Has Not Shown a High Probability of Success on His First Amendment Claim.

Regarding the merits of the First Amendment claim, Suri has not made out a "a high probability of success" to justify release pending a ruling on his habeas petition. *Eliely*, 276 F. App'x at 270. Indeed, the nature of his claim reveals the *very reason* that Congress opted to channel these actions into administrative proceedings. The decision to remove an alien is fact-intensive, and often requires sensitive information. Whether that evidence passes muster is a deliberative decision that Congress assigned to immigration judges in the first instance, with review by appellate courts on the back end. Congress made the specific judgment that those judgment calls are particularly ill-suited for expedited proceedings in federal court.

That said, here, the government has initiated removal proceedings against Suri based on the Secretary of State's determination that Suri's presence would have serious adverse foreign policy consequences for the United States and would compromise a compelling foreign policy interest, per 8 U.S.C. § 1227(a)(4)(C)(i). *See* Simon Decl., Exh. 1. This is a facially legitimate justification for Suri's

detention and removal; and such facially valid justifications are preclusive in this posture. *Cf. Nieves v. Bartlett*, 587 U.S. 391, 402 (2019).

Nor does the Secretary of State's determination run afoul of any constitutional limit. For one, Suri's accusations against the Secretary run headlong into the presumption in favor of regularity—it would be remarkable, and surely unjustified on this record, to countenance a claim that the Secretary of State was motivated by bias and unlawful targeting. *See Nardea v. Sessions*, 876 F.3d 675, 680 (4th Cir. 2017) (citing *USPS v. Gregory*, 534 U.S. 1, 10 (2001), *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926)). All the more so where this decision involves the sensitive area of foreign affairs and is committed to the Secretary's discretion. *See AADC*, 525 U.S. at 491 (The government "should not have to disclose its 'real' reasons for deeming nationals of a particular country a special threat… and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy."); *cf. Trump v. Hawaii*, 585 U.S. 667, 685–86 (2018) (finding it "questionable" that when making a finding under 8 U.S.C. § 1182(f), which "exudes deference to the President in every clause," the President must "explain that finding with sufficient detail to enable judicial review"); *Kerry v. Din*, 576 U.S. 86, 106 (2015) (Kennedy, J. concurring) ("…the dangers and difficulties of handling such delicate security material further counsel against requiring disclosure in a case such as this. Under *Mandel*, respect for the political branches' broad power over the creation and administration of the immigration system extends to determinations of how much information the Government is obliged to disclose…."). That is why "matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Vanderklok v. United States*, 868 F.3d 189, 206 (3d Cir. 2017) (citing *Haig v. Agee*, 453 U.S. 280, 292 (1981)).

As fundamental, Suri misapprehends how the First Amendment applies in this context. While "[f]reedom of speech and of press is accorded aliens residing in this country," *Bridges v. Wixon*, 326 U.S. 135, 148 (1945), the Supreme Court has "indicated that aliens' First Amendment rights might be

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) (citing *Harisiades v. Shaughnessy*, 342 U.S. 580, 591–92 (1952)), *aff'd*, 565 U.S. 1104 (2012); *see OPAWL - Bldg. AAPI Feminist Leadership v. Yost*, 118 F.4th 770, 779–81 (6th Cir. 2024). Moreover, the government's power and its interests are at their apex in the context of regulating immigration. *See Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976). Decisions in this area, which "may implicate our relations with foreign powers" and "changing political and economic circumstances," are "frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary." *Id.* at 81; *see Harisiades*, 342 U.S. at 588–89 ("Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."). Courts must give substantial deference to the governmental findings when, as here, the "litigation implicates sensitive and weighty interests of national security and foreign affairs." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 33–34 (2010). Accordingly, the Supreme Court has found foreign policy and immigration decisions to be constitutional even when they burden U.S. citizens' First Amendment rights. *See id.* at 7–8, 10; *Kleindienst v. Mandel*, 408 U.S. 753, 769–70 (1972). And the Supreme Court has held that the government "constitutionally may deport a legally resident alien because of membership in the Communist Party," even though the First Amendment recognizes freedom of association. *Harisiades*, 342 U.S. at 581, 591–92. Meaning, those First Amendment considerations do not overcome the Executive's prerogative and control over immigration. *See Mandel*, 408 U.S. at 767–68.[9]

[9] Congress also made clear that it intended to prioritize foreign policy considerations when it came to the admission and deportability of aliens. *See* 8 U.S.C. § 1227(a)(4)(C)(ii); 8 U.S.C. § 1182(a)(3)(C)(iii) (providing for a determination that an alien would not be deportable for "past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, u*nless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest*") (emphasis added). The Executive can properly act when Congress has authorized it to do so. *See Haig*, 453 U.S. at 282, 289, 309 (upholding Executive authority to revoke passport on national security and foreign policy grounds

Thus, Suri has not shown a clear case for habeas relief. Suri—as a non-immigrant visitor present in the country for just about two years—has limited rights under the First Amendment in this context. The Government has lawful bases for seeking removal. And the Court should not second-guess the government's discretionary determinations about foreign policy matters.

F. Suri Has Not Established Extraordinary Circumstances

Because the standard for release is deliberately stringent, few cases have presented extraordinary circumstances. The touchstone for these circumstances is not just a general sense of the equities, but instead where delay will specifically render the habeas remedy *ineffective*—because, for instance, a petitioner has already served the duration of his sentence should he prevail on his habeas petition. Indeed, in canvassing Fourth Circuit cases analyzing *Eliely*, that is the *only* circumstance in which a motion for pre-adjudication bond has been granted: *Brooks v. Wilson*, No. 3:16CV857, 2018 U.S. Dist. LEXIS 248077, *4 (E.D. Va. June 14, 2018). That *Brooks* case—as the seminal case for Suri's position—is clearly distinguishable. Mot. at 16, 19, 20, 21.

Brooks, decided on an unopposed motion, granted a prisoner release on bond pending adjudication of his habeas petition, which challenged the length of his sentence as being based on an erroneously increased mandatory minimum, because his position had just been adopted by the Fourth Circuit and he had "served more than the ten-year maximum sentence that might otherwise govern his conviction." *Brooks*, 2018 U.S. Dist. LEXIS 248077, at *4.[10] Suri also cites *Young v. Antonelli*, No.

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after concluding revocation was authorized by Congress). Additionally, Congress has indicated that speech may be consequential for aliens in ways that may not be consequential to citizens. For example, the PATRIOT Act, enacted post-9/11, specifies that certain "speech" activities that support, encourage, endorse, or inspire others to terrorism or to terrorist organizations may lead to inadmissibility. *E.g.*, 8 U.S.C. § 1182(a)(3)(B)(i)(VII) (making aliens who "endorse[] or espouse[] terrorist activity or persuade[] others to endorse or espouse terrorist activity or support a terrorist organization" inadmissible); 1182(a)(3)(B)(iv)(VI)(cc) (those who "afford[] material support" to terrorist organizations inadmissible).

[10] "[A]fter… [*United States v. Wheeler*, 886 F.3d 415 (4th Cir. 2018)], Brooks has shown a high probability of success on his underlying challenge to his sentence… given that Brooks already has served more than the ten-year maximum sentence that might otherwise govern his conviction, Brooks

0:18-1010-CMC, 2021 U.S. Dist. LEXIS 2899, at *2-*3 (D.S.C. Jan. 7, 2021), but *Young* had a similar posture to *Brooks*, and like *Brooks*, *Young* was decided on an unopposed motion. *Id.* Plaintiff cites no in-Circuit case where a litigant has met that burden on an opposed motion, and Respondents can find none. *United States v. Aigbekaen*, No. JKB-15-0462, 2023 U.S. Dist. LEXIS 8998, *2 (D. Md. Jan. 13, 2023) (finding *Eliely* test unmet despite "various health conditions put him at high risk for serious illness due to COVID-19, and that his present solitary confinement 'exacerbates [his] mental issues.'"); *Aigbekaen*, 2021 U.S. Dist. LEXIS 124589 at *4 (allegations of assault by other inmates in detention and untreated sleep apnea, "do not support a finding that his bail *must* be granted in order for a potential habeas remedy to be effective."); *Coreas*, 2021 U.S. Dist. LEXIS 13713 at *31-32 ("Petitioners have not identified any specific exceptional circumstances warranting bail determinations for all high-risk ICE detainees at this time. Other than the general claim of having high-risk conditions, they have not claimed that any detainees are presently so ill that immediate release must be considered.").

Suri has failed to carry the "high burden" of establishing extraordinary circumstances. To support his claim, he relies on personal hardships, including the circumstances of his arrest by ICE, his detention in Texas and Louisiana, his separation of their family, and his arguments that he is not a flight risk or a danger to the community. *See* Mot. at 17–21. But these personal hardships are not the sort that give rise to relief in this context—in no small part, because few are personally unburdened by being placed in immigration detention during their removal proceedings. In light of this, as then-Judge Sotomayor recognized, an "extraordinary circumstance" is not an open-ended inquiry on the equities. Rather, it is concerned with whether "continued detention" would "affect [a] Court's ultimate consideration of the legal issues presented." *Elkimya v. Dep't of Homeland Sec.*, 484 F.3d 151, 154 (2d Cir. 2007); *see Stolfa v. Holder*, 498 F. App'x 58, 60 (2d Cir. 2012) (recognizing that the petitioner "may

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has demonstrated exceptional circumstances making a grant of bail necessary to preserve the effectiveness of the habeas remedy should he ultimately prevail on his habeas claim."

nevertheless file an application for custody or bond redetermination with the immigration judge having jurisdiction over his place of detention"). And here, Suri has not made a showing of *that*. There is no evidence in the record that Suri's representation has been compromised by his detention in Texas. In fact, all record evidence cuts the other way. *See* ECF #7 (*ex parte* stay of removal order); Declaration of Yousuf Khan ("Khan Decl.") (ECF#28-1), ¶¶ 4-10 (outlining the facility's robust and flexible system to facilitate calls). More, this is not a case where bail is necessary to preserve the efficacy of any later remedy—such as cases where an appeal would last longer than the sentence imposed at trial. Rather, it is an attempt to get ultimate relief as a preliminary matter. Last, while it is true Suri will be separated from his family during detention, that is inherent to detention; it is a ubiquitous occurrence in this context, not an exceptional one. It is also not one that gives rise to a constitutional claim, as the Fourth Circuit has held. *Vega Reyna v. Hott*, 921 F.3d 204, 211 (4th Cir. 2019).

In sum, courts of this circuit rarely grant release pending adjudication of a habeas petition. Generally, health conditions (*Coreas*, 2021 U.S. Dist. LEXIS 13713 at *31-32) are sufficient to meet the stringent *Eliely* standard. *Aigbekaen*, 2021 U.S. Dist. LEXIS 124589 at *4. The same goes for salacious allegations about detention facilities, particularly when they are both unsupported by any evidence and are contradicted by a governmental declarant. *See* 2nd Khan Decl. (ECF #30) ¶¶ 4-9. Nor does he explain why "his bail *must* be granted in order for a potential habeas remedy to be effective[,]" particularly when this Court has already enjoined his removal. *See id.* Rather, Suri just wants a snap decision on release now, before the Court has had a full opportunity to assess the fault lines in the Court's jurisdiction or the defects on the merits of his claims—all in contravention of the INA. *See* Mot. 12-21. That does not satisfy the *Eliely* test.

CONCLUSION

For the foregoing reasons, the Court should deny the Motion for Release on Bond.

DATE: April 3, 2025

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