UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

NIZAR TRABELSI,
Petitioner-Plaintiff,

v.

JEFFREY CRAWFORD, in his official capacity as Warden of the Farmville Detention Center;

LIANA CASTANO, in her official capacity as Field Office Director of the Immigration and Customs Enforcement, Enforcement and Removal Operations Washington Field Office;

ALEJANDRO MAYORKAS, in his official capacity as Secretary of Homeland Security;

and

MERRICK B. GARLAND, in his official capacity as U.S. Attorney General,
Respondents-Defendants.

FEDERAL RESPONDENTS-DEFENDANTS' RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Case No. 1:24-cv-01509-RDA-LRV

FEDERAL RESPONDENTS-DEFENDANTS' RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Pursuant to this Court's orders of September 26 and 27, 2024 (ECF Nos. 25, 26), Federal Respondents-Defendants Liana Castano, Director of U.S. Immigration and Customs Enforcement's (ICE) Washington Field Office; Alejandro Mayorkas, Secretary of Homeland Security; and Merrick B. Garland, U.S. Attorney General; in their official capacities (collectively, the Government), hereby respond to, and seek dismissal of, Counts 1 through 4 of Petitioner-Plaintiff Nizar Trabelsi's Petition for a Writ of Habeas Corpus and Complaint for Injunctive Relief (Petition) (ECF

No. 1).[1] Trabelsi, a Tunisian national, was convicted and incarcerated in Belgium for ten years for conspiring to attack the Kleine-Brogel Air Base in Belgium, on behalf of al-Qaeda. He now contends that the extradition treaty between Belgium and the United States requires his return to Belgium, and otherwise prohibits his civil detention; the Immigration and Nationality Act (INA) does not authorize the initiation of removal proceedings against him, and consequently does not authorize his detention; and his detention is unlawful under the Fifth Amendment's Due Process Clause because the Government lacks any legitimate interest in detaining him. For the reasons discussed below, Trabelsi is incorrect. His detention is lawful, and Counts 1 through 4 of the Petition fail for lack of subject matter jurisdiction and on their merits.

BACKGROUND

A. Trabelsi's Criminal Proceedings in Belgium and Extradition to and Criminal Proceedings in the United States

Nizar Trabelsi was originally born in Tunisia. *See* Pet. ¶ 25. He first moved to Germany in 1989 where he briefly played professional association football (soccer) for the club Fortuna Düsseldorf. Pet. ¶ 26; *see also* Zachary K. Johnson, *Chronology: The Plots*, PBS (last accessed Sept. 30, 2024),

[1] Consistent with this Court's orders, and 28 U.S.C. § 2243, Federal Respondents-Defendants Castano, Mayorkas, and Garland respond to only Counts 1 through 4 with this filing. *See* Order (ECF No. 26) (extending the Government's response deadline); Order (ECF No. 27) (clarifying the Government's deadline "only . . . require[s] a response to the habeas claims"); Order (ECF No. 32) (extending Respondent-Defendant Crawford's response deadline to November 8, 2024). Federal Respondents-Defendants will respond to Counts 5–7 of the Petition by the November 8, 2024 deadline. Respondents-Defendants submit that Trabelsi's conditions of confinement claims are inappropriate in any habeas petition per Fourth Circuit precedent and decisions from this District. *See, e.g.*, *Wilborn v. Mansukhani*, 795 F. App'x 157, 164 (4th Cir. 2019) (per curiam); *Aslanturk v. Hott*, 459 F. Supp. 3d 681, 692 (E.D. Va. 2020) (Alston, J.); *Toure v. Hott*, 458 F. Supp. 3d 387, 401 (E.D. Va. 2020) (O'Grady, J.).

https://www.pbs.org/wgbh/frontline/wgbh/pages/frontline/shows/front/special/cron.html.[2] Trabelsi subsequently resided in Germany for a time between 1989 and 2000. *See* Dkt. No. 3 at 2, *United States v. Trabelsi*, 1:06-cr-89-RDM (D.D.C. Apr. 7, 2006). While in Germany around 2000, Trabelsi was persuaded by an associate involved in the designated Foreign Terrorist Organization al-Qaeda to travel to Afghanistan. *Id.* Trabelsi went to Afghanistan in or about October 2000, where he attended al-Qaeda-run camps and met with international terrorist and al-Qaeda leader Osama Bin Laden. *See id.*; *see also supra* Johnson, *Chronology*.

Trabelsi eventually moved to Belgium. He is not a national of Belgium, and he does not allege he ever attained residency status in, or travel documents to, Belgium.[3] Trabelsi was ultimately arrested in Ucle, Belgium, on September 13, 2001, after Belgian police searched his apartment and discovered an Uzi submachine gun in his possession along with a list of chemicals used to manufacture explosives. *United States v. Trabelsi*, 845 F.3d 1181, 1184 (D.C. Cir. 2017). On September 14, 2001, Trabelsi was served with an arrest warrant in Belgium, charging him with "conspiracy, destruction by explosion, possession of weapons of war, and belonging to a private militia." *Id.* Subsequently, on September 30, 2003, Belgian courts convicted Trabelsi and

---

[2] This Court may "properly take judicial notice of matters of public record." *Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). This includes matters of public record related to Trabelsi's prior conviction in Belgium and any materials relating to his prior federal criminal prosecution. *See Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) (noting that federal courts may take judicial notice of proceedings in other courts of record).

[3] *See Extradition de Trabelsi: l'Etat belge coupable d'une "violation manifeste"*, *La Libre* (Oct. 9, 2013 6:58 PM), https://www.lalibre.be/belgique/2013/10/09/extradition-de-trabelsi-letat-belge-coupable-dune-violation-manifeste-STPFTDYCVRFVREMKVU2KABB5CU/ (noting, in the French language, that Trabelsi did not have a residence permit in Belgium and that his application for political asylum in Belgium had been rejected twice); *see also Trabelsi v. Belgium*, App. No. 140/10, 44 Eur. Ct. H. R. 2, 3 (2014), *available at* https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/CASE%20OF%20TRABELSI%20v.%20BELGIUM.pdf (noting that Trabelsi's application for refugee status had been rejected "on the grounds that he had committed offences contrary to the aims and principles of the United Nations within the meaning of Article 1 f) c of the Geneva Convention"); Gov't Ex. 1, Decl. of Robert D. Lee ¶ 3 (Oct. 9, 2024).

sentenced him to ten years in prison "for, among other things, having attempted to destroy the military base of Kleine-Brogel with explosives, having committed forgery, and having been the instigator of a criminal association formed for the purpose of attacking people and property." *Id.*

On April 7, 2006, while Trabelsi was serving his ten-year sentence in Belgium, a grand jury in the United States indicted him for various offenses. *See* Dkt. No. 3, *United States v. Trabelsi*, 1:06-cr-89-RDM, Dkt No. 3 (D.D.C. Apr. 7, 2006). A superseding indictment then was issued on November 16, 2007, which charged Trabelsi with, *inter alia*: conspiracy to kill United States nationals outside of the United States; conspiracy and attempt to use weapons of mass destruction against nationals of the United States; conspiracy to provide material support and resources to a foreign terrorist organization, specifically al-Qaeda; and providing material support and resources to a foreign terrorist organization, specifically, al-Qaeda. *See* Dkt. No. 6, *Trabelsi*, 1:06-cr-89-RDM (D.D.C. Apr. 7, 2006); *see also Trabelsi,* 845 F.3d at 1184; Pet. ¶ 31.

As part of the criminal case, on April 4, 2008, the U.S. Government requested Belgium to extradite Trabelsi to face criminal proceedings in the United States. *Trabelsi*, 845 F.3d at 1184. Trabelsi challenged the extradition request in Belgium, arguing that his extradition would violate the Extradition Treaty between the United States and Belgium,[4] on the theory that he was being criminally prosecuted in the United States for the same offenses he had been tried and convicted of in Belgium. *Id.* Belgian courts, however, concluded that much of the arrest warrant filed in the

[4] *See* Extradition Treaty between the United States of America and the Kingdom of Belgium, signed 27 April 1987 (1987 Treaty); and Instrument as contemplated by Article 3(2) of the Agreement on Extradition between the United States of America and the European Union signed 25 June 2003, as to the application of the Extradition Treaty between the United States of America and the Kingdom of Belgium signed 27 April 1987 (Instrument), with Annex, signed 16 December 2004. The Annex to the Instrument reflects the integrated text of the provisions of the 1987 Treaty and the U.S.-EU Extradition Agreement. *See* Instrument, T.I.A.S. No. 10-201, 2010 WL 10861162. The Annex is referred to hereinafter as the U.S.-Belgium Extradition Treaty or the Treaty, and is available as Exhibit D to the Petition.

United States against Trabelsi was enforceable, and the Belgian Minister of Justice granted the United States' request on November 23, 2011. *Id.* As part of Trabelsi's extradition, the U.S. Embassy in Belgium provided a diplomatic note dated August 10, 2010. *See* Pet. Ex. A (ECF No. 1-1). The 2010 note set forth the charges against Trabelsi, the penalties those charges carried, and the sentencing and clemency options should Trabelsi be found guilty; and stated that, if Trabelsi was "extradited to the United States, the United States w[ould] not extradite him to a third State for an offense committed prior to his surrender without the consent of the Government of Belgium." Pet. Ex. A.

On October 3, 2013, after Trabelsi completed his criminal sentence in Belgium, the Belgian government extradited him to the United States, where he was paroled into the United States for criminal prosecution and arraigned the same day in his District of Columbia criminal proceedings. *Trabelsi*, 845 F.3d at 1185. Trabelsi filed a number of challenges to both his confinement and the basis for his criminal proceedings that lengthened those criminal proceedings. For instance, Trabelsi challenged his confinement in Rappahanock Regional Jail, specifically the Special Administrative Measures (SAMs) that governed his detention. The federal court presiding over his criminal proceedings largely found those restrictions to be reasonable, noting that the SAMs were implemented "in part, on the evidence that Trabelsi was convicted for assaulting a prison guard, that he attempted to escape from prison and was considered a high security risk by Belgium, and that he continue[d] to show a commitment to al Qaeda's goals." *United States Trabelsi*, No. 06-cr-89, 2014 WL 12682266, at *1 (D.D.C. June 18, 2014). Trabelsi also filed several unsuccessful motions to dismiss the indictment, on the theory that his extradition and prosecution were not permitted by the U.S.-Belgium Extradition Treaty, various diplomatic notes regarding his extradition, and certain decisions by Belgian courts interpreting the Extradition Treaty—a theory that multiple courts

rejected. *See United States v. Trabelsi*, No. 23-3034, 2023 WL 3243104, at *1 (D.C. Cir. Apr. 28, 2023); *United States v. Trabelsi*, 28 F.4th 1291, 1302 (D.C. Cir. 2022); *Trabelsi*, 845 F.3d at 1193.

Trabelsi was ultimately tried in front of a jury in the U.S. District Court for the District of Columbia from June to July 2023. *See generally United States v. Trabelsi*, 1:06-cr-89-RDM (D.D.C.). Following three days of deliberation, on July 14, 2023, a jury found Trabelsi not guilty of three counts of conspiracy to kill United States nationals outside of the United States, conspiracy to use a weapon of mass destruction, and attempt to use a weapon of mass destruction. *United States v. Trabelsi*, 1:06-cr-89-RDM, Dkt. No. 651 (D.D.C. July 14, 2023).

B. Trabelsi's Removal Proceedings

Trabelsi was subsequently transferred to the custody of U.S. Immigration and Customs Enforcement (ICE) at the Farmville Detention Center (FDC) on July 17, 2023. Pet. ¶ 48. On July 19, 2023, the Department of Homeland Security (DHS) filed a Notice to Appear (NTA) commencing removal proceedings against Trabelsi, which was served on him the next day. Pet. ¶ 49; Gov't Ex. 2, NTA.[5] DHS charged Trabelsi as inadmissible under 8 U.S.C. § 1182(a)(7)(A)(i)(I), as an "arriving alien" who lacked valid entry documents. Gov't Ex. 2, NTA. On July 19, 2023, ICE also issued Trabelsi a Notice of Custody Determination, which informed Trabelsi he would be detained by DHS pending a final administrative determination in his removal proceedings. *See* Gov't Ex. 3, Notice of Custody Determination. That form includes a template line that this determination was made "[p]ursuant to the authority contained in section 236 of the [INA]," *i.e.*, 8 U.S.C. § 1226.

[5] As Trabelsi incorporates events and documents surrounding his immigration removal proceedings, including, *inter alia*, his notice of custody determination, *see* Pet. ¶ 50, the Government includes these items for the Court herein as they are incorporated by reference. *See, e.g.*, *Lokhova v. Halper*, 441 F. Supp. 3d 238, 252 (E.D. Va. 2020) ("Without converting a motion to dismiss into a motion for summary judgment, a court may consider the attachments to the complaint, documents incorporated in the complaint by reference, and documents attached to the motion to dismiss, so long as they are integral to the complaint and authentic." (citation omitted)).

Gov't Ex. 3. Trabelsi acknowledged receipt of the custody determination and requested that an immigration judge review his custody determination. Gov't Ex. 3.

On September 6, 2023, Trabelsi appeared with counsel for a master calendar hearing in his removal proceedings. *See* Gov't Ex. 4, IJ Op. at 5. He admitted to the allegations in the NTA—thereby conceding his removability from the United States—but declined to designate a country of removal, leading the immigration judge (IJ) to direct that he be removed to Tunisia, the country of his nationality and citizenship. Gov't Ex. 4 at 5. However, on September 22, 2023, Trabelsi filed written pleadings designating Belgium as his preferred country of removal. Gov't Ex. 4 at 5. On October 19, 2023, Trabelsi filed a Form I-589, Application for Asylum and Withholding of Removal, seeking deferral of removal under the Convention Against Torture (CAT) to Tunisia based on a fear of torture by the Tunisian government. Gov't Ex. 4 at 5. Over DHS's objections, the IJ designated Belgium as the primary country of removal with Tunisia listed as the only alternative country. Gov't Ex. 4 at 6.

On November 28, 2023, DHS filed a Form I-261, Additional Charges of Admissibility/Deportability, to amend the NTA previously filed with the immigration court. *See* Gov't Ex. 4 at 6. It included 29 additional factual allegations and seven additional charges of inadmissibility. *See* Gov't Ex. 4 at 6. DHS charged Trabelsi as inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude; and under 8 U.S.C. § 1182(a)(2)(B), for having been convicted of two or more non-political offenses for which the aggregate sentences were five years' confinement or more. DHS also lodged four charges against Trabelsi under 8 U.S.C. § 1182(a)(3)(B)(i)(I), for having provided material support to a terrorist organization, and attempting or conspiring to use a weapon or dangerous device to endanger the safety of others and/or substantially damage property; and one charge under 8 U.S.C. § 1182(a)(3)(B)(i)(VIII), for

having received military-type training from a terrorist organization. Gov't Ex. 4 at 6. Trabelsi again conceded he was removable from the United States, this time as a noncitizen convicted of a crime of moral turpitude and a noncitizen convicted of two or more non-political offenses carrying the requisite sentences. Gov't Ex. 4 at 7. He did not contend DHS lacked authority to prosecute removal proceedings against him.

On July 15, 2024, while Trabelsi's removal proceedings were ongoing, the Belgian government sent another diplomatic note to the U.S. Embassy in Belgium, stating that "the President of the Tribunal of first instance of Brussels ordered the Belgian Government to address a request to [DHS] and [ICE] for the return of [Petitioner] on the Belgian territory." Pet. Ex. C. The note added that "[i]n fulfilment of this order, the Government of Belgium transmits this Diplomatic Note, with the abovementioned request, and kindly asks the Government of the United States to initiate negotiations with a view to a possible return, provided there are no impediments to which the Belgian Government [wa]s bound." Pet. Ex. C. The note provided no further demands that Trabelsi be immediately returned, any kind of timetable for return, or any other means of enforcement. *See* Pet. Ex. C.

On August 30, 2024, the IJ issued her ruling. *See* Gov't Ex. 4. She found Trabelsi removable as charged, including the terrorism-related charges under 8 U.S.C. § 1182(a)(3)(B). *See* Gov't Ex. 4 at 41–45, 58. She ordered Trabelsi removed from the United States to Belgium, or alternatively to Tunisia, and granted his request for deferral of removal under the CAT to Tunisia.[6] Gov't

[6] A grant of withholding or deferral of removal under the regulations implementing the CAT does not mean a noncitizen is not removable from the United States. Rather, it is a form of relief that restrains the United States from removing a noncitizen to a specific country where he demonstrates he is likely to be tortured. *See* 8 C.F.R. §§ 1208.16, 1208.17; *Nasrallah v. Barr*, 590 U.S. 573, 582 (2020) ("An order granting CAT relief means only that, notwithstanding the order of removal, the noncitizen may not be removed to the designated country of removal, at least until conditions change in that country.").

Ex. 4 at 58. DHS subsequently appealed the IJ's grant of CAT relief to the Board of Immigration Appeals (BIA) on September 24, 2024. Gov't Ex. 5, BIA Appeal. Trabelsi did not cross-appeal to the BIA. DHS's appeal remains pending, and thus Trabelsi's removal order is not yet final. *See Johnson v. Guzman Chavez*, 594 U.S. 523, 534 (2021) (explaining that a removal order becomes administratively final "once the BIA has reviewed the order (or the time for seeking the BIA's review has expired)").

C. Trabelsi's Habeas Petition and Complaint

On August 28, 2024, Trabelsi filed a combined Petition for Writ of Habeas Corpus and Civil Complaint in this Court, challenging both the fact of his immigration detention and the conditions of his confinement at the FDC. *See* Pet. ¶¶ 1–134. He raises four Counts against the Government in habeas. In Count 1, he contends his immigration detention violates the U.S.-Belgium Extradition Treaty, because Belgium has sent diplomatic notes "objecting to his continued detention and requesting his return" to Belgium. *See* Pet. ¶¶ 95–100. In Count 2, he contends his detention violates Article 15 of the Treaty, which memorializes the doctrine of specialty, because he was detained without being given 15 days to depart the United States after his acquittal. *See* Pet. ¶¶ 101–07. In Count 3, he contends the Government lacks statutory authority to maintain removal proceedings against him because he did not seek admission to the United States following his acquittal; consequently, the Government lacks authority to detain him pending those proceedings. *See* Pet. ¶¶ 108–12. And in Count 4, he contends his detention violates the Due Process Clause, because the Government lacks any legitimate reason to detain him in light of his desire to return to Belgium and Belgium's purported willingness to accept him. *See* Pet. ¶¶ 113–20. For relief, he requests a declaratory judgment and an order directing the Government to "return Mr. Trabelsi in accordance with the Treaty and diplomatic notes, requesting his return to Belgium without delay," or alternatively an order directing the Government "to release [him] from his current detention

until he has been provided a reasonable opportunity to depart from the United States voluntarily." Pet. at 24–25.

ARGUMENT

I. This Court Lacks Jurisdiction to Review the Legality of Trabelsi's Removal Proceedings and Attendant Detention and Should Deny the Petition.

This Court should deny the Petition because two INA provisions, at 8 U.S.C. §§ 1252(b)(9) and 1252(a)(5), divest this Court of jurisdiction to review Trabelsi's sole argument against his immigration detention—namely, that the Government lacks authority to subject him to removal proceedings and attendant detention. First, 8 U.S.C. § 1252(b)(9) consolidates review of all legal questions "arising from" removal proceedings into review of a final removal order itself. Specifically, Section 1252(b)(9) states:

> Judicial review of **all questions of law and fact**, including interpretation and application of constitutional and statutory provisions, **arising from any action taken or proceeding brought to remove an alien from the United States** under this subchapter **shall be available only in judicial review of a final order under this section.** Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

8 U.S.C. § 1252(b)(9) (emphases added). Section 1252(b)(9) is "a 'general jurisdictional limitation' and . . . 'an unmistakable zipper clause.'" *Aguilar v. ICE*, 510 F.3d 1, 9 (1st Cir. 2007) (quoting *Reno v. AADC*, 525 U.S. 471, 482–83 (1999)). "By its terms, the provision encompasses 'all questions of law and fact' and extends to both 'constitutional and statutory' challenges. Its expanse is breathtaking." *Id.* (quoting 8 U.S.C. § 1252(a)(5)).

Second, 8 U.S.C. § 1252(a)(5) provides that the courts of appeals have exclusive jurisdiction to review removal orders. Specifically, Section 1252(a)(5) states:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, **a petition for review filed with an appropriate court of appeals** in accordance with

> this section shall be the **sole and exclusive means for judicial review of an order of removal** entered or issued under any provision of this chapter, except as provided in subsection (e). For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

8 U.S.C. § 1252(a)(5) (emphases added). One of Congress's primary aims in enacting Section 1252(a)(5) was to eliminate the district courts' habeas jurisdiction to review removal orders and to consolidate such review in the courts of appeals. *See Nasrallah*, 590 U.S. at 580 ("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."); *Jahed v. Acri*, 468 F.3d 230, 233 (4th Cir. 2006) ("The REAL ID Act eliminated access to habeas corpus for purposes of challenging a removal order.") (citing 8 U.S.C. § 1252(a)(5)).

Section 1252(b)(9) thus consolidates judicial review of legal questions arising from removal proceedings into any review of a final removal order itself, and Section 1252(a)(5) gives exclusive jurisdiction over such questions to the courts of appeals. Put another way, Sections 1252(a)(5) and 1252(b)(9) dictate "that *any* issue—whether legal or factual—arising from *any* removal-related activity can be reviewed *only* through the PFR [petition for review] process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016). In short, Section 1252 "consolidat[es] all claims that *may be brought in removal proceedings* into one final petition for review of a final order in the court of appeals." *Casa De Maryland v. DHS*, 924 F.3d 684, 697 (4th Cir. 2019) (citation omitted); *see Nasrallah v. Barr*, 590 U.S. 573, 580 (2020) ("In other words, a noncitizen's various challenges arising from the removal proceeding must be 'consolidated in a petition for review and considered by the courts of appeals.'") (quoting *INS v. St. Cyr*, 533 U.S. 289, 313 & n.37 (2001)); *Johnson v. Whitehead*, 647 F.3d 120, 124 (4th Cir. 2011) ("Petitions for review are the appropriate vehicle for judicial review of legal and factual questions arising in removal

proceedings.").

The habeas claims fall squarely within the ambit of Sections 1252(b)(9) and 1252(a)(5). Trabelsi's sole argument against his detention is that "removal proceedings are not appropriate for people, like Mr. Trabelsi, who have never sought admission to the United States." Pet. ¶ 7. As a consequence of the purported illegality of his removal proceedings, Trabelsi argues he is "*therefore*[] not subject to detention pending removal proceedings." Pet. ¶ 112 (emphasis added). Trabelsi's argument against detention is entirely grounded in his argument against removal proceedings. To find Trabelsi's detention unlawful, the Court necessarily would be required to conclude that the Government lacks authority to subject Trabelsi to removal proceedings in the first place. But the question of whether the Government has authority to subject Trabelsi to removal proceedings "aris[es] from" the removal proceeding itself. 8 U.S.C. § 1252(b)(9). That is because the question of the legality of his removal proceedings "'came into being' or 'originated'" from the initiation and prosecution of those proceedings. *Lopez v. Doe*, 681 F. Supp. 3d 472, 482 (E.D. Va. 2023) (Alston, J.).[7] As Government's authority to initiate removal proceedings is the type of issue "that *may be brought in removal proceedings*," *Casa De Maryland*, 924 F.3d at 697, only the appropriate court of appeals has jurisdiction to decide that question in a properly filed petition for review.

Trabelsi may argue that the Government's argument is foreclosed by *Jennings v. Rodriguez*, 583 U.S. 281 (2018), but he would be incorrect. In that case, the Supreme Court held that Section 1252(b)(9) did not strip it of jurisdiction over habeas claims challenging whether three INA provisions—8 U.S.C. §§ 1225(b), 1226(a), and 1226(c)—authorized "prolonged detention in the

[7] For this reason, Trabelsi's claim is different from the habeas petitioner's claim in *Lopez*. In that case, this Court held that the question of the petitioner's citizenship did not "arise from" removal proceedings, and thus Section 1252(b)(9) did not apply, because the issue had been evaluated by the Government before the initiation of removal proceedings. *See Lopez*, 681 F. Supp. 3d at 482.

absence of an individualized bond hearing." *Jennings*, 583 U.S. at 282. The Court reasoned that prolonged detention claims are "too remote" to be viewed as "arising from" removal proceedings, *id.* at 293 & n.3, and that interpreting Section 1252(b)(9) to deprive it of jurisdiction over prolonged detention claims would make those claims "effectively unreviewable," *id.* at 293.

Neither of those considerations apply here. First, the noncitizens in *Jennings* challenged the *length* of their detention. Unlike Trabelsi, they did not "challeng[e] the decision to detain them in the first place or to seek removal." *Id.* at 294. Even if legal challenges to the length of detention may not arise from removal proceedings, *see id.* at 292–96, Trabelsi's challenge to the Government's authority to subject him to removal proceedings does so "arise." That is because the question of whether Trabelsi may be subjected to removal proceedings and detained thereto "'came into being' or 'originated'" from the initiation and prosecution of the removal proceedings themselves. *Lopez*, 681 F. Supp. 3d at 482.

Second, applying Section 1252(b)(9) to Count 3 would not make Trabelsi's challenge to the authority of his removal proceedings "effectively unreviewable." *Jennings*, 583 U.S. at 293. Unlike prolonged detention claims, which become moot upon a detainee's release from custody, Trabelsi's claim does not turn on whether he is detained or not. Instead, it turns on whether the Government may subject him to removal proceedings *at all*, and that legal issue can be litigated in those proceedings, regardless of whether Trabelsi is detained. Moreover, such a threshold defense against removal proceedings is only reviewable by the appropriate court of appeals. *See* 8 U.S.C. § 1252(b)(9); *see also Whitehead*, 647 F.3d at 124 (reviewing and deciding the question of whether there could be removal proceedings against a habeas petitioner on the ground that he was a U.S. citizen). Because Trabelsi can obtain review of the legal questions presented in the Petition through his removal proceedings and in the court of appeals, *Jennings* does not foreclose the application

of Section 1252(b)(9).

II. Even if the Court Could Review the Petition, Trabelsi's Detention is Lawful.

A. Count 3: Trabelsi's Detention is Statutorily Authorized.

Even if this Court were to reach the merits, Trabelsi's detention is lawful under the INA. In Count 3, Trabelsi contends his detention is ultra vires because he "was forcibly paroled" into the country and "does not seek admission to the United States." Pet. ¶ 109. Thus, he "cannot be treated as an applicant for admission and is not properly subject to removal proceedings" or attendant immigration detention. Pet. ¶ 112. He relies primarily on *Matter of Badalamenti*, 19 I. & N. Dec. 623 (BIA 1988), and its progeny, which generally say that a noncitizen who is involuntarily paroled into the country cannot be deemed an "applicant for admission" and subjected to removal proceedings absent some "evidence that the alien affirmatively seeks admission or is otherwise subject to removal." *United States v. Brown*, 148 F. Supp. 2d 191, 198 (E.D.N.Y. 2001).

Trabelsi's argument is outdated and incorrect. *Badalamenti* was decided in 1988, when the INA provided for removal proceedings against noncitizens "seeking admission or readmission to" the United States. Immigration and Nationality Act of 1952, Pub. L. No. 414–477, § 235(a), 66 Stat. 163, 198–99 (1952). Based on that language, the BIA held there must be evidence that a noncitizen is seeking admission for the Government to initiate immigration proceedings. *Badalamenti*, 19 I. & N. Dec. at 626–27.

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3009 (1996), which amended the definition of an "applicant for admission" to remove any reference to a noncitizen's intent. *See* IIRIRA § 302(a). The operative (and current) version of the INA reads:

> An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States

waters) shall be deemed for purposes of this chapter an applicant for admission.

8 U.S.C. § 1225(a)(1)(A). This definition looks solely to whether a noncitizen is "present in the United States" or "arrives in the United States." *Id.* The statute does not speak of intent. An "applicant for admission" thus includes "not just those who are expressly seeking permission to enter, but also those who are present in this country without having formally requested or received such permission, or who have been brought in against their will under certain circumstances." *Matter of Lemus*, 25 I. & N. Dec. 734, 743 (BIA 2012). Thus, *Badalamenti* and the cases that rely upon it are no longer good law. *See Matter of Solis-Caicedo*, 2004 WL 880221, at *2 (BIA Mar. 8, 2004) (unpublished) (permitting removal proceedings against a noncitizen interdicted in international waters and involuntarily brought to the United States for prosecution, because *Badalamenti* is "no longer controlling in this situation"); Immigration and Naturalization Service Legal Op. 98-18, 1998 WL 1806688, at *3 (Sept. 22, 1998) ("Because [8 U.S.C. § 1225(a)(1)] does not make the alien's intent relevant, the position of the Service is that *Badalamenti* is no longer a binding precedent.").

As *Badalamenti* is no longer good law, the plain language of the INA provides the relevant framework here. Under that rubric, Trabelsi's detention is lawful under 8 U.S.C. § 1225(b)(2)(A). Trabelsi is "present in the United States," which means he "shall be deemed an applicant for admission." 8 U.S.C. § 1225(a)(1)(A). Because he is an applicant for admission, and because he "is not clearly and beyond a doubt entitled to be admitted," he "shall be detained for a proceeding under section 1229a of this title." *Id.* § 1225(b)(2)(A); *see also* 8 C.F.R. § 235.3(c)(1) (providing that "any arriving alien who appears to the inspecting officer to be inadmissible, and who is placed in removal proceedings pursuant to [8 U.S.C. § 1229a] shall be detained in accordance with

[8 U.S.C. § 1225(b)]").[8] The INA thus supplies DHS with express statutory authority to initiate and prosecute "a proceeding under section 1229a" against Trabelsi, and to "detain[]" him for the duration of that proceeding. 8 U.S.C. § 1225(b)(2)(A); *see Clark v. Martinez*, 543 U.S. 371, 373 (2005) ("An alien arriving in the United States must be inspected by an immigration official, 66 Stat. 198, as amended, 8 U.S.C. § 1225(a)(3), and, unless he is found 'clearly and beyond a doubt entitled to be admitted,' must generally undergo removal proceedings to determine admissibility, § 1225(b)(2)(A). Meanwhile the alien may be detained, subject to the Secretary's discretionary authority to parole him into the country. See § 1182(d)(5); 8 CFR § 212.5.").

Trabelsi alleges in the Petition that he is detained pursuant to 8 U.S.C. § 1226, not 8 U.S.C. § 1225. *See* Pet. ¶¶ 50, 117. As an initial matter, the Court is not "bound to accept as true [this] legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Langford v. Joyner*, 62 F.4th 122, 124 (4th Cir. 2023) (same). For the reasons discussed above, Trabelsi is lawfully detained under Section 1225(b)(2)(A). In any event, Trabelsi's detention would still be statutorily permitted under Section 1226. As noted, DHS had authority to initiate removal proceedings under Section 1229a because Trabelsi is an applicant for admission. *See* 8 U.S.C. § 1225(a)(1)(A); *id.* § 1225(b)(2)(A). DHS issued a Notice to Appear and charged Trabelsi with inadmissibility under various provisions of Section 1182(a), some of which Trabelsi conceded. *See* Gov't Ex.4 at 1–2, 5. DHS's decision to charge Trabelsi as inadmissible was authorized under Section 1229a, which provides that "[a]n alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title." 8 U.S.C.

[8] The Secretary has discretion to parole such noncitizens from custody. *See* 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 235.3(b)(2)(iii) (providing that a noncitizen in expedited removal proceedings with credible fear "shall be detained" during removal proceedings, "except that parole of such alien * * * may be permitted"). However, the availability of parole does not detract from the Secretary's statutory authority to detain Trabelsi in the first place.

§ 1229a(a)(2). An immigration judge ultimately found Trabelsi removable from the United States on multiple grounds, including under 8 U.S.C. § 1182(a)(3)(B)(i)(I) for having engaged in terrorist activity, and 8 U.S.C. § 1182(a)(3)(B)(i)(VIII) for having received military-type training from a terrorist organization. *See* Gov't Ex. 4 at 1–2, 44–45.

Based on the initiation of removal proceedings and the specific charges of removability lodged and sustained against him, Trabelsi would also be properly subject to mandatory detention under Section 1226. Section 1226(a) authorizes the Government to "arrest[] and detain[]" a noncitizen "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). Section 1226(c), in turn, mandates the arrest of certain noncitizens, including any noncitizen who—like Trabelsi—"is inadmissible under section 1182(a)(3)(B) of this title." *Id.* § 1226(c)(1)(D). Section 1226(c) then sharply limits the Government's discretion to release such noncitizens in limited circumstances not relevant here. *See id.* § 1226(c)(2); *see also Nielsen v. Preap*, 586 U.S. 392, 409 (2019) (characterizing "subsection (c) [as] simply a limit on the authority conferred by subsection (a)"). Thus, even if Trabelsi is correct that he is detained pursuant to Section 1226, his detention is not only authorized, but *mandatory*, as "[t]he Secretary may *not* release aliens 'described in' subsection (c)(1)." *Preap*, 586 U.S. at 409. In short, regardless of whether Trabelsi is detained under Section 1225 or Section 1226, DHS has acted pursuant to express statutory authority, and Count 3 must fail on this basis as well.

B. Count 4: Trabelsi's Detention is Constitutional.

In Count 4, Trabelsi argues his immigration detention violates the substantive component of the Due Process Clause. *See* Pet. ¶¶ 113–20. He asserts that his detention "is not reasonably related" to the Government's legitimate purpose of ensuring a noncitizen's appearance for removal proceedings and, eventually, removal, because he wishes "to return to Belgium, and Belgium has asked the U.S. to return him there." Pet. ¶¶ 118–19.

Count 4 fails on the merits. Trabelsi is detained under 8 U.S.C. § 1225(b)(2)(A), which mandates the detention of an applicant for admission pending removal proceedings under 8 U.S.C. § 1229a. *See supra* at Argument § II.A; 8 U.S.C. § 1225(b)(2)(A). Alternatively, the Court might determine Trabelsi is detained under 8 U.S.C. § 1226, which in this case mandates Trabelsi's detention pending removal proceedings. *See supra* at Argument § II.A; 8 U.S.C. §§ 1226(c)(1)(D), (c)(2). Trabelsi's detention pending removal proceedings is constitutional under either statute. The Supreme Court has repeatedly "recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process." *Demore v. Kim*, 538 U.S. 510, 523 (2003) (holding that mandatory detention under 8 U.S.C. § 1226(c) is facially constitutional); *see, e.g.*, *Wong Wing v. United States*, 163 U.S. 228, 235 (1896); *Reno v. Flores*, 507 U.S. 292, 305–06 (1993); *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001). Likewise, the Fourth Circuit and judges of this Court have held that detention pending removal proceedings is constitutional, and that "during the deportation process, th[e] government['s] interest includes detention." *Miranda v. Garland*, 34 F.4th 338, 364 (4th Cir. 2022); *see Toure*, 458 F. Supp. 3d at 403 ("Preventing detained aliens from absconding and ensuring that they appear for removal proceedings is a legitimate governmental objective.") (citations omitted).

This rule makes particularly good sense in the context of Trabelsi's presence in the United States. Trabelsi was paroled into the country for criminal prosecution under 8 U.S.C. § 1182(d)(5)(A). *See* Pet. ¶ 109. After serving "the purposes of such parole," Trabelsi's case must now "be dealt with in the same manner as that of any other applicant for admission to the United States." 8 U.S.C. § 1182(d)(5)(A). As an applicant for admission, Trabelsi has the same legal protections and is treated as a noncitizen outside the United States. *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have

come within the territory of the United States and developed substantial connections with this country."). A noncitizen at the threshold of initial entry who has initially been found "not clearly and beyond a doubt entitled to be admitted," 8 U.S.C. § 1225(b)(2)(A), lacks any entitlement to enter the United States. Given this status, Trabelsi's temporary detention pending removal proceedings serves the Government's legitimate purpose of preventing him from absconding into the country and ensuring his appearance for eventual removal. As the Supreme Court put it "more than a century ago," removal proceedings "would be vain if those accused could not be held in custody pending the inquiry into their true character." *Demore*, 538 U.S. at 523 (quoting *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)).

Trabelsi's only argument is that his immigration detention is not "reasonably related" to the purposes of "ensur[ing] [his] appearance for removal and . . . ensur[ing] that removal can be effectuated," because the INA does not authorize his removal proceedings, *see* Pet. ¶ 117, and the Treaty "requires Mr. Trabelsi's return to Belgium," Pet. ¶¶ 116, 118–20.[9] For the reasons discussed above and below, those arguments are incorrect: Congress divested this Court of jurisdiction to evaluate the legality of Trabelsi's removal proceedings, *see supra* at Argument § I; but in any event, his proceedings and detention are statutorily authorized, *see supra* at Argument § II.A, and the Treaty does not require the United States to return Trabelsi to Belgium or prohibit his detention, *see infra* at Argument §§ II.C, II.D. Thus, the Government continues to detain Trabelsi for the legitimate purposes of preventing him from absconding and protecting the United States. *See Demore*, 538 U.S. at 526 (reiterating the Supreme Court's "longstanding view that the

[9] Notably, Trabelsi does not argue his civil immigration detention has become unconstitutionally prolonged, nor that the Constitution requires him to receive a bond hearing. *See* Pet. ¶¶ 113–20. Thus, decisions of this District addressing those issues, *e.g.*, *Portillo v. Holt*, 322 F. Supp. 3d 698 (E.D. Va. 2018), are not material to the legal issue presented here, namely, whether Trabelsi's detention is constitutionally permissible at all.

[g]overnment may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings").

In all events, even if Trabelsi were correct about the INA and the Treaty, there is still no due process violation. The Supreme Court confronted a similar legal issue in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), a case involving a lawful permanent resident returning from a nearly two-year trip abroad who was taken into immigration custody when he arrived at Ellis Island. *Id.* at 207–09. Mezei was denied notice and an opportunity to dispute the basis for his exclusion on national-security grounds, and critically for the purposes of this case, he was unable to depart Ellis Island because his home countries refused to "take him back." *Id.* at 207. Yet relying on the principles above, the Supreme Court concluded that his "continued exclusion" from the United States via his immigration detention "*[does not] deprive[] him of any statutory or constitutional right*"—regardless of the fact that he had no means to depart the United States. *Id.* at 215 (emphasis added). Even the dissent recognized that "[d]ue process does not invest any alien with a right to enter the United States." *Id.* at 222 (Jackson, J., dissenting). So too here. Although Trabelsi "desire[s] . . . to return to Belgium" and believes he should be allowed to "voluntarily depart the United States," Pet. ¶¶ 6, 118, this does not mean the United States is compelled by the Due Process Clause to "release [him] from his current detention," Pet. at 25. That is especially true because Trabelsi does not have any lawful status in Belgium or any means to return there, and thus an order to release him from custody would functionally amount to an order permitting his release into the United States at large, despite his conceded inadmissibility. *See supra Extradition de Trabelsi: l'Etat belge coupable d'une "violation manifeste"*; *see also* Gov't Ex. 1 ¶ 3; *infra* at Argument § II.C (explaining the force of the diplomatic notes). In sum, Trabelsi's detention is constitutional, and Count 4 lacks merit.

C. Count 1: Trabelsi's Detention Does Not Violate the Extradition Treaty or the Diplomatic Notes.

In Count 1 of the Petition, Trabelsi alleges that the Government, by detaining him and "fail[ing] to return him to Belgium," Pet. ¶ 99, has violated the U.S.-Belgium Extradition Treaty and two diplomatic notes sent by Belgium to the United States. *See* Pet. ¶¶ 95–100. Count 1 lacks merit and does not provide a basis for relief because the Treaty and diplomatic notes do not obligate the United States to return Trabelsi to Belgium.

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellín v. Texas*, 552 U.S. 491, 506 (2008); *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992) ("In construing a treaty . . . we first look to its terms to determine its meaning."). A "treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose." *Vitkus v. Blinken*, 79 F.4th 352, 362 (4th Cir. 2023) (citation omitted). If a treaty provision is ambiguous, "[i]t is well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.'" *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982)).

Trabelsi argues the United States is obligated by the Treaty and the 2022 and 2024 diplomatic notes "to return [him] to Belgium." Pet. ¶ 99. But at the outset, he fails to identify any specific language in the Treaty obligating the country that requests extradition (the Requesting State) to return an individual to the country that grants extradition (the Requested State) after the purposes of the extradition request have been served. *See* Pet. ¶¶ 95–100. Nor can he point to any such language applicable to his situation. In the Treaty, the United States and Belgium agreed to "return" an extradited person to the Requested State only in cases of "temporary surrender." *See* Treaty art. 12 ("Temporary and Deferred Surrender"). The relevant provision states:

> If the extradition request is granted in the case of a person who is being proceeded against or is serving a sentence in the Requested State, the Requested State may temporarily

> surrender the person sought to the Requesting State for the purpose of prosecution. **The person so surrendered** shall be kept in custody in the Requesting State and **shall be returned to the Requested State after the conclusion of the proceedings against that person, in accordance with conditions to be determined by agreement of the Contracting States.** The time spent in custody in the territory of the Requesting State will be deducted from the time remaining to be served in the Requested State.

Treaty art. 12.1 (emphasis added). However, Trabelsi was not "temporarily surrendered" to the United States under Article 12.1. At the time he was extradited, the Belgian criminal proceedings against him had concluded, and he had completed his criminal sentence. *See* Pet. ¶¶ 37–40 (stating that Trabelsi "completed his Belgian criminal sentence in June 2012" and was extradited to the United States in October 2013). Thus, he was not an individual who "[was] being proceeded against or [was] serving a sentence" at the time of extradition. Treaty art. 12.1.

Trabelsi's extradition occurred instead under Article 12.2, which provides for an individual's "deferred surrender." That provision states:

> The Requested State may postpone the surrender of a person who is being prosecuted or who is serving a sentence in that State. The postponement may continue until the prosecution of the person sought has been concluded and any sentence has been served.

Treaty art. 12.2. Trabelsi's extradition falls under this provision because Belgium "formally approved" his extradition to the United States in November 2011, while he was serving his criminal sentence in Belgium, but did not extradite him until October 2013, after his sentence was completed. Pet. ¶¶ 36–38. Unlike Article 12.1, there is no mention in Article 12.2 of any obligation of the Requesting State to return an extradited person to the Requested State at the conclusion of criminal proceedings. The Senate Report associated with the Treaty confirms this, as it notes that "[a] person *temporarily transferred* pursuant to the Treaty is to be returned to the Requested State at the conclusion of the proceedings in the Requesting State," but does not include the same summary for instances of deferred surrender. S. Exec. Rep. No. 104-28, at 13–14 (1996) (emphasis added); *see Baturin v. Commissioner of Internal Revenue*, 31 F.4th 170, 173 (4th Cir. 2022)

(looking to "[t]he legislative history of the Treaty's ratification" to "reinforce[]" the court's interpretation of the text). This shows the United States and Belgium agreed to return extradited individuals to the Requested State only in narrow circumstances not applicable here, namely, when a person is extradited while they are the subject of criminal proceedings or serving a criminal sentence in the Requested State. *See* Treaty art. 12.1. Article 12.2 contains no similar obligation, and this Court should not infer one. *See, e.g.*, *Alvarez-Machain*, 504 U.S. at 663–64 (declining to infer a prohibition on international abductions when a treaty provision already "embodies the terms of the bargain which the United States struck"); *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821) (Story, J.) ("[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be . . . an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty.").

Trabelsi may also attempt to rely on Article 15 ("Rule of Speciality"[10]) to establish an obligation to return him to Belgium. That article states in relevant part: "A person extradited under this Treaty may not be extradited to a third State for an offense committed prior to his surrender unless the surrendering State consents." Treaty art. 15.2. But that provision does not obligate the United States to return Trabelsi to Belgium, nor at any specific time. It merely prohibits his extradition to a third country. Although the Government is attempting to secure an order removing Trabelsi to his native Tunisia, *see* Gov't Ex. 5, the Government is not seeking to *extradite* him anywhere, which is a "significant" distinction. *Mironescu v. Costner*, 480 F.3d 664, 676 (4th Cir. 2007). There are considerable procedural and substantive differences between a removal proceeding and an extradition request, including the types of protections or relief that are available to the

[10] While the Treaty refers to the "Rule of Speciality," as discussed further below, the concept embodied in that Article is referred to in American courts as the "rule of specialty." *United States v. Day*, 700 F.3d 713, 722 (4th Cir. 2012).

concerned party. *See, e.g.*, *Barapind v. Reno*, 225 F.3d 1100, 1104–08 (9th Cir. 2000) (generally summarizing removal and extradition proceedings). That extradition is disallowed to a specific country does not mean removal is also prohibited there, nor on the same bases. More fundamentally, extradition is a matter between sovereign nations who have agreed "to impose mutual obligations to surrender individuals in certain defined sets of circumstances, following established procedures." *Alvarez-Machain*, 504 U.S. at 664. "[I]n contrast to extradition," the United States' decision to order a noncitizen removed "is a matter solely between the United States government and the individual seeking withholding of deportation. No other sovereign is involved." *McMullen v. INS*, 788 F.2d 591, 596 (9th Cir. 1986), *overruled on other grounds by Barapind v. Enomoto*, 400 F.3d 744 (9th Cir. 2005). To import diplomatically negotiated limitations on extradition into removal proceedings, where no similar diplomatic considerations exist, would be a "usurpation of power, and not an exercise of judicial functions." *The Amiable Isabella*, 19 U.S. at 71 (Story, J.).

Lacking any textual support in the Treaty itself, Trabelsi contends the unilateral diplomatic notes that Belgium sent to the United States in 2022 and 2024 obligate the United States to return him to Belgium, on the theory that diplomatic notes "have the same legal status and force of law as the Treaty itself." Pet. ¶ 97 (citing *United States v. Suarez*, 791 F.3d 363, 367 (2d Cir. 2015)); *see* Pet. ¶¶ 95, 97–100. But the Government of Belgium did not demand the Government of the United States to return Trabelsi. The 2022 note says that "*the Brussels Court of Appeals ordered* the Belgian Government to request by diplomatic note the return of Nizar Trabelsi and to discuss the conditions of his return," and it informs the United States that "the Government of Belgium transmits this Diplomatic Note, with the abovementioned request, in fulfillment of the order." Pet. Ex. B (emphasis added). The 2024 note similarly says that "*the President of the Tribunal of first instance of Brussels ordered* the Belgian Government to address a request to the [U.S.

Government] for the return of Nizar Trabelsi on the Belgian territory." Pet. Ex. C (emphasis added). It further says: "In fulfilment of this order, the Government of Belgium transmits this Diplomatic Note, with the abovementioned request, and kindly asks the Government of the United States to initiate negotiations with a view to a possible return, provided there are no impediments to which the Belgian Government is bound." Pet. Ex. C. The note also emphasizes that "an appeal procedure against the orders is still ongoing." Pet. Ex. C.

Neither of these unilateral notes demands Trabelsi's return. Instead, the notes only inform the United States that Belgian courts have ordered the Belgian executive to "request . . . the return of Nizar Trabelsi," Pet. Ex. B, and they "ask[] the Government of the United States to initiate negotiations with a view to a possible return," Pet. Ex. C. The 2024 note further emphasizes the Belgian executive has appealed from the Belgian judiciary's directive to transmit the note to the United States. *See id.* A request to "initiate negotiations" with only "a view to a possible return," sent in compliance with a judicial order—while an appeal from that judicial order is ongoing—is not the same as a request for Trabelsi's return. As the D.C. Circuit explained when faced with a separate challenge based on the notes, "[t]he [2022] note merely states that [Trabelsi's] return to Belgium is being requested in accordance with the Court of Appeal's order. Neither that court-ordered request, nor the absence of any language expressing disagreement with the Court of Appeal's holding, demonstrates that Belgium's official position has changed." *Trabelsi*, 2023 WL 3243104, at *1. Moreover, Trabelsi lacks legal residency status in Belgium. *See supra Extradition de Trabelsi: l'Etat belge coupable d'une "violation manifeste"*; Gov't Ex. 1 ¶ 3. He also lacks travel documents to Belgium, which would not be expected if Belgium had requested and intended to accept his return.

Finally, and even assuming *arguendo*—despite their language—that the notes supported

Trabelsi's immediate return to Belgium, the diplomatic notes in this context do not "have the same legal status and force of law as the Treaty itself." Pet. ¶ 97 (citing *Suarez*, 791 F.3d at 367). The Treaty, at Article 12.1, potentially contemplates the Contracting States may bind themselves via diplomatic notes insofar as it requires an extradited person to be returned to the Requested State "in accordance with conditions to be determined by agreement of the Contracting States." Treaty art. 12.1. But Belgium's unilateral notes only convey information. They do not contain any "agreement of the Contracting States." *Id.* Moreover, as explained, Article 12.1 applies only in cases of "temporary surrender." Trabelsi was extradited under Article 12.2 as a case of "deferred surrender," and that Article does not address agreements of the Contracting States or diplomatic notes at all. The Second Circuit's decision in *Suarez* is not to the contrary, as the court there did not purport to categorically elevate diplomatic notes to "the same legal status and force of law as the Treaty itself," as Trabelsi contends. Pet. ¶ 97. Instead, the Second Circuit merely noted the uncontroversial proposition that, for purposes of a standing inquiry, diplomatic notes can shed light on state-parties' expectations in the context of an individual extradition agreement. *See Suarez*, 791 F.3d at 367 ("Diplomatic Notes implicate the same international legal rights as treaties because a violation of an extradition agreement may be an affront to the surrendering sovereign.") (citation omitted). Nothing about *Suarez* supports Trabelsi's position here. In sum, Count 1 lacks merit because the Treaty and diplomatic notes do not require Trabelsi's return to Belgium.

D. Count 2: Article 15 of the Treaty Does Not Prohibit Civil Immigration Detention.

Finally, in Count 2, Trabelsi contends his immigration detention violates the doctrine of specialty under Article 15 of the Treaty. *See* Pet. ¶¶ 101–07. Trabelsi's claim fails because the doctrine of specialty is inapplicable to and does not prohibit civil immigration detention.

Article 15 of the Treaty provides that an extradited individual "may not be detained, tried,

or punished, except for: (a) the offense for which extradition has been granted . . . ; (b) an offense committed after the extradition of the person; or (c) an offense for which the executive authority of the Requested State consents to the person's detention, trial, or punishment," unless the extradited individual does not depart within 15 days of being free to leave. Treaty arts. 15.1, 15.3. To start, the plain language of Article 15 demonstrates it applies to criminal processes. The Article prohibits an extradited individual from being "detained, *tried*, or *punished*, except for" specifically enumerated types of "*offense[s]*." Treaty art. 15.1 (emphases added). Although detention occurs under both criminal and civil processes, "trial" and "punishment" in the context of an extradition agreement are concepts expressly associated with criminal law. *See, e.g.*, *Punishment*, Black's Law Dictionary (12th ed. 2024) ("A sanction—such as a fine, penalty, confinement, or loss of property, right, or privilege—assessed against a person who has violated the law."); Treaty art. 2.1 (establishing that the Treaty applies to criminal offenses "punishable . . . by deprivation of liberty for a maximum period of more than one year"). Likewise, an "offense for which extradition has been granted," Treaty art. 15.1(a), refers only to a criminal offense, as extradition treaties do not apply to civil offenses, such as immigration charges. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (explaining that a removal proceeding "is a purely civil action to determine eligibility to remain in this country"); *Zadvydas*, 533 U.S. at 690 ("The [removal] proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect."). Thus, the word "detain[]" in the Treaty logically does not refer to civil immigration detention, particularly in light of the surrounding language in the Treaty and "the principle of *noscitur a sociis*—a word is known by the company it keeps." *Yates v. United States*, 574 U.S. 528, 543 (2015). To read Article 15 as prohibiting civil immigration detention would improperly "ascrib[e] to one word a meaning so broad that it is inconsistent with its accompanying words." *Id.* (citation omitted);

United States v. Williams, 553 U.S. 285, 294 (2008) (explaining that "a word is given more precise content by the neighboring words with which it is associated").

Besides the plain language, the legislative history of the Treaty confirms Article 15 does not apply here. When analyzing the Treaty, the Senate Foreign Relations Committee eschewed any indication the rule of specialty applies to civil immigration detention. The Committee explained that Article 15 is "[d]esigned to ensure that a fugitive surrendered for one offense is not tried for other crimes." S. Exec. Rep. No. 104-28, at 14 (1996). Article 15 thus "prevents a request for extradition from being used as a subterfuge to obtain custody of a person for trial or service of a sentence on different charges that might not be extraditable or properly documented when the request is granted." *Id.* The Committee's references to "tri[al] for other crimes" and "service of a sentence on different charges," *id.*, supports the conclusion that the doctrine is not applicable to immigration detention.

Finally, courts have long recognized that rule-of-specialty provisions in other treaties are concerned with the criminal process. The doctrine was first articulated in *United States v. Rauscher*, 119 U.S. 407 (1886), in which the Supreme Court held it unlawful for a sailor extradited by the United Kingdom to be tried in the United States on any charges besides those specified in the extradition request. The Court articulated the doctrine as a limitation on criminal proceedings. It explained that when brought into this country pursuant to an extradition treaty, an extradited person "shall not be *arrested or tried* for any other offense than that with which he was charged in those proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought." *Id.* at 424 (emphasis added); *see id.* at 430 ("[A] person who has been brought within the jurisdiction of the court, by virtue of proceedings under an extradition treaty, can only be *tried* for one of the offenses described in that treaty, and for the offense with

which he is *charged* in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings.") (emphases added). The Court distinguished the doctrine from the civil context, explaining: "The difference between serving process in a civil action brought by a private party, whether arrest be an incident to that process or not, and the indictment and prosecution of a person similarly situated for a crime not mentioned in the treaty of extradition under which the defendant was by force brought to this country, is too obvious to need comment." *Rauscher*, 119 U.S. at 427.

Since *Rauscher*, courts have likewise viewed rule-of-specialty treaty provisions as applying to criminal proceedings. For example, the Third Circuit rejected an argument that the specialty provision in the U.S.-Dominican Republic Extradition Treaty prohibited the Government from placing a noncitizen in removal proceedings. *See Reyes v. U.S. Attorney General*, 514 F. App'x 129 (3d Cir. 2013). The treaty in that case "state[d] that '[n]o persons shall be tried for any crime or offence other than that for which he [sic] was surrendered.'" *Id.* at 133. Interpreting this language, the Third Circuit stated that "[i]t is clear that this language refers only to criminal prosecution," and that because "[i]mmigration proceedings are not a criminal prosecution, [they] therefore are not barred by the treaty." *Id.* Other courts of appeals have reached the same conclusion. *See, e.g.*, *Suarez*, 791 F.3d at 366 ("Based on international comity, the principle of specialty generally requires a country seeking extradition to adhere to any limitations placed *on prosecution* by the surrendering country.") (emphasis added); *United States v. Lazarevich*, 147 F.3d 1061, 1063 (9th Cir. 1998) ("The doctrine of specialty embodies the principle of international comity: to protect its own citizens in *prosecutions* abroad, the United States guarantees that it will honor limitations placed on *prosecutions* in the United States.") (quotation omitted, emphasis added); *Leighnor v.*

Turner, 884 F.2d 385, 390 (8th Cir. 1989) ("[T]he doctrine is generally understood to prohibit indiscriminate *prosecution* of extradited individuals rather than to prohibit the receiving state's consideration of pre-extradition offenses while prosecuting the individual for crimes for which extradition was granted.") (emphasis added). Moreover, both the Western District of Louisiana and the Board of Immigration Appeals have rejected Trabelsi's specific argument here, reasoning that the doctrine of specialty does not apply to civil immigration detention. *See Abbas v. DHS*, No. 09-cv-169, 2009 WL 2512844, at *5 (W.D. La. Aug. 17, 2009) (explaining that "the rule of specialty has no applicability in the context of a civil proceeding"); *Matter of Badalamenti*, 19 I. & N. Dec. 623, 625 (BIA 1988) (explaining that the doctrine of specialty "protects against detention, trial, or punishment for criminal offenses other than those for which the subject was extradited, and exclusion proceedings are not criminal proceedings"). In sum, the plain language of Article 15, the Treaty's legislative history, and the weight of precedent show that Article 15 does not prohibit Trabelsi's civil immigration detention.

CONCLUSION

For the reasons discussed herein, this Court should deny the Petition. Alternatively, if the Court were to agree with Trabelsi's arguments, the Government respectfully requests the Court to stay, for fourteen (14) days, any order directing Trabelsi's release from detention to permit the Government to determine its next steps.

//

DATED: October 10, 2024

Respectfully submitted,

JESSICA D. ABER
UNITED STATES ATTORNEY

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director, Office of Immigration Litigation
District Court Section

YAMILETH G. DAVILA
Assistant Director

/s/
YURI S. FUCHS
Assistant United States Attorney
Office of the United States Attorney
Justin W. Williams U.S. Attorney's Building
2100 Jamieson Avenue
Alexandria, Virginia 22314
Tel: (703) 299-3872
Fax: (703) 299-3983
Email: yuri.fuchs@usdoj.gov

/s/
ALEXANDER J. HALASKA
Senior Litigation Counsel
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 307-8704 | Fax: (202) 305-7000
Email: alexander.j.halaska@usdoj.gov

Counsel for Federal Respondents-Defendants

CERTIFICATE OF SERVICE

I do hereby certify that on this 10th day of October, 2024, I have electronically filed the foregoing using the CM/ECF system.

/s/

Yuri S. Fuchs
Assistant U.S. Attorney
U.S. Attorney's Office
2100 Jamieson Avenue
Alexandria, VA 22314
Tel: (703) 299-3872
Fax: (703) 299-3983
Email: yuri.fuchs@usdoj.gov

Counsel for Federal Respondents-Defendants