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

NIZAR ABDULAZIZ TRABELSI,

Petitioner–Plaintiff,

v.

JEFFREY CRAWFORD, *et al.*,

Respondents–Defendants.

NIZAR TRABELSI'S REPLY IN SUPPORT OF HIS PETITION FOR A WRIT OF HABEAS CORPUS

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

TABLE OF CONTENTS

INTRODUCTION

In this case, the government makes an extraordinary and unprecedented claim of detention authority. Its primary argument is not that its claimed authority is lawful, but that this Court cannot review that claim. But under the habeas statute, this Court *must* evaluate the legality of Mr. Trabelsi's detention, and when it does, it should find that the detention is unlawful.

Mr. Trabelsi's illegal detention is a problem of the government's own creation. More than ten years ago, the government plucked Mr. Trabelsi from across the globe, extraditing him from Belgium and bringing him here as a parolee for criminal prosecution. What the government surely did not expect was that a jury would, as one did last summer, acquit Mr. Trabelsi of all charges. Having failed to convict Mr. Trabelsi, the government decided to imprison him anyway, through the misuse of immigration authorities that apply to people who either sought to come here on their own or seek to remain here against the government's wishes. Mr. Trabelsi, though, wants to leave—and simply wants to be put back in the position he was in before the United States government took custody of him.

What happens next should be straightforward. The Belgian government has requested Mr. Trabelsi's return; in response, the United States should engage in a diplomatic process that would swiftly make good on its obligations under the extradition treaty it used to bring Mr. Trabelsi here. Instead, the government has decided it would rather send Mr. Trabelsi to Tunisia, where he was born, and where an immigration judge has already found he would likely be subjected to torture. As a result, Mr. Trabelsi comes to this Court in the unique position of seeking an order allowing him to leave detention not in order to stay in the United States, but to depart, as required by the treaty, or be given a reasonable opportunity to do so, as a federal statute and the government's own practice in extradition cases demands.

Neither the immigration laws, the Constitution, nor the extradition treaty allow the

government to continue making Mr. Trabelsi pay for the government's own failure to secure his criminal conviction. Respectfully, this Court should grant the writ.

ARGUMENT

I. The Court has jurisdiction over Mr. Trabelsi's habeas petition.

Seeking to avoid judicial scrutiny of Mr. Trabelsi's detention, the government argues that 8 U.S.C. §§ 1252(b)(9) and 1252(a)(5) "divest this Court" of jurisdiction over his petition. Gov't Br. 10. That argument misconstrues Mr. Trabelsi's petition and the relevant case law. Mr. Trabelsi challenges his detention, not his removability. And his habeas claims arose not when the government put him into removal proceedings, but when the government chose to continue detaining him after his criminal acquittal.

This Court has jurisdiction over Mr. Trabelsi's petition under the habeas corpus statute. *See* 28 U.S.C. § 2241. "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001). Accordingly, there is a "well-settled" and "strong presumption" in favor of habeas review, even when considering statutes intended to somehow limit that review. *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229 (2020) (quotation marks omitted). The Supreme Court has consistently applied this presumption to the Immigration and Nationality Act ("INA"), including the general section at issue in this case. *See id.* (applying presumption to 8 U.S.C. § 1252(a)); *see also Kucana v. Holder*, 558 U.S. 233, 251 (2010) (same to 8 U.S.C. § 1252(a)(2)(B)).

The government argues that two INA provisions strip the Court of habeas jurisdiction, but neither one applies to Mr. Trabelsi's claims. First, section 1252(a)(5) is irrelevant, because it provides that a petition for review before a court of appeals is the "exclusive means for judicial

review of an order of removal." Mr. Trabelsi does not seek judicial review of an order of removal. On the contrary, the relief he seeks here is consistent with his order of removal, which designates Belgium as his country of removal. Gov't Br. Ex. 4 at 6, ECF No. 33-4.

Second, section 1252(b)(9) does not remove this Court's habeas jurisdiction over Mr. Trabelsi's claims, either, because his claims do not "arise from" his removal proceedings; rather, they arise from his extradition. As Mr. Trabelsi's petition makes clear, his claims did not originate in the government's decision to remove him *from* the United States, but instead in the government's decision to extradite him *to* the United States pursuant to an extradition treaty. The crux of Mr. Trabelsi's petition is that upon the jury's acquittal of him on all charges, Pet. ¶ 47, ECF No. 1, the government should have— under the extradition treaty, and the laws and practices of extradition and parole—returned him to Belgium or given him a reasonable opportunity to depart the United States *before* putting him into removal proceedings. His claims thus precede his removal proceedings, rather than arise from them. And his removal proceedings are the consequence of the government's legal violations, not the cause.

According to the government, Mr. Trabelsi's claims must "arise from" his removal proceedings because "[t]o 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." Gov't Br. 12. This mistakes the meaning of "arise from," treating a possible downstream consequence of Mr. Trabelsi's claims as if it were the origin of his claims. This Court's decision in *Lopez v. Doe*, 681 F. Supp. 3d 472 (E.D. Va. 2023), is instructive. There, a petitioner who was involved in ongoing removal proceedings filed for emergency habeas relief, seeking an order releasing him from detention on the basis that he was a United States citizen who was not subject to detention pending removal. *See id.* at 478. The Court held that the "zipper

clause" in section 1252(b)(9) did not strip it of jurisdiction over the petitioner's claim because "the question of whether Mr. Lopez is a citizen of a United States did *not* originate with a government removal action or proceeding." *Id.* at 482. Instead, his claim had originated years before the government had initiated removal proceedings, when government immigration officers had visited him in criminal custody and decided not to deport him because of their conclusion that he was a U.S. citizen. *Id.* Even though the legal question raised by the petition implicated his removal proceedings, it did not "arise from" those proceedings. *Id.*

Here, too, the government's placement of Mr. Trabelsi into removal proceedings came after the government decisions that give rise to his habeas claims. Those claims became ripe when the government decided not to return him to Belgium after his acquittal (as the extradition treaty requires)[1] and when the government decided not to grant him a reasonable opportunity to depart the United States (as the immigration statutes and the extradition treaty require).[2] Neither of these decisions challenged by his habeas petition have "any apparent connection to a removal action or proceeding." *Id.* at 483. Since Mr. Trabelsi's claims do not originate with the government's removal proceedings, they must be raised via habeas. *See, e.g.*, *Gudiel Polanco v. Garland*, 839 F. App'x 804, 805(4th Cir. 2021) (unlike challenges to removability determinations or an order of removal, "challenges to an alien's detention must be brought pursuant to a habeas petition").

To hold otherwise, as the government urges, would contravene the Supreme Court's instruction that section 1252(b)(9) is meant to be construed narrowly. *See, e.g.*, *DHS v. Regents of the Univ. of California*, 591 U.S. 1, 19 (2020) (describing 1252(b)(9) as "targeted language" and "narrow"). Indeed, as a plurality of the Supreme Court explained in *Jennings v. Rodriguez*, an

[1] *See infra* Section II.C.

[2] *See infra* Section II.A–B.

argument like the government's in this case "would lead to staggering results." 583 U.S. 281, 293 (2018) (plurality op.); *see id.* at 876 (Breyer, J., dissenting, joined by two other justices) (agreeing that section 1252(b)(9) did not strip jurisdiction over a habeas claim of a petitioner's detention without bail because it did not challenge "an order of removal"). While the plurality recognized that the government might argue that section 1252(b)(9)'s use of "arise from" means that "if [the government's removal] had never been taken, the aliens would not be in custody at all," it rejected that approach, explaining that "[i]nterpreting 'arising from' in this extreme way would also make claims of prolonged detention effectively unreviewable." *Id.* at 293 (Alito, J.) (plurality op.). That is because "[b]y the time a final order of removal was eventually entered, the allegedly excessive detention would have already taken place." *Id.*[3]

Finally, the government does not argue that either section 1252(a)(5) or 1252(b)(9) strips the Court of jurisdiction over Mr. Trabelsi's treaty claims, as those claims are wholly independent of his removal order. By its terms, section 1252(b)(9) applies to "all questions of law and fact, including interpretation and application of *constitutional and statutory* provisions"—but not treaty provisions. 8 U.S.C. §1252(b)(9) (emphasis added). And when Congress has intended to address the courts' jurisdiction over questions involving treaties, it has done so explicitly. *See, e.g.*, 28 U.S.C. § 2241(c)(3) (providing habeas jurisdiction over claims that a person's detention is "in violation of the Constitution or laws or *treaties* of the United States" (emphasis added)).

Claims regarding extradition treaties are routinely brought in federal court, *see* 18 U.S.C. § 3184 (providing jurisdiction over extradition), and district courts review the terms of those

[3] The government argues that *Jennings* only concerned a challenge to "the *length* of [noncitizens'] detention," rather than "the decision to detain them in the first place." Gov't Br. 13 (cleaned up). But that is irrelevant here. As this Court has explained, section 1252(b)(9) only removes jurisdiction over claims that "'came into being' or 'originated' from any government 'action' or 'proceeding' brought to remove him.'" *Lopez*, 681 F. Supp. 3d at 482.

treaties when evaluating extradition claims. *See, e.g.*, *In re Zhenley Ye Gon*, 768 F. Supp. 2d 69, 73 (D.D.C. 2011) (citing *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925)); *see also* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 995 (1998) (reviewing case history that "confirm[s] the entitlement of aliens to habeas inquiry into detention for the purpose of" extradition and "the responsibility of the courts to examine compliance with statutes and treaties by United States" officials). And it would be perverse for the government to be able to avoid habeas review of a person's claim of illegal detention based on violations of an extradition or other treaty simply by initiating removal proceedings against them.

Moreover, the immigration court did not have jurisdiction to review Mr. Trabelsi's treaty claims; thus, Mr. Trabelsi could not have raised them in a petition for review under 8 U.S.C. §1252(a)(5). Immigration courts have limited jurisdiction, under which judges can determine "inadmissibility or deportability" and whether a noncitizen is eligible for relief from removal. 8 U.S.C. § 1229a; Dep't of Justice, Introduction to EOIR, Chapter 1.4, "Jurisdiction, Authority and Priorities," https://perma.cc/4MUR-FRM2. Collateral issues, like whether a treaty has been violated, are not properly before the immigration court. If Mr. Trabelsi's claims fall outside the power of the immigration court to review, they must be reviewable in a habeas petition, or else such claims would be "effectively unreviewable." *Jennings*, 583 U.S. at 293 (plurality op.); *cf. St. Cyr*, 533 U.S. at 314 ("[T]he absence of [a] forum [other than habeas], coupled with the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law, strongly counsels against adopting a construction that would raise serious constitutional questions.").

II. The Court should grant the writ.

The Court should grant the writ because Mr. Trabelsi's detention violates federal statutes,

the Constitution, and the United States' extradition treaty with Belgium.

A. Mr. Trabelsi's detention violates the INA.

Noncitizens paroled into the country for prosecution, like Mr. Trabelsi, are not applicants for admission because their presence on U.S. soil is involuntary, as the Board of Immigration Appeals held decades ago. *See Matter of Badalamenti*, 19 I. & N. Dec. 623 (B.I.A. 1988). As a result, they must be given a reasonable opportunity to depart the United States before the government puts them into removal proceedings. *Id*.Because Mr. Trabelsi was not given any opportunity to depart, let alone a reasonable opportunity, his detention violates the INA.

The government argues that *Badalamenti* is no longer good law following the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104–208, 110 Stat. 3009–575 (1996). But that statute did not affect *Badalamenti*'s specific holding: noncitizens paroled into the country after being extradited against their will must still be given an opportunity to depart before being treated like applicants for admission.

The government tells a simple story about a 1996 amendment to IIRIRA that, it claims, overruled *Badalamenti* entirely, making Mr. Trabelsi's argument "outdated and incorrect." Gov't Br. 14. But the government's account is flat wrong. Prior to 1996, the INA contained no definition of "applicant for admission." IIRIRA amended 8 U.S.C. § 1225(a) to state that:

> 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.

IIRIRA at 3009–579. The government argues that the 1996 amendments make *any* unadmitted person on U.S. soil "an applicant for admission," regardless of whether the person's presence in the United States is voluntary. Gov't Br. 14–15.

This argument ignores why Congress amended 8 U.S.C. § 1225(a). Prior to 1996, any noncitizen in the United States was subject to deportation proceedings, while any noncitizen seeking admission at a port of entry was subject to exclusion proceedings. *See, e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 25 (1982). Deportation proceedings and their attendant processes were more generous than exclusion proceedings, and noncitizens subject to deportation hearings "ha[d] a number of substantive rights not available to . . . alien[s] who [were] denied admission in an exclusion proceeding . . . ." *Id.* at 26. As Congress saw it, this meant that undocumented immigrants who had illegally entered the country enjoyed an unfair advantage, as they were subject to the more protective processes instead of the less protective ones.

Through IIRIRA, Congress sought to change that. In *Badalamenti*, the Board of Immigration Appeals ("BIA") had concluded that in extradition cases, "once the purpose of parole has been served and parole has been terminated, the alien must be given a reasonable opportunity to depart *unless there is evidence that he is an applicant for admission*." 19 I. & N. Dec. at 626 (emphasis added). It is this language that concerned government officials. They worried that "*Badalamenti* might apply" to noncitizens who had illegally entered the country without ever presenting at a port of entry. *See* David A. Martin, *A Defense of Immigration-Enforcement Discretion*, 122 Yale L.J. Online 167, 176 (2012) (former INS official detailing the reasons for the amendments). The government thought that, when it did apprehend noncitizens who had entered illegally, the language in *Badalamenti* might require it to give them a "reasonable opportunity to depart"—and take on the risk that they would seek once again to remain inside the country undetected. *Id.* Hearing these concerns, Congress amended 8 U.S.C. § 1225(a) to close this potential loophole, and to clarify that most noncitizens would be considered an "applicant for admission" regardless of whether they had explicitly sought admission or not. The amendment's

purpose is made clear by the parenthetical in its text, which specifically identifies individuals who do not arrive in the United States through a port of entry and individuals interdicted at sea. *See* 8 U.S.C. § 1225(a).

The policy rationales motivating the amendment to section 1225(a) are simply not present with respect to people, like the petitioner in *Badalamenti* and Mr. Trabelsi, who have been paroled in the country to face prosecution pursuant to an extradition treaty. Indeed, it makes sense that Congress decided not to change the way the INA treated noncitizens forcibly paroled here based on extradition treaties. Those treaties, all based on background international law norms like the rule of specialty, already dictate the treatment of those kinds of noncitizens, including by ensuring they have a reasonable opportunity to depart once the purposes of extradition have concluded. And as *Badalamenti* itself made clear, the INA already permitted the government to treat any extradited person who did *not* depart within a reasonable time as an applicant for admission. *See* 19 I. & N. Dec. 626. Furthermore, *Badalamenti* is consistent with a "series" of cases addressing extradition and parole that predate the INA. *United States ex rel. Schirrmeister v. Watkins*, 171 F.2d 858, 859–60 (2d Cir. 1947). Those cases held that "an alien forcibly brought into the United States . . . has not made an 'entry' into the country and is not an 'immigra[nt]' subject to deportation under the immigration laws," and that therefore the alien "has the right of voluntary departure, and only after his refusal or neglect to leave may the Government deport him." *Id.* (quoting *United States ex rel. Ludwig v. Watkins*, 164 F.2d 456, 457 (2d Cir. 1947)). Congress had no interest in overturning this treaty-based regime, and unsurprisingly, it left it alone.

Consistent with Mr. Trabelsi's position, courts addressing his rare situation have continued to apply *Badalamenti* after the 1996 amendments—and those cases also make clear that the government has maintained the same understanding. For example, in *United States v. Brown*, 148

F. Supp. 2d 191 (E.D.N.Y. 2001), a district court relied on *Badalamenti* to hold that "[a]n alien who is extradited and paroled into the United States for the purpose of prosecution does not automatically become an applicant for admission to the United States upon or prior to termination of his parole." *Id.* at 198. The government characterizes *Brown* as a case in *Badalamenti*'s "progeny" that was upended by the 1996 amendments. Gov't Br. 14. But *Brown* took place five years *after* the amendment that the government insists was so pivotal in exactly these circumstances. And still, in that case, "the government concede[d] that the INS was required to afford [the petitioner] a reasonable opportunity to depart the United States voluntarily prior to subjecting him to removal proceedings." 148 F. Supp. 2d at 198. In fact, the entire case arose when the government issued a "*Badalamenti* letter" informing him that "he had thirty days within which to produce an airline ticket to Ghana and a passport," then followed it up with a notice to appear charging him with unlawful presence in the country and asserting that he was subject to removal. *Id.* By issuing the notice to appear, the government had interfered with his reasonable opportunity to depart, which "plainly violated the INS' own requirement, elaborated in *Badalamenti*, that aliens in Brown's circumstances be provided 'a fair and reasonable opportunity to depart' voluntarily before a removal proceeding is initiated." *Id.* at 199 (quoting *Badalamenti*, 19 I. & N. Dec. at 626).

More recently, in *Gutierrez Perez v. Garland*, No. 20-2222, 2022 WL 16826725 (2d Cir. Nov. 9, 2022), the Second Circuit considered a case in which another extradited-and-paroled noncitizen argued that he had not been given a reasonable opportunity to depart before being put into removal proceedings. There, the court summarized the petitioner's claim as being that the reasonable opportunity to depart for individuals extradited and paroled into the country was "required by the BIA's precedential opinion in *Badalamenti*." *Id.* at *1. And while it denied the petitioner's claim, it did so because it found that he *had* been given such an opportunity and, having

failed to exercise it, became a "'parolee who cannot or will not depart the United States,'" and who therefore had "'become subject to . . . proceedings as an applicant for admission.'" *Id.* at *2 (quoting *Badalamenti*, 19 I. & N. Dec. at 626); *see also Abbas v. DHS*, No. Civ. A. 09-0169, 2009 WL 2512844, at *6 (W.D. La. Aug. 17, 2009) (denying a similar claim because the government had "advised" an extradited-and-paroled petitioner "of his *right* to depart the United States at his own expense, and he was given an ample, fair and reasonable opportunity to do so" (emphasis added)).

Against these cases, the government supports its reading of the statute by citing an unpublished, nonprecedential BIA decision. *See* Gov't Br. 15 (discussing *Matter of Solis-Caicedo*, No. AXX-XX9-344-Eloy, 2004 WL 880221 (B.I.A. Mar. 8, 2004)). However, *Solis-Caicedo* concerned an individual interdicted on international waters—a category of persons explicitly addressed by the text of the 1996 amendment. As the BIA explained, "[t]he language of this provision is clear; an alien, like the respondent, who is interdicted in international waters and brought to the United States is considered an applicant for admission." 2004 WL 880221 at *2. Accordingly, the BIA concluded that *Badalamenti* and related cases "are no longer controlling *in this situation*." *Id*. (emphasis added). But Mr. Trabelsi's "situation"—a person extradited to the United States for prosecution—is not that one.

The government also cites its own 1997 memorandum that, it suggests, casts doubt on *Badalamenti*'s value as precedent. *See* Gov't Br. 15. But the memo does not even mention extradition, and regardless, the government's positions taken in *Brown* and *Abbas* suggest that not even the government adheres to its conclusions. In any event, even after the 1996 amendment, the Board of Immigration Appeals distinguished a case by concluding, in a precedential decision, that *Badalamenti* "involved [a noncitizen] who was brought to the United States for prosecution"

whose "entry was involuntary." *In Re Ruiz-Massieu*, 22 I. & N. Dec. 833, 841 (B.I.A. 1999).

In short, Congress did not overrule *Badalamenti*, but limited it to its facts. While Congress fixed a problem the government worried had been *caused* by *Badalamenti*, it did not seek to change the treatment of individuals, like Mr. Trabelsi, in the specific scenario at issue in *Badalamenti* itself. It identified the problem it saw with new text that specifically addressed it, and it left the core holding of *Badalamenti* alone—as courts, and even the government itself, have since understood. The government's argument, which hinges entirely on its misreading of the status of *Badalamenti*, is wrong.

B. Mr. Trabelsi's detention violates the Fifth Amendment.

Mr. Trabelsi's immigration detention is not reasonably related to the government's legitimate purpose of ensuring his appearance for removal hearings and ensuring that removal can be effectuated, because those proceedings are entirely unnecessary. Mr. Trabelsi does not object to his removal to Belgium—which is what immigration law and the Treaty require, and what an immigration judge recently ordered the government to do.[4] Detaining Mr. Trabelsi serves no purpose other than to keep him detained. Consequently, his detention violates the Fifth Amendment.[5]

Civil detention is permissible for narrow, "sufficiently strong special justification[s]." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *see, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997) (upholding civil detention statute for people who are untreatably mentally ill); *United States*

[4] Although the government has appealed the immigration judge's decision granting relief under the Convention Against Torture and deferring removal to Tunisia (the government's preferred course), Mr. Trabelsi has not appealed the removal order to Belgium.

[5] There is a question as to whether Mr. Trabelsi is held pursuant to 8 U.S.C. § 1225(b)(2)(A) or 8 U.S.C. § 1226(c). For the purposes of Mr. Trabelsi's constitutional claims, however, the Court need not differentiate between them: both statutes, as applied, violate Mr. Trabelsi's due process rights.

v. Salerno, 481 U.S. 739 (1987) (holding not unconstitutional for a federal court to detain an arrestee pending trial if government demonstrates by clear and convincing evidence that no release conditions could reasonably assure safety of any other person and the community); *Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 397 (1902) (upholding indefinite civil detention for quarantine to prevent infectious diseases from entering the country).

In *Demore v. Kim*, 538 U.S. 510 (2003), the Supreme Court held that immigration detention during ongoing removal proceedings was constitutional on its face. *Id.* at 530–31. It did so because it found that "[s]uch detention necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." *Id.* at 528 However, the Court in *Demore* did not foreclose as-applied challenges, like this one. *See Nielsen v. Preap*, 586 U.S. 392, 419–20 (2019).

Mr. Trabelsi's detention violates due process because, contrary to the vast majority of cases in which noncitizens are held during removal proceedings, the government has no legitimate interest in detaining him. Mr. Trabelsi does not object to his removal to Belgium, and the government is required to send him there.[6] Indeed, the immigration judge in Mr. Trabelsi's case agreed, designating Belgium as the country of removal and explaining "this Court's belief and understanding . . . that officials from the United States should have informed Belgian officials of Respondent's acquittal on the U.S. federal charges and should have entered into diplomatic discussions regarding the terms and conditions of Respondent's return to Belgium." Gov't Br. Ex.

[6] Though he does not press this claim in his petition, even under the INA, the government is required to send Mr. Trabelsi to Belgium. *See* 8 U.S.C. § 1231(b)(2)(A)(ii) (DHS "shall remove the alien to the country the alien so designates."); *Jama v. ICE*, 543 U.S. 335, 341 (2005) ("The statute thus provides four consecutive removal commands: (1) An alien shall be removed to the country of his choice. . . .").

4 at 40.

As Justice Kennedy explained in his concurrence in *Demore*, "[w]ere there to be an unreasonable delay by the [government] in pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons." 538 U.S. at 532–33. Here, the government could have sought Mr. Trabelsi's removal to Belgium immediately upon his acquittal last year, but has instead chosen to engage in what is likely to amount to years of litigation over an issue that is not necessary to effectuate Mr. Trabelsi's removal. That may be the government's ordinary prerogative under the INA, but the government cannot constitutionally take such actions simply to prolong his time in U.S. custody.

The Supreme Court's decision in *Zadvydas v. Davis* is instructive. 533 U.S. at 689. In *Zadvydas*, the Court considered whether immigration detention was constitutional when a noncitizen's removal was not reasonably foreseeable after a final order of removal was issued. The government proposed two interests in continuing to detain noncitizens despite little to no prospect of ever effectuating removal: flight risk and dangerousness. The Court rejected both. It held that "by definition the first justification—preventing flight—is weak or nonexistent where removal seems a remote possibility at best." *Id.* at 690. It further held that dangerousness alone could not justify a noncitizen's detention in such circumstances. *Id.* at 690–91.

There is no dispute that, generally speaking, the government has a legitimate interest in "ensuring [Mr. Trabelsi's] appearance for removal and ensuring that removal can be effectuated." Gov't Br. 19 (cleaned up). But because his removal can be effectuated now, detaining him for additional years "pending" removal—in the hope that the government is able to remove him to the country of its choice, instead of the one that is available today—does not further that interest.

Again, Mr. Trabelsi is not arguing that he cannot be constitutionally detained pending removal proceedings. Instead, he is arguing that he cannot be constitutionally detained when the extradition treaty and federal statutes require him to be returned immediately to Belgium or be given a reasonable opportunity to depart the United States. As a result, his detention does not "bear a reasonable relation to [the government's] purpose." *Zadvydas*, 533 U.S. at 690 (cleaned up) (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)).[7]

The government relies on a 1953 Supreme Court case to argue that Mr. Trabelsi's due process claim fails. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (discussed at Gov't Br. 20). But *Mezei* does not help the government. In that case, a noncitizen who had lived for many years in the United States returned after two years abroad "behind the Iron Curtain." *Id.* at 214. He was excluded pursuant to a federal statute that allowed the executive to impose national-security-based restrictions on noncitizens' entry into the country. *Id.* at 210. Having been "shut . . . out" by the United States, and without any other country willing to "take him in," his detention stretched past two years. *Id.* at 209. The Supreme Court denied his habeas claim, which was based on a challenge to "the constitutionality of the statutory scheme used to determine Mezei's admissibility," an issue that "at that point had been finally determined." *Mbalivoto v. Holt*, 527 F. Supp. 3d 838, 846 (E.D. Va. 2020) (Trenga, J.) (citing *Mezei*, 345 U.S. at 212). But "because Mezei had already been definitively determined to be barred from entering the United States on national security grounds, the Court did *not* consider directly the constitutionality of his indefinite detention

[7] The government asserts that Mr. Trabelsi's detention is meant to "prevent[] him from absconding," Gov't Br. 19, that interest is both unconstitutional and nonsensical. In *Zadvydas*, the Supreme Court held that flight risk was not a remotely constitutionally sufficient interest where removal was only a remote possibility. *See* 533 U.S. at 690. Similarly, an interest in preventing Mr. Trabelsi from fleeing custody is beyond "weak or nonexistent," *id.*, where the government could remove him to Belgium *today*, and where a treaty and federal statute expressly require him to be afforded a reasonable opportunity to leave the country.

that resulted from that final determination." *Id.* (emphasis added).

The government sees parallels between *Mezei* and this case because Mr. "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." Gov't Br. 20. Again, the government misses why this case is so extraordinary and unique. Mr. Mezei wanted to get into the country; Mr. Trabelsi wants to get out. Mr. Mezei came to the United States on purpose; Mr. Trabelsi was brought here against his will. Mr. Mezei was excluded by the government, on national security grounds, at the border; Mr. Trabelsi was granted permission to enter through parole and under the treaty. Here, unlike in *Mezei*, it was the government who brought Mr. Trabelsi to the United States, and it is the government's statutes and treaty that require him to be sent back to Belgium or be given a reasonable opportunity to return. In these highly unique, highly disturbing circumstances, the constitutional calculation is simply different—and as explained, the government fails it.

C. Mr. Trabelsi's detention violates the United States–Belgium Extradition Treaty.

Mr. Trabelsi's detention violates the rule of specialty, a "norm of international comity" incorporated in Article 15 of the United States–Belgium Extradition Treaty (the "Treaty"), Pet. Ex. D, ECF No. 1-4. *United States v. Day*, 700 F.3d 713, 722 (4th Cir. 2012). Article 15 lists the grounds on which an extradited person may be "detained, tried, or punished" in the "Requesting State"—here, the United States. None of the permissible grounds for detention listed in Article 15 apply to Mr. Trabelsi, and the government does not argue otherwise. *See* Gov't Br. 26–30. Nevertheless, the government maintains that because it has detained Mr. Trabelsi for nominally "civil" reasons, he is not really detained at all—at least, not within the meaning of Article 15. *Id.* at 26. That argument is wrong.

Start with the Treaty's plain language. *See Medellín v. Texas*, 552 U.S. 491, 506 (2008) ("The interpretation of a treaty . . . begins with its text."); *accord Vitkus v. Blinken*, 79 F.4th 352, 362 (4th Cir. 2023). The plain meaning of "detained" clearly encompasses what the government has done to Mr. Trabelsi. *See Detention*, Black's Law Dictionary (12th ed. 2024) ("The act or an instance of holding a person in custody; confinement or compulsory delay."). The government has "detained" Mr. Trabelsi in the most straightforward sense conceivable: by locking him in a cell and assuming dominion over his access to food, water, exercise, human contact, and religious observance. *See* Pet. ¶¶ 48–94. If "detained" means anything, it means this.

Nonetheless, the government contends that when the Treaty uses the word "detained," it *really* means detained *pursuant to criminal process*, excluding "civil immigration detention." Gov't Br. 26–27. But as the government recognizes, "detention occurs under both criminal and civil processes," *id.* at 27, and the Treaty makes no distinction between the two; that is, the Treaty does not bar "criminal detention" or "civil detention"—it bars "detention," plain and simple. The government argues that because the use of "detention" in the Treaty comes alongside "tried," "punished," and "offenses," reading "detention" beyond the criminal context would violate the canon of *noscitur a sociis*. *Id.* While "[t]ools of statutory construction like" that one "can be helpful," courts "must not use them in a way that contravenes plain statutory text." *Benitez v. Charlotte-Mecklenburg Hosp. Auth.*, 992 F.3d 229, 237 (4th Cir. 2021). Moreover, the government's argument ignores that civil courts hold immigration "trials," and there are countless "offenses" that are relevant to civil immigration proceedings. At bottom, Mr. Trabelsi does not ask the Court to adopt a broad, incongruous reading of "detained." He reads the word the way any normal person would in the context of a treaty limiting the state's exercise of coercive power: when the government puts you in a cage, it has "detained" you.

To be sure, when Congress and the courts speak of extradition and the rule of specialty, they often do so in terms associated with criminal, not civil, law. *See* Gov't Br. 28–29. That is to be expected: extradition treaties create mechanisms for removing criminal defendants from countries where they enjoy "asylum" and subjecting them to the jurisdiction of receiving countries, where they may face prosecution. *United States v. Rauscher*, 119 U.S. 407, 419–20 (1886). But the government wrongly infers from this general focus on criminal prosecution that the rule of specialty *permits* detention on purportedly civil grounds. The purpose of extradition treaties is not only to grant jurisdiction to the receiving state, but to constrain how the receiving state exercises its jurisdiction. *Id.* at 419. This is why extradition treaties and the rule of specialty are "keyed to particular offenses"—to limit the receiving state's exercise of coercive power and ensure that an extradited individual will not be "detained" on grounds the surrendering country did not anticipate. *Day*, 700 F.3d at 721–22. The grounds on which an extradited individual may be "detained" are listed in Article 15—and none of them apply here.

Tellingly, the government's reading would permit parties to evade extradition treaties simply by deeming an offense "civil" instead of criminal. Different countries have very different legal regimes, and some even provide for indefinite civil detention. It is preposterous for the government to suggest that nations who are narrowly and for a singular purpose ceding jurisdiction over individuals (sometimes their own nationals) would, through the rule of specialty, prohibit "detention" as a label rather than as a condition—yet that is the government's claim.[8] As the Fourth

[8] The government points to a handful of cases to support its reading of the rule of specialty as *only* preventing criminal detention, but those cases are unbinding, unpersuasive, or irrelevant (and in some cases, all three). The government cites two cases that it represents "have rejected [Mr.] Trabelsi's specific argument here, reasoning that the doctrine of specialty does not apply to civil immigration detention." Gov't Br. 30. But it badly overreads both. In *Badalamenti*, the BIA concluded that the rule of specialty was inapplicable to civil immigration detention, but provided

Circuit has explained, a violation of the rule of specialty is the kind of "bait and switch" from which "the United States wishes to protect its own citizens"; therefore, "so too must it honor the same limitation in the reciprocal situation." *United States v. Day*, 700 F.3d 713, 722 (4th Cir. 2012).[9]

Because it applies through Article 15, the rule of specialty requires, and the diplomatic notes confirm, that Mr. Trabelsi must be given a reasonable opportunity to return to Belgium—and under Article 15, that period is 15 days. Among the limited exceptions to the rule that an individual cannot be detained or tried for offenses other than the one forming the basis for extradition is where "that person does not leave the territory of the Requesting State within 15 days of the day on which that person is free to leave." Pet. Ex. D at 10–11. This provision is consistent with case law on the rule of specialty. As the Supreme Court explained in *Rauscher*, the rule requires the United States to provide an extradited person with "a reasonable time and opportunity" after trial "to return to the country from whose asylum he had been forcibly taken," even when the relevant extradition treaty does not expressly say so. 119 U.S. at 430. In the ensuing century and a half, courts have repeatedly affirmed that the rule of specialty requires extradited persons be given a reasonable opportunity to return to the countries from which they were taken, once the criminal proceedings against them have run their course. *See, e.g.*, *United States v. Alvarez-Machain*, 504 U.S. 655, 660 (1992); *United States v. Valencia-Trujillo*, 573 F.3d 1171, 1180 (11th Cir. 2009).

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no analysis on that point. 19 I. & N. Dec. at 625. And in *Abbas*, a district court stated, without analysis, that the rule of specialty did not apply to civil immigration detention, before holding that the detainee's claims failed on the merits, since he had been given the opportunity to leave the United States and had failed to do so. 2009 WL 2512844, at *5–6. The remainder of the cases the government cites, *see* Gov't Br. 29–30, do not concern civil immigration detention.

[9] On pages 21–23 of its brief, the government contends that Article 12 does not require it to return Mr. Trabelsi to Belgium. That argument is a red herring. As the petition makes clear, Mr. Trabelsi's detention violates Article 15.

The government argues that Article 15 merely prohibits Mr. Trabelsi's "extradition" to a third country. Gov't Br. 23. That is *one* of the ways Article 15 constrains the government's behavior, but not the *only* way. The government fails even to contest that Article 15 requires it to give Mr. Trabelsi a reasonable opportunity to depart the country. *Compare* Pet. ¶¶ 103–07, *with* Gov't Br. 21–30. That decides the case for Mr. Trabelsi, because the government has never given him an opportunity to depart—indeed, its continued detention of him is actively thwarting that opportunity.

Through its diplomatic notes, Belgium has, at a minimum, opened the door for the United States to do what the rule of specialty requires. Incredibly, the government insists that "[n]either" of the notes "demands [Mr. Trabelsi's] return." Gov't Br. 25. But the Court need not take the government's word for it; it can simply read them itself. In the 2024 note, the Belgian government "transmits" the "aforementioned request"—i.e., "a request to [DHS] and [ICE] for the return of Nizar Trabelsi." Pet. Ex. C, ECF No. 1-3. And the 2022 note says the same thing. *See* Pet. Ex. B, ECF No. 1-2. Those requests "implicate the same international legal rights as treaties because a violation of an extradition agreement may be an affront to the surrendering sovereign." *United States v. Suarez*, 791 F.3d 363, 367 (2d Cir. 2015) (quotation marks omitted); *see also United States v. Riascos*, 537 Fed. App'x 898, 900–01 (11th Cir. 2013) (considering diplomatic notes as evidence of agreement for extradition). Even if the government is correct that the notes do not demand Mr. Trabelsi's return, but merely demand a start to negotiations that would lead to that return, Gov't Br. 25, the notes still make that demand, and the government has not complied with it.

CONCLUSION

Respectfully, the Court should grant the writ.

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Respectfully Submitted,

/s/

Sophia Leticia Gregg
VSB No. 91582
American Civil Liberties Union of Virginia
P.O. Box 26464
Richmond, VA 23261
Tel: (804) 774-8242
sgregg@acluva.org

A. Nicole Hallett*
Supervising Attorney
Saloni Jaiswal
Sahar Omer
Student Attorneys
Edwin F. Mandel Legal Aid Clinic
6020 South University Avenue
Chicago, Illinois 60637
T: 203.910.1980
nhallett@uchicago.edu

Brett Max Kaufman*
Charlie Hogle*
Judy Rabinovitz *
American Civil Liberties Union Foundation
125 Broad St., 18th Floor
New York, NY 10004
T: 212.549.2500
bkaufman@aclu.org

Cecillia D. Wang*
American Civil Liberties Union Foundation
425 California Street, Suite 700
San Francisco, CA 94104
(415) 343-0775
cwang@aclu.org

Jonathan Hafetz*
Seton Hall Law School
1109 Raymond Blvd.
Newark, NJ 07102
jonathan.hafetz@shu.edu

**Admitted Pro Hac Vice*

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, undersigned counsel, hereby certify that I filed the foregoing and all attachments using the CM/ECF system, which will send a notice of this filing to all participants in this case.

Dated: October 17, 2024

Respectfully submitted,

/s/

Sophia Leticia Gregg
VSB No. 91582
American Civil Liberties Union of Virginia
P.O. Box 26464
Richmond, VA 23261
Tel: (804) 774-8242
sgregg@acluva.org
Counsel for Petitioner