IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

RÜMEYSA ÖZTÜRK,
Petitioner

v. No. 2:25-cv-00374

DONALD J. TRUMP, et al.,
Respondents

SUPPLEMENTAL MEMORANDUM OF LAW ON JURISDICTIONAL ISSUES

INTRODUCTION

Petitioner appreciates the opportunity to refresh her briefing addressing the government's arguments that this Court lacks habeas jurisdiction in the first place and that, even if it does not, it lacks jurisdiction to consider her habeas claims. Neither of these arguments has any merit.

Sixteen days ago, Ms. Öztürk was arrested by plainclothes officers because officials in the government disliked an op-ed she wrote last year for a college newspaper. To date, the government has not offered a single justification for Ms. Öztürk's arrest or treatment. Instead—through delays in the habeas process largely brought about by the government's own decisions to quickly move Ms. Öztürk after her arrest—the government has already achieved precisely what it set out to do in the first place: send a message throughout the United States to anyone who dares to oppose the policies it prefers, specifically when it comes to speech supportive of Palestinians or critical of Israel. Of course, Petitioner does not fault this Court, or one in which her lawyers reasonably filed her habeas petition, for these delays, and she has patiently watched from behind bars as this process has played out. But her claims are not only compelling—they are urgent.

First, Ms. Öztürk was in Vermont when her lawyers filed her habeas petition, and under the longstanding rule that courts like this one apply every single day in habeas cases, that is where

her petition belongs. Of course, Ms. Öztürk's lawyers did not know she was in Vermont when they filed—because the government had taken her from Massachusetts and started her on a four-state, all-night journey to here and then on to Louisiana, all without telling her lawyers where she was, and without allowing her to call them. The government contends Ms. Öztürk's lawyers' failure to prognosticate which New England ICE facility she would be taken to in real time is fatal to her petition. Instead, it says, the petition should be dismissed. But the government's argument that this Court lacks habeas jurisdiction ignores an on-point, clearly written federal statute that both allows transfer of cases, including habeas petitions, where someone initially files in the wrong place, and requires them to be treated by transferee courts as if they had been filed in the proper district at the original time of filing. Though the government has put forth just a few arguments in defense of its rule, they essentially boil down to the notion that Ms. Öztürk's petition did not originally name her then-custodians in Vermont. While the government acts as if that is the whole ballgame, it is irrelevant: the habeas statute itself embraces the possibility that a petitioner will not know the identity of their custodian; the Supreme Court has endorsed an exception to the default "immediate custodian" rule where the custodian is unknown; the Supreme Court has prohibited the government from manipulating habeas jurisdiction by moving someone who has filed for habeas relief; and habeas petitions are routinely amended to fix any such defects.

Second, the government argues that whether the Court has jurisdiction over the petition is effectively irrelevant because the Court is powerless to grant Ms. Öztürk any relief. Its argument is that various so-called "jurisdictional bars" in the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, channel Ms. Öztürk's claims into an administrative process, where she would have to wait for months and probably years until an immigration judge decides her case, the Board of Immigration Appeals reviews it, and a federal court of appeals (in the government's chosen

jurisdiction) takes a look itself. But that is simply not the law. The so-called jurisdictional bars on which the government stands its entire case are inapplicable to the immediate relief Ms. Öztürk seeks: release from unconstitutionally retaliatory detention and restoration of her unlawfully terminated student status. None of the INA's bars divest federal district courts of habeas jurisdiction over claims of illegal civil immigration detention (nor could they). Nor do they divest jurisdiction over claims, like Ms. Öztürk's student status claim, that are entirely collateral to removal proceedings, and that require meaningful judicial review before relief would come too late. And they certainly do not divest jurisdiction over her policy claim because its plain unconstitutionality does not involve a discretionary government decision, and because it, too, requires review sooner than later.

Respectfully, the Court should reject the government's various attempts to avoid the real issue and proceed to decide Ms. Öztürk's petition and her application for release pending this litigation.

ARGUMENT

I. This Court has habeas jurisdiction over the petition.

Ms. Öztürk's petition is properly before this Court. First, Judge Casper's court and this Court both have subject matter jurisdiction over the petition under 28 U.S.C. § 2241. Second, because Ms. Öztürk was physically in Vermont at the time that her original petition was filed, a straightforward application of the "district of confinement" rule means that this Court has habeas jurisdiction over the petition. Third, under the plain language of 28 U.S.C. § 1631 (as well as 28 U.S.C. § 1406(a)), Congress not only empowered but required Judge Casper to transfer this matter to this Court even though it was originally filed in Massachusetts: that is because Ms. Öztürk was physically in Vermont at the time that her original petition was filed, and therefore a

straightforward application of the "district of confinement" rule means that the case "could have been brought" here and doing so was "in the interest of justice." 28 U.S.C. §§ 1631, 1406(a). Fourth, personal jurisdiction is no hurdle for various reasons: the Court has jurisdiction over Respondent Secretary of Homeland Security Kristi Noem, who could be ordered to direct Ms. Öztürk's immediate release; Ms. Öztürk's counsel had no way of knowing that her client was in Vermont when the original petition was filed, so she could not name an immediate custodian in Vermont; and a related-back amendment to the petition to add a Vermont custodian is a routine matter. Finally, Justice Kennedy's concurrence in *Rumsfeld v. Padilla*, 542 U.S. 426, 451–55 (2004) (Kennedy, J., concurring), reinforces this Court's jurisdiction to hear Ms. Öztürk's claims.[1]

A. The Court has habeas jurisdiction over Ms. Öztürk's case pursuant to 28 U.S.C. § 1631 and *Ex Parte Endo*.

First, "[n]o one doubts that federal district courts have jurisdiction over the subject matter"—"habeas cases under 28 U.S.C. § 2241." *Khalil v. Joyce (Khalil D.N.J.)*, No. 25-cv-1963,

[1] The Court also has habeas jurisdiction under the law of the case. Judge Casper rejected the government's argument that dismissal or transfer to Louisiana was appropriate in a reasoned opinion that was fully litigated by the government. *See Ozturk v. Trump*, No. 25-cv-10695, 2025 WL 1009445, at *10-11 & n.5 (D. Mass. Apr. 4, 2025). In this Circuit, "to preserve the opportunity for review of a transfer order in the transferee Circuit, a party must move for retransfer in the transferee district court," *SongByrd, Inc. v. Est. of Grossman*, 206 F.3d 172, 177 (2d Cir. 2000) (citation omitted), and the district court "considering a retransfer motion might be limited by 'law of the case' principles, at least in the absence of changed circumstances." *Id.* at 178 n.7 (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988)); *see also Gary Friedrich Enters., LLC. v. Marvel Enters., Inc.*, No. 08-cv-1533, 2008 WL 4129640, at *3 (S.D.N.Y. Sept. 4, 2008) ("The law of the case doctrine discourages a transferee court from reexamining the determinations of the transferor court[.]"); *Deep S. Pepsi-Cola Bottling Co., Inc. v. Pepsico, Inc.*, No. 88-cv-6243, 1989 WL 48400, at *4 (S.D.N.Y. May 2, 1989) (transfer statute "does not permit parties to hopscotch from one forum to another" where the transferor court "already has decided . . . that the convenience of the litigants and witnesses, as well as the interests of justice, would be best served by transfer to this District").

2025 WL 972959, at *6 n.12 (D.N.J. Apr. 1, 2025).[2] When the government challenges this Court's "jurisdiction," it is talking about "habeas jurisdiction"—which, as Justice Kennedy explained in *Padilla*, is better understood as a question of "personal-jurisdiction or venue rules." 542 U.S. at 452; *see Skaftouros v. United States*, 667 F.3d 144, 146 n.1 (2d Cir. 2011); *Gooden v. Gonzales*, 162 F. App'x 28, 29 (2d Cir. 2005); *Cruz v. Decker*, No. 18-cv-9948, 2019 WL 4038555, at *2 (S.D.N.Y. Aug. 27, 2019), *aff'd*, 2019 WL 6318627 (S.D.N.Y. Nov. 26, 2019))); *Rivera-Perez v. Stover*, 2024 WL 4819250, at *5 (D. Conn. Nov. 18, 2024).

Second, there is no dispute that the "default rule" in habeas cases requires suing the "immediate custodian" in the district in which a noncitizen is confined at the time a habeas petition is filed. *Padilla*, 542 U.S. at 435–36, 443–44 (majority opinion). In this case, that is this District, where Ms. Öztürk was detained at 10:02 p.m. on March 25, 2025. Am. Pet. ¶ 21, ECF 12; *Ozturk v. Trump*, No. 25-cv-10695, 2025 WL 1009445, at *11 (D. Mass. Apr. 4, 2025); *see Ruiz v. Mukasey*, 552 F.3d 269, 273 (2d Cir. 2009) (Section 1631 transferee court was "capable of exercising jurisdiction at the time of filing"); *Liriano v. United States*, 95 F.3d 119, 123 (2d Cir. 1996), *as amended* (Oct. 7, 1996) (transferred habeas petition deemed filed "on the date of its initial filing in the district court"); *United States v. Greenwood*, No. 200-CR 109-4, 2007 WL 2463266, at *2 (D. Vt. Aug. 28, 2007) (adopting magistrate judge report and recommendation).

Third, the federal transfer statutes, in particular 28 U.S.C. § 1631, not only permitted but required Judge Casper to transfer the petition to this District after she concluded that the petition could not proceed in the District of Massachusetts. The plain text of § 1631 makes this clear:

[2] While Judge Farbiarz granted the government's request to seek an interlocutory appeal of his decision in the Third Circuit because "certain issues addressed" by the court's order "have not been directly discussed by the Third Circuit," the court made clear in its certification order that it "would not expect to stay the proceedings[.]" 2025 WL 1019658, at *1 (D.N.J. Apr. 4, 2025).

> Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court *shall*, if it is in the interest of justice, transfer such action . . . to any other such court . . . in which the action . . . could have been brought at the time it was filed . . . , and the action . . . *shall proceed* as if it had been filed in . . . the court to which it is transferred on the date upon which it was actually filed in . . . the court from which it is transferred.

28 U.S.C. § 1631 (emphases added). Likewise, when a case is filed in the wrong venue, § 1406(a) permits a district court to "transfer such case to any district . . . in which it could have been brought" if transfer is in "the interest of justice." 28 U.S.C. § 1406(a).

These statutes are a proper basis for this Court to possess habeas jurisdiction, a position endorsed by three separate courts in recent habeas cases within the span of less than three weeks. *See Khalil v. Joyce (Khalil S.D.N.Y.)*, No. 25-cv-1935, 2025 WL 849803, at *11–13 & n.7 (S.D.N.Y. Mar. 19, 2025); *Khalil D.N.J.*, 2025 WL 972959, at *14–24; *Ozturk*, 2025 WL 1009445, at *10–11.

As Judge Casper found, transfer of Ms. Öztürk's petition was plainly in the "interest of justice." *Ozturk*, 2025 WL 1009445, at *11; *see Khalil S.D.N.Y*, 2025 WL 849803, at *12 (finding that transfer of habeas petition, rather than dismissal, was in the interest of justice because, "as the Government acknowledges, a prompt resolution of this important case is imperative"; because "dismissal would prejudice [the petitioner] in several important ways," including "litigating far from his lawyers . . . and from the location where most (if not all) of the events relevant to his petition took place"; and because his "lawyers filed the Petition in this District based on a good-faith and reasonable belief that he was then detained here" (cleaned up)); *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467 (1962) (the transfer statutes are intended to promote transfer to avoid "penaliz[ing]" plaintiffs with "time-consuming and justice-defeating technicalities"(footnote omitted)); *see also Liriano*, 95 F.3d at 122 (observing that the "good faith" filing of an action in an improper forum is a "[f]actor[ ] militating for a transfer" rather than dismissal). Those

considerations carry even more force in the context of habeas—"a flexible judicial remedy which is used to 'insure that miscarriages of justice within its reach are surfaced and corrected.'" *Gilroy v. Ferro*, 534 F. Supp. 321, 324 (W.D.N.Y. 1982) (quoting *Harris v. Nelson*, 394 U.S. 286, 291 (1969)). Accordingly, district courts in the Second Circuit regularly apply § 1631 to transfer habeas petitions to other district courts. *See, e.g.*, *Zhen Yi Guo v. Napolitano*, No. 09-cv-3023, 2009 WL 2840400, at *6 (S.D.N.Y. Sept. 2, 2009) ("Courts have consistently found it in the interest of justice to transfer habeas petitions when jurisdiction is lacking." (quoting *Shehnaz v. Ashcroft*, No. 04-cv-2578, 2004 WL 2378371, at *4 (S.D.N.Y. Oct. 25, 2004))); *Abraham v. Decker*, No. 18-cv-3481, 2018 WL 3387695, at *3 (E.D.N.Y. July 12, 2018).

To the extent the District of Massachusetts lacked personal jurisdiction over the petition or was the wrong venue, § 1631 and § 1406(a) correct that defect. And critically, § 1631 makes clear that transfer does not simply move the case at the point at which it is transferred. Instead, it requires the transferee court—here, this Court—to treat the case "as if it had been filed" there "on the date upon which it was actually filed in" the transferor court. 28 U.S.C. § 1631. In explaining this argument at length in a different recent habeas case, the District of New Jersey called this statute "a kind of time machine," *Khalil D.N.J.*, 2025 WL 972959, at *15, and it is. *See id.* at *16 (Once transfer is complete, § 1631 "tells the transferee court that it 'shall' treat the case as having been brought there, in the transferee court, at the moment it was first initiated in the transferor court.").[3]

[3] To the extent that the Second Circuit has suggested in a single off-hand footnote that § 1631's legislative history "provides some reason to believe that this section authorizes transfers only to cure lack of subject matter jurisdiction," *SongByrd, Inc.*, 206 F.3d at179 n.9, such *dictum* cannot "defeat" the statute's "unambiguous statutory text," *Bostock v. Clayton Cnty.*, 590 U.S. 644, 674 (2020). "[W]hen the statutory language is plain," as it is in § 1631, courts "must enforce it according to its terms." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). What is more, the First Circuit—from which the case was transferred—has concluded that the term "jurisdiction" in § 1631 encompasses both personal and subject-matter jurisdiction. *See Fed. Home Loan Bank of*

Congress's intention was clear: both legally and functionally, Ms. Öztürk's petition was filed in this Court on March 25, 2025, at 10:02 p.m., when she was detained in this District. Mem. and Order at 24, ECF 42. *See Khalil D.N.J.*, 2025 WL 972959, at *19 ("Bottom line: Section 1631 means that the Petition here is treated as if it was backdated—and in particular, as if it was filed" at the time the petition was originally filed.).

Fourth, the government argues that the transfer statutes are irrelevant for two reasons: Ms. Özturk's petition did not name her (current) Louisiana custodian, and it did not name her (at the time of filing) custodian in Vermont. Resp'ts Opp. at 28-28, ECF 19. But "[n]either of these arguments works." *Khalil D.N.J.*, 2025 WL 972959, at *25 (rejecting the same exact arguments in an extended analysis).

"The first argument, as to the Louisiana warden, runs aground on the Supreme Court's *Endo* Rule." *Id.* (discussing *Ex Parte Endo*, 323 U.S. 283 (1944)). For more than eighty years, no court (nor even the government) has remotely questioned the "*Endo* Rule": "that a habeas court that otherwise has jurisdiction over a case does not lose that jurisdiction just because the habeas petitioner has been moved out of the district." *Id.* at *20; *see Padilla*, 542 U.S. at 441; *Ex Parte Catanzaro*, 138 F.2d 100, 101 (3d Cir. 1943) ("[W]e do not believe that passing about of the body of a prisoner from one custodian to another after a writ of habeas corpus has been applied for can

---

Boston v. Moody's Corp., 821 F.3d 102, 114 (1st Cir. 2016), *abrogated on other grounds by Lightfoot v. Cendant Mortg. Corp.*, 580 U.S. 82 (2017). The Fifth, Sixth, and Seventh Circuits have reached the same conclusion. *Franco v. Mabe Trucking Co., Inc.*, 3 F.4th 788, 794 (5th Cir. 2021); *Roman v. Ashcroft*, 340 F.3d 314, 328 (6th Cir. 2003); *North v. Ubiquity, Inc.*, 72 F.4th 221, 227 (7th Cir. 2023); *see also Khalil D.N.J.*, 2025 WL 972959, at *17–18 (discussing plain-text meaning of the word "jurisdiction" as used in 28 U.S.C. § 1631). And courts in the Second Circuit have relied on § 1631 to transfer actions where personal jurisdiction is lacking. *See, e.g.*, *Bell v. Shah*, No. 3:05-cv-0671, 2006 WL 860588, at *1 (D. Conn. Mar. 31, 2006); *Sabatino v. St. Barnabas Med. Ctr.*, No. 03-cv-7445, 2005 WL 2298181, at *3 n.12 (S.D.N.Y. Sept. 20, 2005).

defeat the jurisdiction of the Court to grant or refuse the writ on the merits of the application.").[4] As the Supreme Court explained in *Padilla*, "*Endo* stands for the . . . proposition that when the Government moves a habeas petitioner after she properly files a petition naming her immediate custodian, the District Court retains jurisdiction and may direct the writ *to any respondent within its jurisdiction who has legal authority to effectuate the prisoner's release*." 542 U.S. at 441 (emphasis added). And that rule means that "there was no need for the Petitioner to have named the Louisiana warden as a respondent . . . because one of the warden's senior supervisors is named—and that is what is needed under the Supreme Court's decisions in *Padilla* and *Endo*." *Khalil D.N.J.*, 2025 WL 972959, at *26. Respondent Noem, who was named in the original petition, is an appropriate custodian because, as the Secretary of Homeland Security, she has the power to produce Ms. Öztürk to this habeas Court. *See Padilla*, 542 U.S. at 435–36 ("the proper respondent is the warden of the facility where the prisoner is being held" at the time the petition was filed," meaning the person "with the power to produce the body of such party before the court or judge").

The government repeatedly leans on the fact that *Padilla* described the *Endo* Rule as applying where a petitioner "properly filed" a petition in the first place. ECF 19 at 2, 6, 7, 8 n.3, 9, 10, 16, 27. But the government "does not reckon," *at all*, with 28 U.S.C. § 1631. *Khalil D.N.J.*, 2025 WL 972959, at *14; *see* ECF 19 (never discussing § 1631). That statute, again, makes clear

[4] Courts in the Second Circuit repeatedly hold that "a habeas court with jurisdiction does not lose it because the detainee has been moved out of the district." *Khalil D.N.J.*, 2025 WL 972959, at *23; *see, e.g.*, *Rivera-Perez v. Stover*, No. 3:23-cv-1348, 2024 WL 4819250, at *5 (D. Conn. Nov. 18, 2024); *Mason v. Alatary*, No. 9:23-cv-0193, 2023 WL 2965619, at *3 (N.D.N.Y. Apr. 17, 2023); *Golding v. Sessions*, 2018 WL 6444400, at *3 (S.D.N.Y. Dec. 6, 2018); *Tribble v. Killian*, 632 F. Supp. 2d 358, 361 & n.4 (S.D.N.Y. 2009); *Miller v. Reily*, No. 06-cv-6485, 2007 WL 433394, at *2 (E.D.N.Y. Feb. 5, 2007); *see also Middleton v. Schult*, 299 F. App'x 94, 94 n.1 (2d Cir. 2008) ("Because jurisdiction attaches on the initial filing for habeas corpus relief, we maintain jurisdiction in the immediate case.").

that in every relevant respect, Ms. Öztürk's petition *was filed in this District* at the original filing time—and it named Respondent Noem. Under *Endo*, the government's post-filing transfer of Ms. Öztürk to Louisiana cannot deprive this Court of habeas jurisdiction.

Nor does the government reckon with the consequences of its rule, which would profoundly undermine *Endo*. According to the government, *Endo* means that the government cannot move a petitioner who has "properly filed" a petition in order to unilaterally choose a different venue—but *Endo* has nothing to say about the government moving a petitioner in a way that prevents any "proper" filing in the first place. That is a bafflingly dim view of *Endo*, which is bedrock habeas law. *See Anariba*, 17 F. 4th at 445–46. As the Supreme Court has instructed, habeas corpus "must not be subject to manipulation by those whose power it is designed to restrain." *Boumediene v. Bush*, 553 U.S. 723, 765-66 (2008). And, the Court held in *Endo*, "[t]he objective of habeas relief may be *in no way* impaired or defeated by the removal of the prisoner from the territorial jurisdiction of the District Court." 323 U.S. at 307 (cleaned up and emphasis added); *see Anariba v. v. Dir. Hudson Cnty. Corr. Ctr*., 17 F.4th 434, 444 (3d Cir. 2021) (warning that *Endo* cannot be read to permit the government to "willingly transfer an ICE detainee seeking habeas relief from continued detention to a jurisdiction that is more amenable to the Government's position, or . . . transfer an ICE detainee for the purpose of intentionally introducing complicated jurisdictional defects to delay the merits review of already lengthy § 2241 claims").

"The second argument, as to the [Vermont] warden, . . . does not work," either, "in light of the "unknown custodian" exception to the "immediate custodian" rule. *Khalil D.N.J.*, 2025 WL 972959, at *25. This exception, recognized as the "law of the land" by the majority in *Padilla*, *see Khalil*, 2025 WL 972959, at *28–29, is necessary because "it is impossible to apply the immediate custodian and district of confinement rules" "when . . . a prisoner is held in an undisclosed location

by an unknown custodian." *Padilla*, 542 U.S. at 450 n.18 (cleaned up) (discussing *Demjanjuk v. Meese*, 784 F.2d 1114 (D.C. Cir. 1986)); *see Ozturk,* 2025 WL 1009445, at *10 (noting "there is also an exception to the immediate-custodian rule where the custodian of the petitioner is unknown at the time that the Petition is filed"); *Khalil D.N.J.*, 2025 WL 972959, at *28-30 (citing cases showing that "the lower federal courts have consistently embraced the unknown custodian exception to the immediate custodian rule"); *see also United States v. Moussaoui*, 382 F.3d 453, 465 (4th Cir. 2004).[5]

And that exception clearly applies here. As Judge Casper noted, the "irregularity of the arrest, detention and processing here is coupled with the failure to disclose Ozturk's whereabouts even after the government was aware that she had counsel and the Petition was filed in this Court." *Ozturk,* 2025 WL 1009445, at *9. Judge Casper also acknowledged that "Ozturk's attorney did not and could not have known her place of confinement or her immediate custodian at the time she filed the Petition, and even in the aftermath of that filing, the government did not disclose Ozturk's whereabouts in Vermont or her planned transport to Louisiana until a day later after she arrived in Louisiana." *Id.* at *9; *see id.* at *10 (Ms. Öztürk similarly could not provide that information herself because she was not permitted to contact her lawyers, despite repeated requests). The application of this exception in this case is therefore consistent with *Padilla*, 542 U.S. at 450 n.18; *Khalil D.N.J.*, 2025 WL 972959, at *28–29, as well as the habeas pleading statute, which contemplates this very situation—filing a petition when a detainee's custodian is unknown, *see* 28 U.S.C.

[5] As this and other exceptions to the "immediate custodian" rule make clear, the rule is not "jurisdictional" in the strict sense. And notably, *Rasul v. Bush*, 542 U.S. 466 (2004)—decided the same day as *Padilla*—rejected the argument that the district of confinement rule is "require[d]" by the habeas statute. *See id.* at 506 (Scalia, J. dissenting); *see id.* at 479 (majority op.) (explaining that a prisoner's presence within the territorial jurisdiction of the district court is not 'an invariable prerequisite' to the exercise of district court jurisdiction under the federal habeas statute" (quoting *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973)).

§ 2242.[6] It is also consistent with Judge Farbiarz's decision in *Khalil D.N.J.*. *See* 2025 WL 972959, at *30 (believing petitioner was in New York, and "because no phone calls were allowed" to "undo the impression," unknown custodian exception applied); *Padilla*, 124 S. Ct. at 450 n.18 (noting exception would apply where detainee was held "in an undisclosed location by an unknown custodian" (citing *Demjanjuk*, 784 F.2d at 1115)). As Judge Farbiarz pointed out, the application of the "unknown custodian" exception is even more straightforward in situations similar to Ms. Öztürk's, where her district of confinement is unknown at "this earlier point in the litigation," than situations like that of the *Demjanjuk* petitioner's, where his location of confinement remained unknown even as the court there reached the merits of his petition. *See Khalil D.N.J.*, 2025 WL 972959, at *31–34.[7]

The government has argued that "there are no extraordinary circumstances that make appropriate the naming of supervisory officials as respondents to this action or that ground jurisdiction with this Court." ECF 19 at 13. And it maintains that all of the government's transfers of Ms. Öztürk were done of out "operational necessity." *Id.* While the Court should not credit the assertion regarding ICE's purposes made by a declarant with no apparent personal knowledge of them, ECF 19-1 ¶¶ 1–6, the "unknown custodian rule" does not even implicate the government's

[6] *See United States v. Moussaoui*, 382 F.3d 453, 465 (4th Cir. 2004) (where "immediate custodian" is "unknown," "the writ is properly served on the prisoner's ultimate custodian"); *United States v. Paracha*, 2006 WL 12768, at *6 (S.D.N.Y. Jan. 3, 2006), *aff'd*, 313 F. App'x 347 (2d Cir. 2008) (similar); *Ali v. Ashcroft*, 2002 WL 35650202, at *3 (W.D. Wash. Dec. 10, 2002); *see* 28 U.S.C. § 2242 (at pleading stage, requiring naming of petitioner's warden "if known"); Hertz & Liebman, 1 Federal Habeas Corpus Practice & Procedure § 10.1 (7th ed. 2015) ("The 'immediate custodian' rule . . . is inapplicable . . . where the prisoner's current whereabouts are unknown.").

[7] The government's theory would suggest that lawyers seeking to increase the odds they file petitions in the "right" districts amidst government efforts to quickly transfer people to far-away jurisdictions might try to file in multiple places, just to be safe. But as Judge Farbiarz pointed out, that approach "might . . . be[] in some tension with the lawyer's professional obligations." *Khalil D.N.J.*, 2025 WL 972959, at *24 n.26. Here, Ms. Öztürk's lawyers did all they could have possibly done to learn the location of their client. ECF 12 ¶¶ 25–39.

reasons for transferring Ms. Öztürk, and it can and should be applied regardless of why the government maintains she needed to be moved three times in less than three and a half hours between three different states. Ms. Öztürk's lawyers did not know who was detaining her or where, but they reasonably filed in the last place she was known to have been, after making multiple failed efforts to get information from the government concerning her whereabouts. As both Judge Farbiarz and Judge Casper have concluded, a clear application of the "unknown custodian" rule resolves the question of the Court's jurisdictional over this petition and the named Respondents.

Finally, even without the "unknown custodian" rule, Ms. Öztürk could amend her petition to name the Vermont custodian. Fed. R. Civ. P. 15(a)(2); *see Khalil D.N.J.*, 2025 WL 972959, at *31 n.32 (permitting similar amendment). Under the federal rules, amendments to originating case documents "relate back" to the date of filing. Fed. R. Civ. P. 15(c)(1)(B), (C). Leave to amend to name the proper custodian is regularly granted in habeas cases, and often, substitution is made without a motion. To the extent this Court believes that Ms. Öztürk's immediate custodian while she was in transit or housed at the St. Albans ICE Field Office was an official or officer other than Respondent Hyde, Ms. Öztürk respectfully seeks leave from the Court to amend her petition to include these unknown Respondents who either exercised custodial control during her transfer or were proper custodians with responsibility over the St. Albans Field Office.[8]

[8] *See, e.g.*, *Saunders v. United States Parole Comm'n*, 665 F. App'x 133, 135 (3d Cir. 2016) (summary order) ("When a habeas petitioner incorrectly identifies the party-respondent, the proper course typically is not a with-prejudice dismissal of the petition. Rather, the habeas petitioner should be permitted leave to amend.") (collecting cases); *Crumble v. United States*, No. 1:23-CV-4427 (LTS), 2023 WL 5102907, at *6 (S.D.N.Y. Aug. 7, 2023) (*sua sponte* granting leave to amend habeas petition to name proper respondent); *DeSousa v. Abrams*, 467 F. Supp. 511, 513 (E.D.N.Y. 1979) (same); Order, *Durel B. v. Decker*, No. 20- 3430-KM (D.N.J. Apr. 1, 2020) (ECF 18) (after transfer from S.D.N.Y. to D.N.J., reviewing a habeas petition for COVID-19 relief and directly adding the "proper respondent"); *Hinds v. Hufford*, No. 17-CV-488, 2017 WL 6346413, at *3 n.1 (M.D. Pa. Dec. 12, 2017); *Smith v. Gaetz*, No. CIV 10-616, 2010 WL 3926868, at *2 (S.D. Ill. Oct.

And such amendment may even be unnecessary if the Court determines that Respondent Hyde, whose office maintains control over ICE enforcement operations throughout New England, was the appropriate custodian.[9] At the time the habeas petition on her behalf was filed, the government has stated that Ms. Özturk was in a vehicle being moved to the St. Albans ICE Field Office. Wesling Decl. ¶¶ 12-13, ECF 19-1. Because Hyde and the New England Field Office took custody over Ms. Öztürk at the time of her arrest in the early evening of March 25, 2025, and never relinquished it until she stepped off a plane in Alexandria, Louisiana, almost 21 hours later, ECF 19-1 ¶¶ 4–18, Hyde may also be considered the immediate custodian who could have "produce[d] the body . . . before the court" at the time the petition was filed, *see Padilla*, 542 U.S. at 435 (quoting *Wales v. Whitney*, 114 U.S. 564, 574 (1885)); *see also Rasul*, 542 U.S. at 478–79.

B. Even if the transfer statutes and *Endo* did not apply, though they do, this Court still has habeas jurisdiction over Ms. Öztürk's petition.

1. This Court has habeas jurisdiction over the petition because this case meets the exceptions described in Justice Kennedy's *Padilla* concurrence.

If the Court were to reject all of the arguments above, it should still find it has jurisdiction, because this is the rare case in which exceptions discussed by Justice Kennedy's concurrence and

---

5, 2010); *Kaufman v. Trammell*, No. 08-CV-276, 2012 WL 380351, at *6 n.1 (N.D. Okla. Feb. 6, 2012); *Soto v. Pugh*, No. CV 306- 092, 2007 WL 113945, at *3 n.1 (S.D. Ga. Jan. 10, 2007); *Steele v. Beasley*, No. 19-CV-23, 2019 WL 1270932, at *3 n.1 (E.D. Ark. Mar. 19, 2019), *report and recommendation adopted*, No. 19-CV-23, 2019 WL 1461909 (E.D. Ark. Apr. 2, 2019), *aff'd sub nom. Steele v. Doe*, No. 19-1830, 2019 WL 5390950 (8th Cir. Aug. 6, 2019).

[9] U.S. ICE Enf't, *Boston Field Office*, https://www.ice.gov/field-office/boston-field-office (last accessed Apr. 8, 2025) (noting areas of responsibility include "Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont"); U.S. ICE Enf't, *St. Albans, VT*, https://www.ice.gov/node/62058 (last accessed Apr. 8, 2025) (noting St. Albans, VT Field Office's check-in office as Boston Field Office and email address as Boston.Outreach@ice.dhs.gov).

acknowledged by the majority in *Padilla* excuse non-conformance with the immediate custodian and district of confinement rules in habeas cases.

In *Padilla*, the Supreme Court considered where a petition seeking habeas relief should be filed. Looking to the "plain language" of the federal habeas statute, which limits district courts to granting relief "within their respective jurisdictions," 28 U.S.C. § 2241, the Court concluded that a habeas petition naming a prisoner's custodian can be filed in only one district: "the district of confinement." 542 U.S. at 442. But the Supreme Court in *Padilla* also accepted that, in rare but important cases, the default rule would not apply. In a widely recognized concurring opinion, Justice Kennedy, joined by Justice O'Connor, explained that the immediate custodian rule is "subject to exceptions." 542 U.S. at 452 (Kennedy, J., concurring). And he emphasized that the five-vote majority opinion—of which the two concurring Justices were a pivotal part—"acknowledged" the same thing. *Id.* (citing *id.* at 435-36, 437-42, 444-47 (majority op.)); *see supra* I.A (discussing the "unknown custodian" exception recognized by the majority). The exceptions allow courts to fashion flexible outcomes in unique, outlier cases that are tailored to the particular situation. They do not open the door to a free-for-all, permitting the filing of a petition in "any one of the federal district courts," but only in "the one with the most immediate connection to the named custodian." *Id.* at 453.

Justice Kennedy listed various examples of past exceptions the Supreme Court had made. *See id.* at 454. And of particular relevance here, he explained that, as a matter of fairness and in the interests of justice, he "would acknowledge an exception if there is an indication that the Government's purpose in removing a prisoner were to make it difficult for his lawyer to know where the habeas petition should be filed, or where the Government was not forthcoming with respect to the identity of the custodian and the place of detention." *Id.* "In cases of that sort," he

continued, habeas jurisdiction would be "in the district court from whose territory the petitioner had been removed." As in this case, "if the Government had removed [Ms. Öztürk] from the District [where she was located] but refused to tell [her] lawyer where [s]he had been taken, the District Court would have had jurisdiction over the petition." *Id.* "Or, if the Government did inform the lawyer where a prisoner was being taken but kept moving [her] so a filing could not catch up to the prisoner, again, in my view, habeas jurisdiction would lie in the district or districts from which [s]he had been removed." *Id.*

The *Padilla* majority and concurrence took pains to ensure that future courts—courts just like this one—would exercise their habeas authority to address extraordinary circumstances, in extraordinary moments, and prevent the grave injustice they imagined, but did not see directly before them, from ever coming to pass.[10]

Other courts, including in this District, have seen clearly just what Justice Kennedy meant to do—even as they did not conclude that the kind of extreme case he wrote about was before them. *Griffin v. Ebbert*, 751 F.3d 288, 290 (5th Cir. 2014) (warning against potential that the government would "play[] forum games or ke[ep] moving" detainee "so that his filing could not catch up"); *Sow v. Whitaker*, No. 18-cv-11394, 2019 WL 2023752, at *6 (S.D.N.Y. May 8, 2019) ("This Court agrees that *Padilla* should not be interpreted so as to condone or encourage misbehavior or deceptive conduct by the Government in transferring immigrant detainees."); *see*

[10] The *Padilla* majority—again, of which both Justice Kennedy and Justice O'Connor formed a crucial part—felt it important to twice emphasize that Justice Kennedy's proposed exception had not been met in the case before the Court. *See* 542 U.S. at 435-36 (majority op.) ("No exceptions to this rule, either recognized or proposed, apply here." (cleaned up)); *id.* at 441-42 ("There is no indication that there was any attempt to manipulate behind Padilla's transfer—he was taken to the same facility where other al Qaeda members were already being held, and the Government did not attempt to hide from Padilla's lawyer where it had taken him.").

also Tr. at 6-9, ECF 28, *Thomas v. Decker*, No. 19-cv-8690 (S.D.N.Y. Oct. 16, 2019) (questioning government about type of circumstances in which it believed *Padilla* exception would apply).

The government's conduct towards Ms. Öztürk to date raises precisely the kinds of concerns that have so troubled Justice Kennedy and other courts subsequently applying *Padilla*. Even though there are ICE detention facilities for female detainees in multiple locations across New England, and it is "the usual practice to have detainees, arrested on civil immigration charges, booked and processed at the ICE Boston Field Office in Burlington, Massachusetts before they are sent to a detention facility," ICE insisted that Ms. Öztürk needed to be transferred to Louisiana. *Ozturk v. Trump*, 2025 WL 1009445, at *2. There is far more than "an indication" that the government sent Ms. Öztürk to New Hampshire (then to Vermont, and then on to Louisiana) "to make it difficult for [her] lawyer to know where the habeas petition should be filed." *Padilla*, 542 U.S. at 454. And there is far more than "an indication" that "the Government was not forthcoming with respect to the identity of the custodian and the place of detention." *Id.* Ms. Öztürk's counsel tried to but could not confirm her whereabouts before filing the petition. *Ozturk v. Trump*, 2025 WL 1009445, at *2. And even after the petition was filed, the government did not respond to Ms. Öztürk's counsel's attempts:

> She contacted the ICE ERO in Burlington, Massachusetts and ICE Homeland Security Investigations in Boston, Massachusetts several times to request information, but received no response. Ozturk's attorney also was unable to locate her via ICE's Online Detainee Locator System, where the field for "Current Detention Facility" for Ozturk remained blank. She had several conversations with counsel for the government who could not confirm Ozturk's whereabouts. . . . A representative of the Turkish consulate even went to the ICE Boston Field Office in Burlington, Massachusetts, and was reportedly informed Ozturk was not in that office and ICE could not provide further information about her whereabouts.

Id. at *3. Justice Kennedy's concurrence speaks directly to this case, and the Court thus has venue over Ms. Öztürk's claims based on the exceptions to *Padilla*'s default rule.[11]

2. Respondents should be precluded from challenging this Court's personal jurisdiction and venue under the doctrine of equitable estoppel.

Equitable estoppel can be invoked against the government "where the party can establish both that the Government made a misrepresentation upon which the party reasonably and detrimentally relied and that the Government engaged in affirmative misconduct." *Pollock v. Chertoff*, 361 F. Supp. 2d 126, 134 (W.D.N.Y. 2005) (quoting *City of New York v. Shalala*, 34 F.3d 1161, 1168 (2d Cir. 1994)); *see also Schwebel v. Crandall*, 967 F.3d 96 (2d Cir. 2020). The Second Circuit has applied equitable estoppel in an immigration case where the withholding of critical information caused a noncitizen grave harm. *See Corneil-Rodriguez v. INS*, 532 F.2d 301, 306 (2d Cir. 1976) (the "failure to provide the warning mandated by [a regulation] was fully as misleading as the misinformation given to" an individual in a persuasive Seventh Circuit case, "and certainly as unjust and as seriously prejudicial to her interests" (citing *Lee You Fee v. Dulles*, 236 F.2d 885 (7th Cir. 1956), *rev'd on other grounds*, 355 U.S. 61 (1957))).

Here, for almost a full day after Ms. Öztürk's arrest, ICE provided no information about her whereabouts in response to her counsel's repeated inquiries, which not only precluded counsel from speaking with and advocating for Ms. Öztürk, who suffers from asthma and did not have her

[11] Purely for the purpose of preserving the argument for future appellate review, Ms. Öztürk maintains that venue was proper in the District of Massachusetts. Judge Casper held otherwise, and Ms. Öztürk has no desire to waste the Court's time re-arguing a closed issue. *See supra* note 1. But in order to preserve potential future review of that question, should it become necessary, Ms. Öztürk reserves the right to file a motion for re-transfer to the District of Massachusetts in advance of such review. *See SongByrd, Inc. v. Est. of Grossman*, 206 F.3d 172, 177 (2d Cir. 2000) ("Most Circuits have held that in order to preserve the opportunity for review of a transfer order in the transferee Circuit, a party must move for retransfer in the transferee district court.").

medication when ICE agents cornered her in Somerville, Massachusetts, but also forced Ms. Öztürk's counsel to file a petition without full knowledge of her client's whereabouts—the true genesis of the jurisdictional merry-go-round the government now invokes as grounds for dismissing or transferring this action. The government should be estopped from contesting personal jurisdiction in this District.

3. This Court has jurisdiction over the petition because of Ms. Öztürk's non-core habeas claims.

Ms. Öztürk's amended habeas petition and complaint alleges claims that, together, seek various forms of relief that include both "core" and "non-core" habeas claims—that is, a core habeas order that her detention is unlawful and therefore she must be released from custody, and a non-core order providing types of declaratory and injunctive relief other than release. *See, e.g.*, *Singh v. Holder*, No. 12-Civ-4731, 2012 WL 5878677, at *1 (S.D.N.Y. Nov. 21, 2012). The amended petition and complaint sought declaratory relief that Respondents' actions violated the First Amendment and the Due Process Clause of the Fifth Amendment. *See* Am. Pet. ¶¶ 67–76, ECF 12. What runs through all of the claims, core and non-core, is the retaliatory nature of Respondents' aggressive actions taken against Ms. Öztürk. This Court therefore has venue over both sets of claims. *See Calderon v. Sessions*, 330 F. Supp. 3d 944, 952 (S.D.N.Y. 2018) ("Since the non-core challenges predominate, it simply makes no sense to apply the legal custodian rule to the non-core challenges and the immediate custodian rule to the core challenges, and then litigate in separate venues."). "In these circumstances, 'the convenience of the parties and the court' favors applying the same custodian rule to both the core challenges and non-core challenges, and because the predominant non-core challenges clearly belong to legal custodians, the core challenges go along, as well." *Id.* (cleaned up) (quoting *Henderson v. INS*, 157 F.3d 106, 122 (2d Cir. 1998)). This Court maintains jurisdiction over this petition under a straightforward application of this rule,

where Respondents' legal custody of Ms. Öztürk is uncontroverted. ⍰⍰ Since Respondents have not alleged they cannot be reached by service under Vermont law, this Court has jurisdiction. *See, e.g.*, *Calderon*, 330 F. Supp. 3d at 954. Even if Respondents do allege they cannot be reached by service under Vermont law for a lack of personal jurisdiction, such an argument should not be afforded any weight.

Under Vermont law, "[s]pecific jurisdiction is satisfied when a defendant has 'fair warning' that a particular activity may subject it to the jurisdiction of a state by virtue of the fact that the defendant 'purposefully directed' its activities at residents of the forum state and that the litigation results from injuries arising out of or relating to those activities." *State v. Atl. Richfield Co*., 142 A.3d 215, 221 (Vt. 2016) (citations omitted). Here, Respondents Hyde and Noem purposely direct activities at residents in the State of Vermont through the operation of the St. Albans ICE Field Office. Respondents also concede that Ms. Öztürk's claims are related to Respondents' activities in Vermont. Respondents, for example, readily admit that prior to unlawfully detaining Ms. Öztürk, they planned to transfer her through Vermont to her ultimate destination in Louisiana. Wesling Decl. ¶¶ 4–18, ECF 19-1. Respondents intended for Ms. Öztürk to not only enter Vermont for a fleeting transitory period, like she had in New Hampshire, but for Ms. Öztürk to be issued a Notice to Appear and be detained for several hours overnight at the St. Albans ICE Field Office before she was ultimately jettisoned to Louisiana the following morning. This Court therefore has personal jurisdiction over Respondents.

II. The Immigration and Nationality Act does not bar review of Ms. Öztürk's claims.

Ms. Öztürk's claims arise from the government's Policy of targeting noncitizens for their protected speech—in her case, a single op-ed written for a campus publication. This unconstitutional Policy resulted in her sudden and traumatic detention by government agents and

the termination of her student status in SEVIS [Student and Exchange Visitor] system.[12] While the government's Policy also lay behind the revocation of her visa and placement in removal proceedings, she does not, in this Court, challenge those actions. Instead, she seeks relief on her claims challenging her apprehension, detention, and the termination of her SEVIS: release from detention, reinstatement of her SEVIS, and corresponding declaratory and injunctive relief that the Policy that resulted in her apprehension, detention, and SEVIS termination are illegal.

This Court has jurisdiction to review the legality of her apprehension and detention, the termination of her SEVIS, and the Policy that led to these acts. The Supreme Court and the Second Circuit agree that claims of illegal civil immigration detention are reviewable in habeas. And the termination of Ms. Öztürk's SEVIS is reviewable for the same reasons those Courts have found detention reviewable: It is an action that cannot meaningfully be challenged in removal proceedings, it is collateral to the question of removability, and the injuries that result from it are occurring *now* and cannot be remedied later. Importantly, because the Court has subject matter jurisdiction over Ms. Öztürk's challenges to detention and her SEVIS termination, it also has authority to grant Ms. Öztürk's motion for release pending the adjudication of her habeas petition. *See Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001) (describing courts' inherent authority to release immigrants on bail during the pendency of habeas proceedings).

A. This Court has jurisdiction to review challenges to Ms. Öztürk's detention.

The Supreme Court has repeatedly affirmed the basic principle that district courts have habeas jurisdiction over claims of illegal civil immigration detention. *See Jennings v. Rodriguez*, 583 U.S. 281, 293 (2018) (finding jurisdiction over challenge to detention during removal

[12] SEVIS is "the web-based system that [DHS] uses to maintain information regarding:" F-1 "students studying in the United States[.]" https://studyinthestates.dhs.gov/site/about-sevis.

proceedings); *Nielsen v. Preap*, 586 U.S. 392, 402 (2019) (same). The Second Circuit has reviewed such claims in habeas.[13] So have its sister Circuits.[14] And district courts in the Second Circuit have repeatedly done so, too.[15]

The government cites multiple provisions in the INA—8 U.S.C. §§ 1252(b)(9), 1252(g), 1226(e), and 1201(i)—to urge dismissal of the case. None apply to the detention claim, and the manner in which Courts have interpreted these provisions demonstrate why they do not apply to Ms. Öztürk's other claims either.[16]

1. The government has relied on 8 U.S.C. § 1252(b)(9), a channeling provision that generally requires claims "arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter" be raised "only in judicial review of a final order." The Supreme Court has interpreted § 1252(b)(9) to avoid "extreme" results that would render valid claims, including challenges to detention, "effectively unreviewable." *Jennings*, 583 U.S. at 293;

---

[13] *See, e.g., Black v. Decker*, 103 F.4th 133 (2d Cir. 2024) (habeas challenge to illegal detention during removal proceedings); *Hechavarria v. Sessions*, 891 F.3d 49, 52 (2d Cir. 2018), *as am.* (May 22, 2018) (same as detention after removal proceedings ended).

[14] *See, e.g.*, *Kong v. United States*, 62 F.4th 608, 609 (1st Cir. 2023); *German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 210 (3d Cir. 2020); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1079 (9th Cir. 2006); *Madu v. U.S. Att'y. Gen.*, 470 F.3d 1362, 1367 (11th Cir. 2006).

[15] *See, e.g., Michalski v. Decker*, 279 F. Supp. 3d 487, 492–95 & n.3 (S.D.N.Y. 2018); *Joseph v. Decker*, No. 18-CV-2640(RA), 2018 WL 6075067, at *4 (S.D.N.Y. Nov. 21, 2018); *Davis v. Garland*, No. 22-CV-443-LJV, 2022 WL 17155828, at *5 (W.D.N.Y. Nov. 22, 2022).

[16] The government has previously argued that Ms. Öztürk's detention is unreviewable because it is downstream of the government's decisions to revoke her visa and subsequently place her in removal proceedings, which the government contends are decisions that are not reviewable in federal court until the conclusion of proceedings. ECF 19 at 16–23. This is flatly incorrect. The decision to detain Ms. Öztürk is unrelated to the decision to revoke her visa. While the visa revocation may prevent Ms. Öztürk from traveling back into the country and is the basis for removal listed in her Notice to Appear, ECF 12, Ex. B, it does not require her detention. Indeed, in typical visa revocation cases, individuals are neither detained nor placed in removal proceedings.Nor is detention mandated as part of her removal proceedings. Indeed, given there is no indicia that she is a flight risk or danger, liberty is the norm, and the detention here is the result of the punitive policy she challenges.

id. ("By the time a final order of removal was eventually entered, the allegedly excessive detention would have already taken place."); *see also Preap*, 586 U.S. at 402 ((b)(9) did not preclude detention challenge); *DHS v. Regents of the Univ. of California*, 591 U.S. 1, 19 (2020) (emphasizing that (b)(9)'s "targeted language" is "narrow").[17]

From *Jennings*, the Third Circuit derived a simple "now-or-never" principle: "When a detained alien seeks relief that a court of appeals cannot meaningfully provide on petition for review of a final order of removal, § 1252(b)(9) does not bar consideration by a district court." *E.O.H.C., v. Sec'y U.S. Dep't of Homeland Sec.*, 950 F.3d 177, 180 (3d Cir. 2020); *see also Aguilar v. U.S. Immigr. & Customs Enf't*, 510 F.3d 1, 11 (1st Cir. 2007) (explaining that reading § 1252(b)(9) to cover claims that "cannot be raised efficaciously" on a petition for review would effectively bar "any meaningful judicial review"); *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011) ("[W]hether the district court has jurisdiction will turn on the substance of the relief that a plaintiff is seeking."); *id*. (district court has jurisdiction where "habeas petitions challenged only the constitutionality of the arrest and detention...") (citations omitted).

Here, Ms. Öztürk challenges her *current* unconstitutional detention. "[C]ourts cannot meaningfully provide" review of her detention "alongside review of a final order of removal" and, even assuming they could, "relief may come too late to redress" the harm. *E.O.H.C.*, 950 F.3d at 186 (citing *Aguilar*, 510 F.3d at 11). As a result of her retaliatory detention, Ms. Öztürk's speech and that of others who similarly seek to speak out in support of Palestinian rights is being chilled. Requiring her to raise these claims in her immigration proceedings and go through the lengthy process of getting a final order of removal, appealing it to the Board of Immigration Appeals

[17] The larger statutory scheme attests to the availability of habeas corpus challenges to "detention pending removal proceedings." 28 U.S.C. § 2253(b).

("BIA") and then filing a PFR would render her claims "effectively unreviewable" because the unlawful conduct—punitive detention and chilling of speech—"would have already taken place." *Jennings*, 583 U.S. at 293. Am. Pet. ¶¶ 67–76. *Accord Gutierrez-Soto v. Sessions*, 317 F. Supp. 3d 917, 921 (W.D. Tex. 2018) (addressing merits of First Amendment challenge to ICE detention). Indeed, the government's unconstitutional policy of suppressing disfavored speech would be effectuated if such were the case, because noncitizens would receive the message that speaking out means a lengthy period of unreviewable detention.

2. The government has also relied on 8 U.S.C. § 1252(g), which bars review of specified actions outside of the channeling provision of § 1252(b)(9). This provision also does not apply to Ms. Öztürk's challenge to the legality of her detention. This narrow provision is tethered solely to decisions with respect to "three discrete actions" by the Attorney General to "'*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (citing 8 U.S.C. § 1252(g) (emphases added)). By its terms, § 1252(g) does not apply to detention. *See, e.g.*, *Bello-Reyes v. Gaynor*, 985 F.3d 696, 698, 700 n.4 (9th Cir. 2021) (finding (g) did not bar First Amendment challenge to ICE detention); *Kong*, 62 F.4th at 609 (holding that (g) does not preclude jurisdiction over challenges to the legality of the detention); *Michalski*, 279 F. Supp. 3d at 495 ("the decision or action to detain an individual under § 1226(a) is independent from the decision or action to commence a removal proceeding") . Contrary to the government's contention, Ms. Öztürk does not challenge ICE's general authority "to detain [her] during removal proceedings," Resp't Opp. Pet'r Am. Pet. 18 (citing *Alvarez v. U.S.*

Immigr. & Customs Enf't, 818 F.3d 1194, 1203 (11th Cir. 2016)), but its authority to do so in retaliation for her speech and where detention serves no legitimate purpose.[18] ECF 12 ¶ 75.

The cases cited by the government, Resp't Opp. Pet'r Am. Pet. 19, ECF 19, do not undercut Ms. Öztürk's argument, as they all involve the three discrete actions named in § 1252(g). *See, e.g.*, *Zundel v. Gonzales*, 230 F. App'x 468, 475 (6th Cir. 2007) (challenging "decision to issue an order of removal"); *Humphries v. Various Fed. USINS Emps.*, 164 F.3d 936, 945 (5th Cir. 1999) (similar); *Kumar v. Holder*, No. 12-CV-5261 SJF, 2013 WL 6092707, at *6 (E.D.N.Y. Nov. 18, 2013) (same); *Vargas v. DHS*, No. 1:17-CV-00356, 2017 WL 962420, at *3 (W.D. La. Mar. 10, 2017) (similar, and finding that substantive due process claim challenging detention was "properly before" the court).[19]

3. Section 1226(e) does not preclude review of Ms. Öztürk's detention. *See Öztürk*, 2025 WL 1009445, at *4 & n.1 (rejecting government's 1226(e) argument). That provision precludes review of DHS's "discretionary judgment regarding the application of [Section 1226]." 8 U.S.C. § 1226(e). But Ms. Öztürk does not challenge a "discretionary judgment"; instead, she asserts that the government has no legal authority to detain her in retaliation for her protected speech and that her detention violates due process because it serves no legitimate purpose. Am. Pet. ¶¶ 73–76. As

[18] Indeed, Defendant Rubio recently confirmed the coercive purpose of detaining noncitizen students, stating that "if [the students] seek to self-deport they can do that, because that's what we've done. We're basically asking them to leave the country. That's why they've been detained." Sec'y of State Marco Rubio, Remarks to the Press En Route to Miami, Florida (Mar. 28, 2025) (available at https://perma.cc/JUU8-GDQK).

[19] *Taal v. Trump*, where the court found in three short paragraphs that the plaintiff had not established jurisdiction sufficient to warrant a TRO against two executive orders, is unpersuasive due to the brevity of the court's analysis and the important distinctions between that case and this one. *See* No. 3:25-CV-335, 2025 WL 926207, at *2–3 (N.D.N.Y. Mar. 27, 2025). Critically, in analyzing (b)(9) and (g), the court relied on the plaintiffs' concession that "Taal will have the opportunity to raise his constitutional challenges before the immigration courts." *Id.* Ms. Öztürk makes no such concession and, in any case, *Taal* did not involve claims challenging the legality of detention, which are reviewable in habeas.

the Supreme Court and numerous lower courts have held, § 1226(e) has no application to such claims challenging the legality of detention. *See Demore*, 538 U.S. at 516–17 ("Section 1226(e) contains no explicit provision barring habeas review, and . . . its clear text does not bar [a petitioner's] constitutional challenge" to the legal authority for their detention); *Nielsen*, 586 U.S. at 401 (Section 1226(e) does not bar challenges to "the extent of the statutory authority that the Government claims"). "Because the extent of the Government's detention authority is not a matter of 'discretionary judgment,'" Ms. Öztürk's challenge to the legal basis for detention "falls outside the scope of § 1226(e)." *Jennings*, 583 U.S. at 296; *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020).

4. The government has suggested that habeas review is unnecessary, or unwise, because the Immigration Judge *may* release Ms. Öztürk on bond in the future.

But there is no statutory exhaustion requirement prior to challenging the legality of detention. And prudential exhaustion is not required here because it would be futile. *See McCarthy v. Madigan*, 503 U.S. 140, 147 (1992) (recognizing that prudential exhaustion is not required where a plaintiff "may suffer irreparable harm if unable to secure immediate judicial consideration of her claim," where there is "some doubt as to whether the agency was empowered to grant effective relief," and where the agency has "predetermined the issue" or resort to the agency would otherwise be futile).

Ms. Öztürk's claim is that the policy resulting in her detention is itself unconstitutional. This constitutional question is beyond the bounds of the IJ and BIA's scope of inquiry in a regulatory bond hearing, which asks only whether she can demonstrate she is not a flight risk or a danger to the community. *See Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006). Indeed, even a finding by the IJ that she should be released could be stayed and appealed by the government to

the BIA, thus extending her detention without a hearing on the constitutionality of her detention. And, even should she still be released, she would still be subject to a policy that calls for her re-detention based on protected First Amendment speech.

B. This Court has jurisdiction to review the termination of Ms. Öztürk's student status in SEVIS.

The termination of SEVIS is reviewable, for much the same reasons as the constitutionality of Ms. Öztürk's detention.

1. Section 1252(b)(9) does not bar review. Ms. Öztürk's challenge to her SEVIS termination is also not subject to (b)(9) because it is entirely collateral to her immigration case. And because this claim would not receive meaningful review in the limited administrative process available in immigration court, § 1252(b)(9) does not bar review. Ms. Öztürk's challenge to her SEVIS termination is also not subject to (b)(9) because it is entirely collateral to her immigration case. And because this claim would not receive meaningful review in the limited administrative process available in immigration court, and any possible relief would come too late, (b)(9) poses no obstacle to this Court's review.

Indeed, the government disavows any connection between her SEVIS termination and removal proceedings. Resp't Opp. Pet'r Am. Pet. 4 ("With the *revocation of her visa*, Petitioner was subject to removal…" (emphasis added)); *id*. 16 (removal proceedings initiated "on account of her revoked visa"). And the ground for removability listed on her NTA, 8 U.S.C. § 1227(a)(1)(B), applies to "an alien whose nonimmigrant visa . . . has been revoked under section 1201(i)." ECF 12-2. Thus, the SEVIS termination—which is part and parcel of the government's Policy of retaliating against noncitizens for their pro-Palestine speech, ECF 12 ¶¶ 77-79—is independent of her immigration proceedings and not barred by (b)(9). *See infra* p. 29.Moreover, as with Ms. Öztürk's detention claims, any review in a PFR process would come too late. *See*

E.O.H.C., 950 F.3d at 180. Ms. Öztürk is experiencing the harms flowing from the violation of her First Amendment rights and retaliatory termination of SEVIS right now. And such review would be futile because neither the IJ nor the BIA have authority to reinstate Ms. Öztürk's student status, which is within the sole discretion of USCIS. *Jie Fang*, 935 F.3d at 184–85 (collecting cases). This underscores the urgent need for this Court's review.

2. Section 1252(g) does not bar Ms. Öztürk's challenge to the termination of her SEVIS because it is separate and independent of any of the three actions listed in (g). *See Jennings*, 138 S. Ct. at 841 (explaining that "we read the language" in § 1252(g) "to refer to just those three specific actions themselves"); *AADC*, 525 U.S. at 483 (Section 1252(g) does not alter a court's jurisdiction to review the "many other decisions or actions that may be part of the deportation process"). Her challenge to the "very authority" to terminate SEVIS on the basis of protected speech does "not implicate[]" § 1252(g). *Garcia v. Att'y Gen.*, 553 F.3d 724, 729 (3d Cir. 2009); *see also S.N.C. v. Sessions*, No. 18 CIV. 7680 (LGS), 2018 WL 6175902, at *5 (S.D.N.Y. Nov. 26, 2018) (1252(g) does not apply to "collateral legal and constitutional challenges to DHS's legal authority").

3. Section 1201(i) does not bar Ms. Öztürk's challenge to her ongoing unlawful detention and the retaliatory termination of her SEVIS status. Indeed, the government does not contend that § 1201(i) bars review of such claims, nor could it—they are entirely collateral to the visa revocation. *See Jie Fang v. Dir. U.S. Immigr. & Customs Enf't*, 935 F.3d 172, 176 (3d Cir. 2019) (noting that the "mechanism of revocation is [] inapplicable to this appeal," which involved DHS's termination of a student's SEVIS status); *Maramjaya v. U.S. Citizenship & Immigr. Servs.*, 2008 WL 9398947, at *4 (D.D.C. Mar. 26, 2008) (Section 1201(i) did not bar claim that was collateral to visa revocation decision).

To the extent that the government seeks to argue that the SEVIS termination is bound up with its revocation of Ms. Öztürk's visa, that is incorrect. Even when a visa is revoked, ICE is not authorized to terminate an individual's student status. *See* 8 C.F.R. § 214.1(d). Indeed, ICE's own guidance confirms that "[v]isa revocation is not, in itself, a cause for termination of the student's SEVIS record."[20] A nonimmigrant visa, such as the F-1 visa Ms. Öztürk obtained, controls a noncitizen's admission into the United States, whereas their continued stay is governed by the regulations governing their visa classification in 8 C.F.R. § 214.2(f), such as maintaining a full course of study and avoiding unauthorized employment. The SEVIS is a centralized database used by ICE to manage information on nonimmigrant students and track their compliance with terms of their status. DHS regulations state that a student may fall out of status due to: (1) a "fail[ure] to maintain status," or (2) an agency initiated "termination of status." *See* 8 C.F.R. §§ 214.1(d); 214.2(e)–(f). *See also Jie Fang*, 935 F.3d at 185 n.100. Neither of these bases include the revocation of a visa. Accordingly, the revocation of a visa does not constitute failure to maintain status and cannot therefore be a basis for Ms. Öztürk's SEVIS termination.

C. This Court has jurisdiction to review Ms. Öztürk's challenge to the government's policy of targeting noncitizens for their speech.

At this stage, the most critical needs for Ms. Öztürk are to be released from detention and have her SEVIS status restored. The Court has jurisdiction to review these claims and the legality of the Policy that led to these actions. *See supra* pp. 18–19. But Ms. Öztürk's challenge to the Policy also encompasses actions beyond detention and SEVIS termination. Am. Pet. ¶¶ 69–70; 78. The INA does not bar review of those claims either. The government contends that a challenge to the Policy cannot be heard because certain acts that it requires—the revocation of visas and

[20] DHS, *ICE Policy Guidance 1004-04–Visa Revocations* (June 7, 2010), https://perma.cc/HRX6-EX3Y

placement in removal—are discretionary and thus shielded from judicial review. Not so. While these claims could benefit from additional briefing and fact development, and are less urgent for the Court to address straightaway, the INA does not preclude their review.

The government claims that Ms. Öztürk cannot challenge the Policy—specifically, those portions of the Policy that resulted in her visa revocation and placement in removal proceedings—because those decisions are discretionary ones that must be addressed in administrative proceedings. Resp't Opp. Pet'r Am. Pet. 16–23. But Ms. Öztürk's Policy challenge takes aim not at a discretionary action, but the very legal authority of the government to wield immigration laws as a cudgel to retaliate against noncitizens for engaging in speech it disagrees with. And this claim would not receive "meaningful . . . review," *Jennings*, 583 U.S. at 293, in her immigration proceedings because the IJ and BIA are limited in their ability to review such claims and develop a robust record for the Court of Appeals.

First, § 1252(b)(9) does not bar Ms. Öztürk's challenge to the Policy because it would not receive meaningful review in the administrative process. She cannot raise her First Amendment challenge to the Policy in her removal proceedings. *See, e.g.,United States v. Gonzalez–Roque,* 301 F.3d 39, 48 (2d Cir.2002) (explaining that "constitutional claims lie outside the BIA's jurisdiction"); *Hadayat v. Gonzales*, 458 F.3d 659, 665 (7th Cir. 2006) (similar). Nor can she develop a robust record of evidence on her constitutional claims. *See, e.g.,* 8 C.F.R. 1003.35(a)-(b) (IJ may only require deposition testimony and issue subpoenas if "essential" to the removal case); *Tefel v. Reno*, 972 F. Supp. 608, 615–16 (S.D. Fla. 1997) (IJ cannot develop record for Court of Appeals on issues that IJ cannot hear). Ms. Öztürk's claims concern facts and respondents wholly beyond the purview of her removal proceedings. *See* Am. Pet; *Chang v. United States*, 327 F.3d 911, 923–24 (9th Cir. 2003) (explaining why "access to removal proceedings is an inadequate

substitute for prompt access to judicial review"). "[C]ramming judicial review of those questions into the review of final removal orders would be absurd." *Jennings*, 583 U.S. at 293. Moreover, as with her detention claims, any review in a PFR process would come too late. Ms. Öztürk is experiencing the harms flowing from the violation of her First Amendment rights now. And, again, the government would be able to effectuate an unconstitutional policy if the only way to challenge it were to first experience the harm of retaliatory immigration proceedings.

Second, § 1252(g) does not bar review of the Policy because courts have jurisdiction to review challenges to the legal authority for the Executive's actions. *See, e.g.*, *Madu,* 470 F.3d at 1368 (explaining that (g) "does not proscribe substantive review of the underlying legal bases for those discretionary decisions and actions"); *Arce v. United States*, 899 F.3d 796, 801 (similar); *Garcia*, 553 U.S. F.3d at 729; *Calderon*, 330 F. Supp. 3d at 955 (challenge to ICE's "legal authority" to execute removal reviewable in habeas); *Ali v. Mukasey*, 524 F.3d 145, 150 (2d Cir. 2008) (similar). This is true even where those actions may inevitably lead to removal proceedings. *See, e.g., Regents*, 591 U.S. at 19 ((g) did not preclude judicial review of a challenge to government's DACA recission policy, which "revoke[d] a deferred action program" and could be cast as an initial step in the commencement of removal proceedings); *Catholic Soc. Servs., Inc. v. I.N.S.*, 232 F.3d 1139 (9th Cir. 2000) (en banc) (finding (g) did not bar review of challenge to policy that led to denial of immigration relief, although such denial could lead to decision to commence removal proceedings). Ms. Öztürk's challenge to the government's targeting of noncitizens squarely challenges the extent of its authority under the First Amendment to undertake such actions. As the Second Circuit held in in *Ragbir v. Homan*, "[t]o allow this retaliatory conduct to proceed would broadly chill protected speech, among not only activists subject to . . . deportation but also those citizens and other residents who would fear retaliation against others." 923 F.3d 53,

71 (2d Cir. 2019), *judgment vacated sub nom. Pham v. Ragbir*, 141 S. Ct. 227 (2020) (vacating on other grounds).

Third, § 1201(i) does not bar this Court's review of the Policy because it applies only to "discretion[ary]" decisions by the Secretary of State to revoke visas. But "that discretion is not boundless." *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd,* 484 U.S. 1 (1987); *see also Myers & Myers, Inc. v. U. S. Postal Serv.*, 527 F.2d 1252, 1261 (2d Cir. 1975) ("It is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally . . ."); *Bates v. Town of Cavendish, Vermont*, 735 F. Supp. 3d 479, 506 (D. Vt. 2024) ("The government has no discretion to violate the . . . Constitution; its dictates are absolute and imperative.") (cleaned up). As explained above, Ms. Öztürk does not challenge an ordinary decision to revoke her visa, but the Executive's authority to do so on the basis of an op-ed she published in her school newspaper. And channeling review of this claim into her removal proceedings, as § 1201(i) directs, is inappropriate for the substantially the same reasons that (b)(9) doesn't apply. All the while, the chilling effect of the visa revocation continues to harm Ms. Öztürk.

CONCLUSION

For the foregoing reasons, the Court has jurisdiction to resolve the claims in this case.

Respectfully submitted,

/s/ Lia Ernst
Monica H. Allard
ACLU FOUNDATION OF VERMONT
PO Box 277
Montpelier, VT 05601
(802) 223-6304
lernst@acluvt.org
mallard@acluvt.org

Jessie J. Rossman*
Adriana Lafaille*
Rachel E. Davidson*
Julian Bava**
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF MASSACHUSETTS, INC.
One Center Plaza, Suite 850
Boston, MA 02108
(617) 482-3170
jrossman@aclum.org
alafaille@aclum.org
rdavidson@aclum.org
jbava@aclum.org

Mahsa Khanbabai**
115 Main Street, Suite 1B
North Easton, MA 02356
(508) 297-2065
mahsa@mk-immigration.com

Brian Hauss**
Esha Bhandari**
Brett Max Kaufman**
Noor Zafar**
Sidra Mahfooz*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street, Floor 18
New York, NY 10004
(212) 549-2500
bhauss@aclu.org
ebhandari@aclu.org
bkaufman@aclu.org
nzafar@aclu.org
smahfooz@aclu.org

Counsel for Petitioner
Dated: April 10, 2025

Ramzi Kassem**
Naz Ahmad*
Mudassar Toppa**
Shezza Abboushi Dallal*
CLEAR PROJECT
MAIN STREET LEGAL SERVICES, INC.
CUNY School of Law
2 Court Square
Long Island City, NY 11101
(718) 340-4558
ramzi.kassem@law.cuny.edu
naz.ahmad@law.cuny.edu
mudassar.toppa@law.cuny.edu
shezza.dallal@law.cuny.edu

Matthew D. Brinckerhoff**
Katherine Rosenfeld**
Vasudha Talla**
Sonya Levitova**
EMERY CELLI BRINCKERHOFF ABADY WARD
& MAAZEL LLP
One Rockefeller Plaza, 8th Floor
New York, NY 10020
212-763-5000
mbrinckerhoff@ecbawm.com
krosenfeld@ecbawm.com
vtalla@ecbawm.com
slevitova@ecbawm.com

**Pro hac vice application forthcoming*
***Admitted to appear pro hac vice*