No. 25-1113

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOHSEN MAHDAWI,
Petitioner-Appellee,

v.

DONALD J. TRUMP, ET AL.,
Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT
District Court Case No. 2:25-cv-389

THE GOVERNMENT'S REPLY IN SUPPORT OF ITS EMERGENCY MOTION PURSUANT TO CIRCUIT RULE 27.1(d) FOR STAY PENDING APPEAL WITH RELIEF REQUEST BY MAY 6, 2025

INTRODUCTION

A federal district court has released Mohsen Mahdawi, notwithstanding the Executive Branch's decision to detain him as part of ongoing removal proceedings. In doing so, the district court acted in direct contravention of explicit jurisdictional bars. Relief is warranted.

Congress clearly removed district court jurisdiction over the precise sort of challenges that Mahdawi asserts—challenges that go to the heart of the validity of his removal proceedings. *See* 8 U.S.C. § 1252(a)(5), (b)(9), (g). Both the district court and Mahdawi take an overly cribbed view of his claims, branding them as run-of-the-mill "arrest and detention" challenges. They are not. Instead, Mahdawi's challenge to his detention is wholly derivative of his challenge to his removal, and thus barred all the same. Indeed, he essentially confirms as much, detailing how the substance of his detention challenge is the same as his removal one (*compare* Opp.7-13, *with* Opp.14-17). And while it can make sense for certain *collateral* challenges to detention (*e.g.*, conditions of confinement) to have a forum in federal district court, it makes zero sense for wholly *derivative* challenges like the one here to get that sort of review. That is because such challenges turn on the *exact same substance* as the very claims that Congress channeled to the courts of appeals alone, as part of a single petition for review. Aliens cannot circumvent that scheme by reframing a challenge to one's ultimate removal, as a challenge to one's preceding detention. And for that reason, the decision below cannot stand.

ARGUMENT

I. The District Court Lacked Jurisdiction.

A. The District Court Lacked Jurisdiction to Grant *Mapp* Relief.

Mapp relief is not unqualified. This Court conditioned such extraordinary relief not only on a petitioner's satisfaction of certain rigorous factors, but also on the district court having jurisdiction over the case. *See Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001) ("Today we reaffirm these cases and hold, once again, that the federal courts have inherent authority to admit to bail individuals *properly within their jurisdiction*.") (emphasis added); *id.* at 231 ("[T]he federal judiciary's power to grant bail to those *who are properly before it*") (emphasis added). Mahdawi concedes this point. Opp.7. Because the district court lacked jurisdiction over Mahdawi's claims, it was without jurisdiction to grant release under *Mapp*.

Section 1252(g). When an alien challenges his detention on the ground that he should not be removed in the first place, it is in substance a challenge to his removal. And when an alien challenges being detained in the process of being removed, that suit is one that "aris[es] from the decision . . . to commence [removal] proceedings." 8 U.S.C. § 1252(g).

That is this case. As his habeas petition makes clear, Mahdawi is not challenging some discrete aspect of his detention; he is challenging the fact he is detained, on the ground he cannot properly be removed to begin with. *See, e.g.*,

ECF# 20.1, Ex. A ¶¶ 1, 62-68, 72-77, 79-81, 83-85. That falls within the heartland of § 1252(g). *See, e.g.*, *Limpin v. United States*, 828 F. App'x 429, 429 (9th Cir. 2020) ("[C]laims stemming from the decision to arrest and detain an alien at the commencement of removal proceedings are not within any court's jurisdiction.").

Mahdawi's argument otherwise (at 12-13) rests entirely on bifurcating detention and removal—allowing suits to the former, regardless of their connection to the latter. But that would neuter the very purpose of § 1252(g): It would allow every alien to attack the merits of his removal, through a habeas suit nominally challenging his detention; and in turn, the government would be subject to the sort of burdensome, parallel litigation the INA endeavored to stop. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482-86 (1999) ("*AADC*"). Instead, what matters is the "substance" of the challenge. *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011). And where, as here, a challenge to detention is in substance a collateral attack on the decision to remove, § 1252(g) bars it.

Indeed, in *AADC*, where the Supreme Court held that materially identical claims were covered by § 1252(g), nowhere did Justice Scalia hint that the exact same theories could be raised in federal court, just captioned as a challenge to the interluding "detention," versus the ultimate "removal." Nor would that make any sense under the opinion. The entire logic of *AADC* was to bar certain parallel litigation, and preserving *ex ante* litigation that would interrupt the "initiation and

prosecution of [the] various stages in the deportation process." 525 U.S. at 484. That applies in full measure here, where Mahdawi is challenging being detained, as part of being removed.

Sections 1252(a)(5), (b)(9). The INA's exclusive review and zipper provisions independently bar Mahdawi's suit. Mahdawi relies on *Jennings v. Rodriguez* for the proposition that challenges to detention are outside these bars. Opp.8-12. But *Jennings specifically said* that whatever § 1252(b)(9)'s reach, it covered the "decision to detain [an] alien in the first place or to seek removal [of him]." 583 U.S. 219, 294 (2018). Mahdawi is wrong (Opp.11-12) to dismiss this as "dicta"; only by defining the general reach of § 1252(b)(9) was the Court able to conclude that Mahdawi's claim was *not* barred by it.

Properly understood, *Jennings* only excludes detention claims that are *both* unreviewable *and* disconnected to the substance of the removal action itself. 583 U.S. at 291-92. Or as this Court put it, only when the action is "unrelated to any removal action or proceeding" is it within a district court's jurisdiction. *Ruiz v. Mukasey*, 552 F.3d 269, 274 n.3 (2d Cir. 2009). "[T]he substance of the relief that a plaintiff is seeking" will dictate. *Delgado*, 643 F.3d at 55. If the substance of a suit is an *indirect* challenge to a removal order, it is barred by the INA. *Id.*

Further, Mahdawi's reading of *Jennings* elides the real issue. There, the government did not argue that § 1252 barred review. And for good reason. The

challenge was purely one to detention, and whether the detention statutes could be read to contain implicit requirement for bond hearings after six months. Importantly, neither *Jennings* nor the other recent immigration detention cases that Mahdawi cites involved challenges to the underlying validity of removal proceedings. For example, criminal aliens subject to mandatory detention under 8 U.S.C. § 1226(c) did not challenge whether their particular criminal conviction was properly used as a predicate for mandatory detention and the removal charge. If they did, that would run headlong into the jurisdiction-stripping provisions of § 1252. Here, that is precisely what Mahdawi is doing. He does not, for instance, bring a procedural due process claim for a bond hearing. Instead, the thrust of his claim is that his removal proceedings are unlawful, and so any detention incident to such invalid proceedings is likewise unlawful. That is not a simple detention challenge that may be heard in habeas. That is a challenge to removal proceedings, regardless of how it is spun. Allowing such claims to proceed in district court would welcome the precise front-end district court litigation that the § 1252 provisions were supposed to stop.

Challenge to the Rubio Determination. Aside from his detention-related challenge that is inextricably intertwined with his challenge to the validity of his removal proceedings, Mahdawi argues that the INA does not even bar his direct challenge to his removal. Opp.14-17. He is incorrect. Mahdawi baselessly claims that he cannot obtain "meaningful review" in a petition for review (Opp.14), but

everyone agrees that at that stage the court of appeals is the proper forum to hear any legal or constitutional challenges to removal proceedings. His "meaningful review" argument thus rings hollow. So too his assertion that review would come too late. The Supreme Court squarely rejected that argument in *AADC*, where the aliens also complained about the "chill" that would take place in the meantime. *AADC*, 525 U.S. at 487-88.

Moreover, the substance of the relief that Mahdwai seeks is to set aside the Rubio Determination, which would have the effect of terminating Mahdawi's removal proceedings. *Delgado*, 643 F.3d at 55. The Rubio Determination is the basis for the removal charge; Mahdawi cannot collaterally attack that as "distinct." In an effort to resist this, Mahdawi misstates holdings of various cases, including that of *Ali v. Mukasey*, 524 F.3d 145 (2d Cir. 2008). Opp.16. He cites *Ali* as holding "1252(g) inapplicable where petitioner alleges they were 'placed in removal proceedings unlawfully or for reasons that would offend the Constitution.'" *Id.* But that is a misleading statement. *Ali* was a petition for review case where this Court acknowledged that *it* would have jurisdiction to review constitutional claims or questions of law concerning an alien's allegations of being unlawfully placed in removal proceedings. *Ali*, 524 F.3d at 150. Nothing in *Ali* suggests that § 1252(g) is inapplicable to *district* courts.

B. The District Court Lacked Jurisdiction to Extend the TRO.

Courts in this Circuit have repeatedly held that they lack the authority to dictate to the Executive Branch where it must detain an alien during removal proceedings.[1] That rule follows from a straightforward application of the INA: Section 1226(a) gives DHS broad discretion over whether to detain an alien during removal proceedings; Section 1231(g) gives the Secretary authority to "arrange for appropriate places of detention for aliens detained pending removal or a decision on removal"; and Section 1252(a)(2)(B)(ii) strips jurisdiction for federal district courts to review that sort of discretionary determination. *See, e.g.*, *Van Dinh v. Reno*, 197 F.3d 427, 433 (10th Cir. 1999).

Mahdawi's primary response is that none of these provisions mention the word "transfer." Opp.18. But that is irrelevant. The INA commits to DHS's discretion where to detain an alien in removal proceedings; a TRO preventing DHS from transferring an alien for detention outside of a particular judicial district, by

[1] *See, e.g.*, *P.M. v. Joyce*, No. 22-CV-6321 (VEC), 2023 WL 2401458, at *5 (S.D.N.Y. Mar. 8, 2023); *Vasquez-Ramos v. Barr*, No. 20-CV-6206-FPG, 2020 WL 13554810, at *6 (W.D.N.Y. June 26, 2020); *Mathurin v. Barr*, No. 6:19-CV-06885-FPG, 2020 WL 9257062, at *11 (W.D.N.Y. Apr. 15, 2020); *Adejola v. Barr*, 408 F. Supp. 3d 284, 287 (W.D.N.Y. 2019); *Gomez v. Whitaker*, No. 6:18-CV-6900-MAT, 2019 WL 4941865, at *6 (W.D.N.Y. Oct. 8, 2019); *Salazar v. Dubois*, No. 17-cv-2186 (RLE), 2017 WL4045304, at *1 (S.D.N.Y. Sept. 11, 2017); *Zheng v. Decker*, No. 14-cv-4663 (MHD), 2014 WL 7190993, at *15-16 (S.D.N.Y. Dec. 12, 2014).

definition, interferes with that judgment call, and injects the courts into an area that Congress assigned exclusively to the Executive. *See* 8 U.S.C. § 1226(e).

Mahdawi also says that an "AWA order" does not involve the sort of "judicial review" covered by § 1252(a)(2)(B). But that provision specifically references the AWA as a precluded form of relief. Regardless, an AWA order is capable of impermissible review just the same as any other order: When a federal court uses the AWA to alter or prevent a discretionary decision made by the Executive, it has necessarily reviewed that decision and decided a different course is appropriate.

The out-of-circuit cases cited by Mahdawi do not help. Opp.18. Foremost, they all rest on the faulty premise that § 1252(a)(2)(B) extends only to provisions that expressly confer discretion. *E.g.*, *Aguilar v. U.S. Immigr. & Customs Enf't*, 510 F.3d 1, 20 (1st Cir. 2007). But as this Court recognized in *Wood v. U.S.*, "statutory discretion" can come in many forms, including where the Secretary is given the power to do something, without being simultaneously "required" to do so in any "particular" way. 175 F. App'x 419, 420 (2d Cir. 2006). So much so here: The Secretary has discretion over whether and where to detain Mahdawi; that sort of "discretionary judgment" is unreviewable. *See also* 8 U.S.C. § 1226(e).

Even on their own terms, the cases cited by Mahdawi are inapposite. Tracking the distinction above (between discrete challenges to detention, versus derivative ones), each case involved a challenge to some *specific aspect* of the transfer. None

involved a court deciding for itself what district is most "appropriate" in light of other considerations, or doing so as part of a way to collaterally attack the underling removal decision. 8 U.S.C. § 1231(g). That is, for detentions as transfers, if the legal challenge is at bottom a challenge to the underlying detention, it runs into the INA's jurisdictional bars. *See Aguilar*, 510 F.3d at 21 (limiting holding to only claims that are "collateral to removal"). That is this case.

II. The Balance of Equities Support a Stay.

The government will experience irreparable harm if this Court does not intervene. Mahdawi says that the government will suffer no harm (Opp.21), but this is incorrect. Besides the fundamental affront to sovereignty that comes with the order below, it does not appear the district court appreciated any of the practical costs. Under the court's order, the Executive was required to immediately release Mahdawi in Vermont, and even if it could detain him, it must do so in a facility in Vermont. But these restraints require ICE to create an ad-hoc location for Mahdawi to appear remotely at his removal proceedings in Louisiana, and creating an ad-hoc location creates an operational burden on ICE and presents security concerns for the officers involved. They also interfere with ICE operational decisions.

Further, allowing a district court to circumvent the jurisdictional bars and specified review-scheme that Congress imposed will cause continuing harm to the public interest. *Nken v. Holder*, 556 U.S. 418, 435 (2009). And Congress amended

the INA, including through 8 U.S.C. § 1252(g), with precisely such harms in mind. *See id.*; *AADC*, 525 U.S. at 487 ("[8 U.S.C. § 1252(g)] is specifically directed at the deconstruction, fragmentation, and hence prolongation of removal proceedings."). "[T]he public has an interest in the Judicial Branch's respect for the jurisdictional boundaries laid down by Congress." *Widakuswara v. Lake*, 2025 WL 1288817, at *6 (D.C. Cir. May 3, 2025).

Finally, a stay is equitable. The district court's order preempts the immigration scheme that Congress established, and forces the Executive to expend limited resources in service of the very parallel litigation that Congress sought to eliminate. Especially if replicated elsewhere, that deeply harms the public interest.

III. Mandamus is Appropriate.

Alternatively, mandamus relief is warranted. Just as a discovery order that intrudes on the separation of powers satisfies the requirements of mandamus, so too does an order directing the government to immediately release an alien in removal proceedings. *See Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 382 (2004). All the more so where, as here, the district court lacks jurisdiction at virtually every level. *See In re Roman Cath. Diocese of Albany, New York, Inc.*, 745 F.3d 30, 37 (2d Cir. 2014) (citing *In re Ivy*, 901 F.2d 7, 10 (2d Cir. 1990)); *accord Stein v. KPMG, LLP*, 486 F.3d 753, 759 (2d Cir. 2007) (finding mandamus appropriate to vacate district court's order where "the actions of the district court were well outside

its subject matter jurisdiction"); *In re S.E.C. ex rel. Glotzer*, 374 F.3d 184, 188 (2d Cir. 2004) ("[T]he SEC is not just arguing that the district court abused its discretion; it is asserting that the court entirely lacked jurisdiction to consider the motion to compel. If the SEC is correct in its assertion, then the district court improperly interfered with agency authority, and the need for [mandamus] relief is more pressing than it would be absent a jurisdictional issue.").

CONCLUSION

The Court should grant the emergency motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d)(2)(A), I certify that the foregoing was prepared using 14-point Times New Roman type, is proportionally spaced and contains less than 2,575 words, exclusive of the tables of contents and citations, and certificates of counsel.

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CERTIFICATE OF SERVICE

I certify that on May 5, 2025, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate ACMS system. I further certify that all participants in the case are registered ACMS users and that service will be accomplished through that system.

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