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UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
BOARD OF IMMIGRATION APPEALS

In the Matter of:  
  
Mahmoud KHALIL,  
  
Respondent,  
  
In Removal Proceedings.



**MR. KHALIL'S OPENING BRIEF ON APPEAL**

*Motion to Remand Previously Filed on February 13, 2026*

*Mr. Khalil is concurrently filing a Joint Motion to Extend Page Limit for Briefs on Appeal with DHS, in which the parties jointly seek leave to file forty-five (45) page briefs on appeal.*

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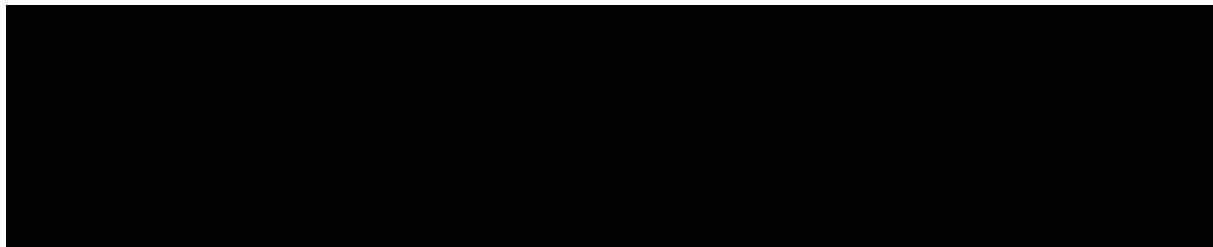
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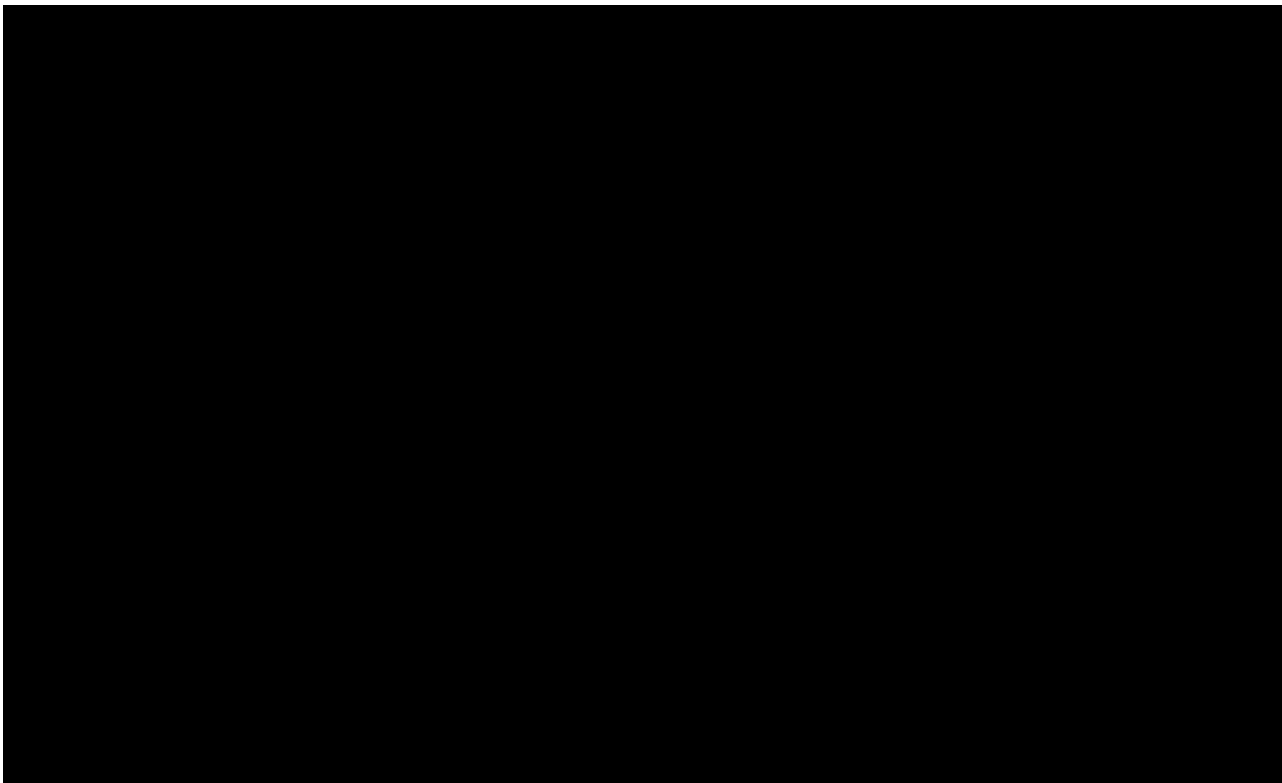
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Respondent, **Mr. Mahmoud KHALIL**, hereby submits his Opening Brief challenging the Immigration Judge’s (“IJ”) decision dated September 12, 2025.

### ISSUES ON APPEAL

Mr. Khalil first clarifies the issues that are pending before the Board of Immigration Appeals (“Board”): (1) whether the IJ erroneously denied pre-decision motions, including Mr. Khalil’s motion to terminate proceedings based on ICE’s egregious regulatory violations, his reasonable requests for continuances, and his motions for discovery that would have permitted him to build a record on his constitutional claims;<sup>1</sup> (2) whether the IJ made factual and legal errors in sustaining the post hoc Immigration and Nationality Act (“INA”) § 237(a)(1)(A) charge; (3) whether the IJ made factual and legal errors in denying Mr. Khalil’s INA § 237(a)(1)(H) waiver; (4) whether the IJ made errors in denying Mr. Khalil asylum, Withholding of Removal, and protection under the Convention Against Torture (“CAT”); and (5) whether the IJ erred in failing to even address Mr. Khalil’s request for voluntary departure. As explained below, the foreign policy ground of removal, INA § 237(a)(4)(C), is not a basis for Mr. Khalil’s order of removal on appeal and is not an issue pending before the Board.

On April 11, 2025, the IJ issued an initial oral ruling finding Mr. Khalil removable under INA § 237(a)(4)(C) (the “foreign policy ground” or “FPG”) based solely on a memorandum from Secretary of State Marco Rubio (“Rubio Determination”). *See* April 11 Transcript of Proceedings (“Tr.”) at 104. On June 11, Judge Michael Farbiarz issued a preliminary injunction in *Khalil v. Trump*, Case No. 2:25-cv-01963-MEF, Dkt. 299, *as clarified by* 355 (D.N.J.), barring DHS and EOIR from seeking to remove Mr. Khalil based on the Rubio Determination. The injunction is still in effect. Nevertheless, on June 20, the IJ issued a written decision (1) memorializing her April 11 oral finding of removability on the FPG charge; (2) finding Mr. Khalil removable under the post hoc INA § 237(a)(1)(A) alleged

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<sup>1</sup> On February 13, 2026, Mr. Khalil filed a Motion to Remand to submit new, additional evidence on First Amendment retaliation. Of course, if the Board finds DHS failed to meet its burden to sustain the INA § 237(a)(1)(H) charge, remand would not be necessary as proceedings would be concluded in Mr. Khalil’s favor.

misrepresentation/fraud charge (the “post hoc charge”); and (3) denying Mr. Khalil asylum, withholding of removal, and protection under the CAT. The IJ failed to consider Mr. Khalil’s requests for an INA § 237(a)(1)(H) waiver or, alternatively, voluntary departure. On July 17, the District Court clarified the terms of its June 11 injunction. In light of the District Court’s clarification, the IJ issued an order on July 31 vacating her April 11 oral finding of removability under the FPG, which had been memorialized in her June 20 decision. Exhibit 51. DHS did not appeal that order.

Then, on September 12, the IJ issued an amended decision, clarifying that her July 31 order had also vacated her June 20 written decision to the extent that it found Mr. Khalil removable under the FPG. *See* IJ Order of Sept. 12, at 3 (citing “Exhibit 51” as the “Court’s Order Vacating Its June 20, 2025 decision (July 31, 2025)”). Nevertheless, the IJ stated that her June 20 Order, which discussed both charges of removability, was incorporated in its entirety by reference into her September 12 Order (as was her July 31 Order, which vacated the FPG charge). The IJ further denied Mr. Khalil’s INA § 237(a)(1)(H) waiver request and ordered him removed to Algeria, or, in the alternative, Syria.

On October 9, Mr. Khalil filed a timely appeal of the IJ’s September 12 decision, which included arguments related to the FPG charge in an abundance of caution, given the lack of clarity from DHS and the IJ’s orders regarding which charges were before the Board on appeal.

On October 22, at oral argument before the U.S. Court of Appeals for the Third Circuit in *Khalil v. Trump*, Case No. 25-2162, 25-2357, counsel for EOIR and DHS clarified the government’s position as to (a) the effect of the IJ’s July 31 Order, (b) what issues were on appeal to the Board, and (c) what would have to occur for the FPG charge to be reinstated. Counsel stated that, “as to the foreign policy charge, that’s been wiped from the IJ’s decision. So.... that charge could only ever be pursued upon a remand to the IJ. So... as to the foreign policy charge, there is no such charge. *So there would have to be new IJ proceedings before that could ever occur.*” *Khalil v. Trump*, Case No. 25-2162, Dkt. 125 (3d Cir. Oct. 22, 2025) (Transcript of Oral Argument) at 59:4-10 (emphasis added). Counsel for EOIR

and DHS further clarified that the misrepresentation charge is “the only ground he’s been found removable on, that’s pending before the BIA.” *Id.* at 61:2-5.

On January 15, 2026, a divided Third Circuit panel held that the District Court lacked subject matter jurisdiction to enter the preliminary injunction. *Khalil v. Trump*, Case No. 25-2162, 25-2357 (3d Cir. Jan 15, 2026). The panel did not reach the merits of Mr. Khalil’s constitutional challenges.

Mr. Khalil is pursuing a petition for rehearing or rehearing en banc of the panel’s divided opinion. Unless and until the mandate of the Third Circuit issues, the District Court’s orders remain in effect. Accordingly, EOIR, including the Board, remains enjoined from finding Mr. Khalil removable under the FPG charge, and the charge cannot be and is not the basis of the removal order on appeal. Thus, Mr. Khalil will not be addressing the FPG charge.<sup>2</sup>

### SUMMARY OF ARGUMENT

The IJ committed clear factual and legal error on numerous accounts, including: (1) denying pre-decisional motions that prevented Mr. Khalil from having a full and fair proceeding, thereby violating his statutory, regulatory, and constitutional due process rights; (2) sustaining Allegations 6 and 8 of the Notice to Appear (“NTA”), even though the IJ never found that Mr. Khalil was a “member” of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (“UNRWA”) or Columbia University Apartheid Divest (“CUAD”), which is what DHS alleged; (3) sustaining the INA § 237(a)(1)(A) charge by ignoring the overwhelming weight of evidence showing that Mr. Khalil did not engage in fraud or misrepresentation on his I-485, and by failing to consider his claim of First Amendment retaliation; (4) ignoring precedent, clear statutory language, and the intent of Congress to find Mr. Khalil ineligible for an INA § 237(a)(1)(H) waiver; (5) denying Mr.

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<sup>2</sup> Notwithstanding that the FPG is not and could not be before the Board—particularly because the mandate of the Third Circuit has not issued—if the Board intends to nonetheless make an alternative finding on the FPG despite the injunction and counsel for EOIR’s representation that the charge is not the basis for removal, the Board must explain why and, prior to issuing a ruling on that ground, provide Mr. Khalil the opportunity to brief his substantial challenges to the FPG charge to ensure his due process right to notice and an opportunity to be heard.

Khalil an evidentiary hearing on his waiver application in violation of controlling statutes, regulations, and the Constitution; (6) abusing her discretion to deny the waiver despite the overwhelming positive equities that clearly outweigh any negative factors; (7) denying Mr. Khalil’s application for asylum, Withholding of Removal, and CAT; and (8) failing to address his request for voluntary departure.

The Board should reverse the IJ and terminate proceedings, as the IJ erred in sustaining the sole charge of removability—the INA § 237(a)(1)(A) charge—that is at issue here. Alternatively, the Board must remand the case so that Mr. Khalil may have a meaningful chance to develop the record on his challenges to his removal, including a full and fair hearing on his INA § 237(a)(1)(H) waiver application before the New York Immigration Court.

### STATEMENT OF FACTS AND CASE

Mr. Khalil is a thirty-one-year-old Palestinian, who was born in a refugee camp in Syria. Under Syrian law, he is not eligible for citizenship. May 22 Tr. at 304. Mr. Khalil holds Algerian citizenship, though he has never lived in Algeria and does not speak the language. *Id.* at 369.

Mr. Khalil is married to a U.S. citizen, Dr. Noor Abdalla. Exhibit 27, Tab A. The couple has one U.S. citizen son, Deen Khalil, who is ten months old. *Id.* at Tab C. Because Mr. Khalil lawfully entered the United States and is married to a U.S. citizen, he applied for and obtained conditional lawful permanent resident status on November 16, 2024. Exhibit 15, Tab B. Despite arresting him and initiating these removal proceedings, the U.S. government itself has acknowledged that Mr. Khalil has never engaged in any criminal conduct. *See, e.g., American Association of University Professors et al v. Rubio et al.* (“*AAUP*”), Case No. 1:25-cv-10685-WGY (D. Mass.), Dkt. 315-18 at 3 (Action Memo for Secretary) (“[W]e are not aware of any prior arrests or citations for Khalil regarding criminal activity”).<sup>3</sup>

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<sup>3</sup> Each of the documents from *AAUP* referenced here are the “the contents of official documents,” which permits the Board to take administrative notice of them. *See* 8 C.F.R. § 1003.1(d)(3)(iv). As explained in Mr. Khalil’s Motion to Remand (which included these newly released documents, in addition to other new, material, probative evidence of First Amendment retaliation), if the Board does not conclude proceedings in Mr. Khalil’s favor, it must remand to the IJ with

**I. Mr. Khalil’s childhood in Syria is marred by discrimination, subjugation, and the constant threat of violence.**

As set out in his written closing argument, Exhibit 34 at 2-3, and established at the Individual Calendar Hearing (“ICH”), May 22 Tr. at 303-16; 380-85, Mr. Khalil grew up in a Palestinian refugee camp in Syria, where he faced systemic and targeted persecution from the Assad regime due to his Palestinian identity and political opposition to the Assad regime.

**II. Mr. Khalil’s life in Lebanon and humanitarian work at the British Embassy.**

Mr. Khalil fled Syria to Lebanon at age eighteen, where he put himself through university. *Id.* at 318-19. In June 2018, Mr. Khalil was hired at the British Embassy to work at the United Kingdom (“UK”) Office for Syria. *Id.* at 320. After clearing a rigorous background check, he managed the prestigious Chevening scholarship program, the UK’s equivalent to the Fulbright scholarship. *Id.* at 322-23. Significantly, he also worked on programs related to accountability for crimes committed by Assad and the Islamic State of Iraq and Syria (“ISIS”) during the Syrian Civil War. *Id.* at 321. As the IJ found, Mr. Khalil worked at the British Embassy until December 2022. IJ Order of June 20, at 6-7.

**III. Mr. Khalil moves to the U.S. to pursue a master’s degree at Columbia University.**

In December 2022, after receiving a substantial scholarship, Mr. Khalil moved to New York to pursue a master’s degree from Columbia University’s School of International and Public Affairs (“SIPA”). May 22 Tr. at 324-25. There, he actively worked with the Columbia administration and students on community-building and humanitarian relief efforts, *id.* at 327-28, and built a strong relationship with the administration and faculty at Columbia. *Id.* at 328-334.

Mr. Khalil’s master’s program heavily emphasized practice, meaning students were required to complete internships as part of their coursework. *Id.* at 329-30. The summer after his first year, he was required to do a three-credit internship course over the summer. *Id.* UNRWA, a United Nations

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instructions to reopen the record for further factual development, as the Board cannot properly resolve this appeal without this highly relevant and probative evidence and additional evidence that would be presented after discovery. *Id.*

agency that assists Palestinian refugees, regularly presented at Columbia regarding their internship offerings. *Id.* at 331. Around April 2023, UNRWA offered him a voluntary, unpaid internship to begin in June 2023. *Id.* Consistent with the terms of his student visa, Columbia provided Mr. Khalil with a stipend for the summer to cover his expenses, *id.* at 332-33, and approved and oversaw the internship, for which he also received course credit, *id.* at 330-33; *see also* Exhibit 13, Tab B-C. Mr. Khalil assumed that, because his internship placement by Columbia at UNRWA was housed under the United Nations, the U.S. Department of State was notified about his placement. *Id.* at 331.<sup>4</sup>

On October 7, 2023, after seeing the news of the Hamas-led attacks on Israel, Mr. Khalil felt strongly that civilians on any side should never be targeted and that human rights and international humanitarian laws should apply equally to all. *Id.* at 336-37. As a Palestinian, he was very afraid of what the ensuing conflict would mean for his people. *Id.* at 334-35. In October and November 2023, Mr. Khalil took part in lawful, peaceful protests (clearly activity protected by the First Amendment) against the killings in Gaza, calling for an end to violence. *Id.* at 337. Given his positive relationship with the administration, Columbia public safety officials would often come to him before and after protests to seek his help with ensuring safety for everyone across campus in a tense environment. *Id.*

In November 2023, Mr. Khalil married his U.S. citizen wife. Exhibit 54, Tab C.

#### **IV. In March 2024, Mr. Khalil files for adjustment of status.**

On March 26, 2024, Mr. Khalil submitted his Form I-485 to the U.S. Citizenship and Immigration Services (“USCIS”). He completed the application on his own, without the assistance of legal counsel, relying on the publicly available Form I-485 instructions to complete the form. May 22 Tr. at 344. Notably, those instructions include no information or guidance regarding how to answer the membership question set forth at Part 8 Q.1. Exhibit 23a at 18. On November 16, 2024, USCIS approved the Form I-485 without interviewing Mr. Khalil. May 22 Tr. at 344.

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<sup>4</sup> DHS never denied that the U.S. government knew of Mr. Khalil’s UNWRA internship beginning in 2023.

Mr. Khalil accurately filled out his Form I-485. As the IJ recognized, IJ Order of June 20, at 6-7, he correctly reported that he left the British Embassy in December 2022. Mr. Khalil also accurately reported his employment at Columbia. Because he had completed his internship at UNRWA as part of his coursework, and because Columbia had paid him directly and supervised his placement, Mr. Khalil reasonably believed that listing his employer as Columbia included this internship. May 22 Tr. at 332-33; *see also* IJ Order of Sept. 12, at 6 (“Respondent’s employment is limited to internships ***through the university*** while enrolled in school[.]”) (emphasis added). The Form I-485 and accompanying instructions do not request information on specific coursework, nor does the form contain questions about student internships completed for course credit. Finally, as Mr. Khalil “was not involved with CUAD” in March 2024, IJ Order of June 20, at 7, he did not list it on the I-485.

**V. Mr. Khalil is tapped to serve as a negotiator on behalf of all student organizations involved in the encampment at Columbia.**

In April 2024, Columbia made international headlines when student protestors set up an encampment on the school’s lawn to protest the ongoing genocide in Gaza. As Mr. Khalil had a positive relationship with Columbia’s faculty and administration, and given his background in diplomacy and negotiation, faculty and students approached him to lead negotiations with the student protestors. Exhibit 19, Tab C. As a negotiator, he conveyed the decisions of the student protestors to the administration, and vice versa, in an attempt to reach an amicable and peaceful resolution.

Jewish students, faculty, and organizations such as Jewish Voice for Peace (“JVP”) and Jews for Ceasefire played an essential role in the protests against the unfolding genocide in Gaza. May 22 Tr. at 338. As a staunch opponent of antisemitism, Mr. Khalil believed that Jewish students were an integral part of the student movement, and that it was important that criticism of the state of Israel was not conflated with antisemitism. *Id.* In addition to his own public statements denouncing antisemitism, *see, e.g.*, Exhibit 13, Tab A (CNN Interview), numerous Jewish friends and colleagues attest that he actively worked to protect their safety and make them feel comfortable and secure at

Columbia. *See, e.g.*, Exhibit 27, Tab P.1; Exhibit 14, Tab C. In his role as a negotiator and in making public statements to the press, Mr. Khalil never wore a mask or concealed his name because he knew he was doing nothing wrong and had nothing to hide. May 22 Tr. at 355.

CUAD, which became publicly associated with the encampment, is a coalition of various student groups formed at Columbia in 2016 as a continuation of the 1990s anti-apartheid in South Africa movement. *Id.* at 342. In November 2023, the coalition was revived and expanded. *Id.* at 341. At that time, 120 groups came together to push for an end to the genocide in Gaza and a permanent ceasefire. *Id.* at 341-42. CUAD was primarily composed of undergraduate groups, ranging from JVP and Students for Justice in Palestine, to the climate and dance clubs. *Id.* To Mr. Khalil's knowledge, CUAD is a broad coalition of organizations with no individual membership. *Id.* at 341-42. The affiliated groups were composed of thousands of students with differing views on countless issues. *Id.* at 341-43. At no point was Mr. Khalil a leader or "member" of CUAD. May 22 Tr. at 343; Exhibit 13, Tabs J, K (Letters from faculty and students confirming Mr. Khalil was never a CUAD member).

Due to his public statements on behalf of Palestinian rights, Mr. Khalil was subject to numerous defamatory campaigns by doxing<sup>5</sup> organizations, such as Canary Mission and Betar USA,<sup>6</sup> which called him antisemitic, made racist and Islamophobic remarks, and threatened him. These groups publicly called on United States government officials to deport Mr. Khalil. *See* Exhibit 19A, Tab N.1 (Evidence of racist, false accusations, and Islamophobic threats made against Mr. Khalil by Betar Worldwide, Canary Mission, and others); *see id.* at 4 (Tweet from Betar with a photo of Mr.

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<sup>5</sup> Doxing means to publicly identify or publish private information about someone such as their address or phone number, without their consent, typically by posting it online, especially as a form of punishment or revenge.

<sup>6</sup> The Office of the Attorney General of the State of New York recently found that Betar USA violated state civil rights laws due to, inter alia, "discriminating against individuals' civil rights of protest and peaceful assembly because of a belief or perception regarding their national origin" and "harassing individuals [] who were exercising their First Amendment Rights because of a belief or perception regarding their race, creed, color, or national origin." *See* "In the Matter of Investigation by LETITIA JAMES, Attorney General of the State of New York, of Betar Zionist Organization, Inc.," (Jan. 13, 2026), available at <https://ag.ny.gov/sites/default/files/settlements-agreements/betar-zionist-organization-inc-assurance-of-discontinuance-2025.pdf>. Betar "regularly publicized on social media that its members specifically 'follow' and 'hound' people to 'get them deported.'" *Id.*

Khalil calling him a “jihadi” and with the caption “DEPORT”); *id.* at 6 (Tweet from Canary Mission taking credit for Mr. Khalil’s deportation). Evidence that has been revealed since Mr. Khalil’s removal proceedings in immigration court concluded shows that these defamatory tweets and related tabloid articles were the sole basis for the investigation into Mr. Khalil in March 2025 that led to the initiation of removal proceedings. *AAUP*, Case No. 1:25-cv-10685-WGY, Dkt. 315-15 at 14-18 (HSI Profile for Mr. Khalil) (consisting of tabloid articles from the *NY Post*, a Canary Mission profile, Instagram posts, a Tweet, and articles discussing Columbia’s investigation of students based on pro-Palestine speech as a result of threats by President Trump).

**VI. On March 8, 2025, DHS arrests Mr. Khalil, transports him to Louisiana, and initiates removal proceedings.**

On March 8, 2025, one day after initiating its “investigation” into Mr. Khalil, DHS arrested and detained him inside his apartment building in New York City. DHS did not have a judicial search warrant permitting agents to enter this private space. DHS also did not have an arrest warrant for Mr. Khalil, nor did DHS have any reason to believe that he was a flight risk.

Mr. Khalil was transported to New Jersey early the following morning and then was whisked far away to Louisiana hours later. During that process, several hours after his arrest, on March 9 at 12:35 a.m., DHS issued a warrant for Mr. Khalil in an attempt to cover up that he had been arrested without any warrant and absent any reason to believe that he presented a flight risk. Exhibit 12a.

On March 9, DHS issued an NTA and initiated removal proceedings, scheduling him to appear for a hearing before ACIJ Comans at the LaSalle Detention Facility on March 27, where he was the sole case on her docket at that court. The NTA claimed Mr. Khalil is subject to removal under INA § 237(a)(4)(C)(i) (the FPG), in that “the Secretary of State has reasonable ground to believe that your presence or activities in the United States would have potentially serious adverse foreign policy consequences for the United States.” Mr. Khalil filed a federal lawsuit on March 9 challenging his detention and subsequently amended the lawsuit on March 13 to challenge, among other things, the

policy and invocation of the FPG against Mr. Khalil for his protected political speech.

Two business days later, on March 17, the same day Mr. Khalil filed a motion for preliminary injunction in federal court, DHS issued a Form I-261, Additional Charges of Inadmissibility/Deportability, which asserted an additional charge under INA § 237(a)(1)(A).<sup>7</sup> The Form I-261 also stated that “the Secretary of State has determined that your activities and presence in the United States would have potentially serious adverse foreign policy consequences and would compromise a compelling U.S. foreign policy interest,” admitting that the government is attempting to deport Mr. Khalil for his “beliefs, statements or associations” that are constitutionally protected under the First Amendment. *See* INA § 237(a)(4)(C)(ii); INA § 212(a)(3)(C)(iii).

During a Master Calendar Hearing on April 8, the IJ ordered DHS to file all of its evidence by the next day. *See* Apr. 8 Tr. at 29. Mr. Khalil requested sufficient time to review the evidence and adequately respond, but the IJ denied that request and scheduled a contested removability hearing for April 11, only two days after DHS was to submit its evidence. *Id.* at 24-31.

On April 9, DHS filed four submissions in an attempt to establish its allegations and charges of removal against Mr. Khalil. The first DHS submission was the undated, two-page Rubio Determination. Exhibit 7. The letter itself contains no recitation of facts pertaining to Mr. Khalil nor any explanation as to why his presence in the U.S. is counter to a compelling foreign policy objective. *Id.* Furthermore, although the Rubio Determination references several “Attachments,” none of those Attachments were provided to Mr. Khalil or the IJ. *Id.* at p. 6 (citing “DHS Letter on Mahmoud Khalil” and “HSI Subject Profile of Mahmoud Khalil”).<sup>8</sup> DHS’s Second, Third, and Fourth

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<sup>7</sup> Specifically, DHS alleged that Mr. Khalil failed to disclose on his Form I-485: “that you were a member of the United Nations Relief and Works Agency for Palestine Refugees (UNRWA) from June through November 2023, as a political affairs officer” (Allegation 6); “your continuing employment as a Program Manager by the Syria Office in the British Embassy in Beirut beyond 2022” (Allegation 7); and “that you were a member of the Columbia University Apartheid Divest (CUAD)” (Allegation 8). Exhibit 2. Mr. Khalil subsequently amended his federal lawsuit to claim that these post hoc fraud or misrepresentation allegations were also First Amendment retaliation.

<sup>8</sup> On January 22, 2026, these Attachments were made public through discovery in *AAUP*, Case No. 1:25-cv-10685-WGY, Dkt. 315-15 (HSI Profile); Dkt. 315-17 (DHS Letter); Dkt. 315-18 (Action Memo for the Secretary).

submissions consist of what appears to be a Form I-485 and articles from the tabloid *NY Post*, as well as the *Columbia Spectator*, and several other media outlets that discuss Mr. Khalil's role as a negotiator in April 2024 and note that his LinkedIn listed his role at UNRWA, in an effort to somehow establish that Mr. Khalil committed fraud or misrepresentation on his I-485. *See* Exhibits 7A-C.<sup>9</sup>

Mr. Khalil argued orally and in writing that forty-eight hours was not sufficient time to adequately review and respond to DHS's evidence, and to thereafter present arguments in court. Apr. 8 Tr. at 24-31; Exhibit 11; Apr. 11 Tr. at 62-63; 69. Nevertheless, on April 11, the IJ denied his request for additional time, orally sustained the FPG charge, and held in abeyance the post hoc INA § 237(a)(1)(A) charge, directing the parties to submit additional evidence by April 23.

On April 21, while Mr. Khalil was detained in Jena, Louisiana, he became the father of his first child, Deen, who was born a U.S. citizen in New York City. Exhibit 27, Tab C.

On April 23, Mr. Khalil submitted additional rebuttal evidence and a Form I-589 with preliminary country conditions evidence. Exhibits 14; 15. DHS did not submit any evidence. On May 12, Mr. Khalil submitted additional evidence in support of his applications for relief, Exhibits 19-19A, and a witness list, Exhibit 21. DHS also submitted documents, Exhibits 23-23B, and a motion to pretermite Mr. Khalil's asylum application, asserting he is a threat to national security on the basis of the Rubio Determination. Exhibit 24. On May 19, Mr. Khalil submitted additional evidence in response to DHS's evidence of May 12. Exhibits 27-27A. DHS did not submit any additional evidence.

## **VII. The Individual Calendar Hearing on May 22, 2025, and IJ's June 20 Decision.**

On May 22, the IJ denied DHS's motion to pretermite, finding Mr. Khalil was not statutorily barred from asylum, and denied his request for a continuance to gather evidence as to why the bar did

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<sup>9</sup> Discovery from *AAUP*, *see supra* n. 8, has subsequently revealed that much of the evidence submitted in Mr. Khalil's removal proceedings to establish the misrepresentation charge was taken from the tabloid articles, Tweets, and Canary Mission profile that make up HSI's investigation (which led DHS to conclude there was no ground besides the baseless FPG applicable to Mr. Khalil on March 8). *See also* Argument Section I.B.

not apply. May 22 Tr. at 129-130; 134-35. The IJ further stated that DHS had not met its burden to sustain Allegation 7, and that she was still evaluating Allegations 6 and 8. *Id.* at 146.

Mr. Khalil presented unrefuted expert testimony from four witnesses, all of whom stated he would be at significant risk of persecution and torture if removed from the U.S. Mr. Khalil also presented his own credible testimony regarding the persecution he suffered in Syria as a child, his political beliefs and activities in the U.S., his Form I-485, and his fear of being removed to Syria and/or Algeria. Importantly, DHS did not ask Mr. Khalil a single question on cross-examination regarding the information he provided on his Form I-485 and his testimony on that point, which definitively demonstrated he made no willful, material misrepresentation on his Form I-485.

Nevertheless, the IJ issued a decision on June 20 ordering Mr. Khalil removed to Algeria, or, in the alternative, to Syria. *See supra*, Issues on Appeal.

#### **VIII. Mr. Khalil's INA § 237(a)(1)(H) Waiver Application.**

On July 30, after a series of District Court orders prohibiting use of the Rubio Determination,<sup>10</sup> as discussed *supra*, the IJ set a deadline of August 11—just 12 days later—for the submission of all evidence regarding Mr. Khalil's INA § 237(a)(1)(H) waiver. Exhibit 50. Although EOIR could have waited for Mr. Khalil's proceedings before the Third Circuit to resolve in order to assess whether reinstating the FPG charge would be permissible, the agency elected to move forward with only the post hoc charge at issue. Mr. Khalil complied with the August 11 deadline to the extent possible, but requested a thirty-day extension, explaining that he would be prejudiced by this abnormally short timeline for a non-detained case. Exhibits 53-56. He also specifically requested an evidentiary hearing

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<sup>10</sup> As stated above, Judge Farbiarz issued an injunction on June 11 barring use of the Rubio Determination by EOIR which remains in effect to this day, and which Mr. Khalil provided to the IJ. Motion to Reconsider, dated June 17, 2025, at Tab A. Over the next three months, the IJ issued a series of orders to correct her own findings which, if left undisturbed, were clear violations of the injunction. Exhibit 45; Exhibit 51. DHS has not appealed those orders.

On July 18, after the IJ issued an order reopening proceedings, Exhibit 45, Mr. Khalil submitted a preliminary brief outlining his eligibility for a waiver under INA § 237(a)(1)(H) and summarizing previously-submitted evidence relevant to his waiver request. Exhibit 47. He also submitted a motion for change of venue to the New York Immigration Court, where he and his witnesses reside. Exhibit 46.

and provided a list of witnesses, including himself, his U.S. citizen wife, his U.S. citizen sister-in-law, peers and professors from Columbia, his infant U.S. citizen son's pediatrician, a former colleague of Mr. Khalil, and a licensed psychologist who would assess Mr. Khalil and his wife and child. Exhibit 54. Mr. Khalil again requested that his case be transferred to the non-detained docket in New York.

**IX. The IJ's September 12 Decision.**

On September 12, without holding an evidentiary hearing, the IJ denied Mr. Khalil a waiver and denied as moot his motions for an extension of time and change of venue. *See* IJ Orders of Sept. 12. To reiterate, the IJ denied Mr. Khalil's INA § 237(a)(1)(H) waiver *without hearing any testimony on the hardship and equities*, which is crucial to a full and fair evaluation of whether the waiver should be granted in the exercise of discretion.<sup>11</sup> She then ordered him removed to Algeria, or, in the alternative, Syria.

**ARGUMENT**

**I. The IJ erred in denying Mr. Khalil's pre-decision motions.**

**A. ICE egregiously violated Mr. Khalil's constitutional, statutory, and regulatory rights in arresting him without a warrant and falsely claiming during litigation that he attempted to flee, thereby requiring the termination of proceedings.**

ICE conceded during Mr. Khalil's proceedings that it arrested him without a warrant in the lobby of his private residence in front of his eight-months pregnant wife. *See* Exhibit 12b; *see also* Exhibits 12a; 26; 26b. Noticing that it had blatantly violated 8 C.F.R. § 287.8(c)(2)(i) by arresting Mr. Khalil without a warrant, several hours after the arrest, ICE generated a warrant of arrest, attempting to cover up its error. Exhibit 12a. ICE claimed during removal proceedings that Mr. Khalil attempted to flee arrest, thus alleviating ICE of the requirement of obtaining a warrant, *see* Exhibit 12b, but then backed away from that position when video footage showed Mr. Khalil remained fully compliant with

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<sup>11</sup> *See, e.g.*, Exhibit 47, Tab A-B (declarations explaining ordinary course of events is to schedule a hearing on waiver application); Exhibit 56, Tab AA-CC (declarations describing the high likelihood that Mr. Khalil would normally have been granted a waiver after a hearing); *see also* Motion to Remand, Att. 8 (additional declarations supporting finding of pattern of retaliation by EOIR against Mr. Khalil throughout removal proceedings).

ICE's officers during their interaction. Exhibit 26, Tab A; Exhibit 26a.

In her June 20 Order holding that the circumstances were not egregious, the IJ failed to acknowledge Mr. Khalil's arrest clearly violated 8 C.F.R. § 287.8(c)(2)(i) and a binding settlement agreement in *Nava v. Dep't of Homeland Sec.*, 1:18-cv-03757, Dkt. 146-1 (N.D. Ill. 2020), or that DHS's oversight arm opened an investigation "into due process concerns raised by Khalil's arrest and his attempted removal from the United States" only days before officials working for that office were placed on administrative leave. *See* Exhibit 26, Tab C. It is well settled law—which DHS never contested—that an egregious violation of a regulation is grounds for termination of proceedings. *See Matter of Garcia-Flores*, 17 I. & N. Dec. 325, 328 (BIA 1980) (certain types of regulatory violations can "render subsequent agency actions invalid"); *Sanchez v. Sessions*, 904 F.3d 643, 654 (9th Cir. 2019). In light of the egregious circumstances of Mr. Khalil's arrest—which the IJ largely ignored—as well as ICE's false statements (later abandoned) during litigation, the IJ should have granted Mr. Khalil's motions to terminate proceedings, and this Board should now do so.

**B. The IJ prevented Mr. Khalil from developing the record on his First Amendment retaliation defense to the charge under INA § 237(a)(1)(A).**

The IJ's denial of Mr. Khalil's discovery motions, as well as his motions for continuances for additional time to present evidence and argument, prevented him from submitting evidence and argument that would have been material, probative, and led to further discovery of evidence relevant to his impermissible targeting on First Amendment grounds. Mr. Khalil asserted that DHS's decision to arrest him, initiate these proceedings, and levy two grounds of removal against him, is a result of the U.S. government's retaliation for his constitutionally protected speech and its desire to use the threat of immigration enforcement to silence him and others from speaking about Palestinian human rights in the future. *See, e.g.*, Apr. 11 Tr. at 68-69; Exhibit 19 at 1. In support of his challenges to removal, Mr. Khalil sought on April 11 to compel production of certain documents, including "(1) the "Attachments" referenced in Secretary Rubio's undated, two-page memorandum, (2) any and all

prior versions of Secretary Rubio’s undated, two-page memorandum, and (3) any and all exculpatory evidence that tends to show that (a) his presence in the United States would not have potentially serious adverse foreign policy consequences and (b) he did not commit fraud or material misrepresentation during his adjustment of status process.” Exhibit 9. The discovery requests were relevant to Mr. Khalil’s defenses against *both* charges. Nevertheless, the same day that he filed his motion to compel, the IJ issued a one-sentence denial simply stating: “Court lacks authority. See Matter of Ruiz-Massieu, 22 I&N Dec. 833, (BIA 1999).” Exhibit 9a.<sup>12</sup> This was error on multiple counts, including because *Ruiz-Massieu* has no relevance to the post hoc charge.

That Mr. Khalil was prejudiced by this denial is not reasonably in dispute, given the intervening disclosure in *AAUP* of several (but not all) of the documents he sought. These documents reveal an enforcement policy of targeting individuals based on their protected political speech, that DHS targeted Mr. Khalil based on this policy, that DHS’s investigation of Mr. Khalil consisted solely of a dossier of reports regarding his protected political speech, and that DHS concluded on March 8 that it did “not identif[y] any alternative grounds of removability [other than the FPG charge] that would be applicable to [Khalil].” *AAUP*, No. 1:25-cv-10685-WGY, Dkt. 315-18 at 3 (Action Memo for the Secretary, dated March 8, 2025); *AAUP*, 802 F. Supp. at 194. This statement in the Action Memo is particularly significant because the report of HSI’s investigation, which DHS refused to produce and which the IJ refused to compel DHS to provide, included (1) a review of his Form I-485 and (2) the information that DHS later proffered as post hoc support for the allegations underlying the

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<sup>12</sup> DHS took essentially the same position as the IJ that the Immigration Court lacked jurisdiction to consider constitutional challenges. *See, e.g.*, Apr. 11 Tr. at 56 (“MR. METOYER: I think a good deal of the arguments that respondent counsel is trying to allege kind of fall on the First Amendment. And obviously, the immigration court nor the BIA is a place to make any arguments that actually deal with the First Amendment in any way. My understanding is that First Amendment violations cannot be adjudicated by an immigration judge or the Board of Immigration Appeals, as neither body entertains constitutional challenges to the statutes that they administer...The proper function of the immigration tribunal in the administrative scheme does not encompass passing upon constitutional questions.”). But DHS and the IJ’s position appears to conflict with new assertions made by EOIR in the Policy Directive issued on September 5, 2025. EOIR Policy Memo 25-45 (“PM 25-45”), *Consideration of Constitutional Arguments in Agency Adjudications*.

misrepresentation charge. *See id.* at Dkt. 315-15 at 14 (HSI Profile on Mr. Khalil) (noting HSI reviewed his I-485, and including tabloid articles later submitted by DHS in removal proceedings indicating that Mr. Khalil was a “political affairs officer” at UNRWA, and that he served as a negotiator on behalf of student protestors at Columbia in April 2024). Despite being fully aware of the contents of Mr. Khalil’s Form I-485, his role at UNRWA, and his role as a negotiator *after* he filed his Form I-485, DHS/HSI found no basis for a misrepresentation charge on March 8, 2025.

That changed just one week later, *after* Mr. Khalil filed a lawsuit challenging the government’s unprecedented decision to detain and deport him under the rarely used FPG. *Khalil v. Joyce*, Case No. 2:25-cv-01963-MEF (filed March 9, 2025, as amended March 13, 2025). Mr. Khalil’s lawsuit was fully anticipated by the Department of State, as stated in the now public Action Memo. *See AAUP*, No. 1:25-cv-10685-WGY, Dkt. 315-18 at 3 (noting “Khalil [is] likely to challenge [his] removal under this authority, and courts may scrutinize the basis for these determinations”). Nevertheless, as stated above, DHS had previously concluded there were no other grounds that would be applicable to Mr. Khalil. Two days prior to the issuance of the Form I-261, DOS then acknowledged, in discussing the cases of similarly-situated noncitizens, “the potential that a court may consider [their] actions inextricably tied to speech protected under the First Amendment,” noting “it is likely that courts will closely scrutinize the basis for [the Rubio] determination[s].” *Id.* at 9; 14 (Action Memos re Mr. Mahdawi and Dr. Khan Suri, dated March 15, 2025). DOS also understood on March 15 “that Khalil intends to seek an injunction of the determination in his case[.]” *Id.* Approximately forty-eight hours later, the same day he filed for an injunction, DHS added the post hoc charge of removability.

If the IJ had not denied Mr. Khalil the opportunity to pursue discovery, each of the documents disclosed through *AAUP*—and many more—would have been made available before the IJ sustained the post hoc INA § 237(a)(1)(A) charge on June 20. HSI’s legal determination as of March 8 directly contradicts and undermines the IJ’s flawed finding that Mr. Khalil committed fraud or material

misrepresentation when completing his Form I-485. The denial of these motions also meant Mr. Khalil was prevented from seeking further discovery before the IJ, including on the decision-making process that led DHS to (1) determine on March 8 that no alternative removability charges existed besides the FPG, and (2) then add the post hoc charge eight days later based not on any new information but after Mr. Khalil filed a lawsuit in federal court challenging the FPG, and following nationwide outrage regarding Mr. Khalil’s arrest, *see, e.g.*, Exhibit 27a.

**II. The IJ erred in sustaining the post hoc INA § 237(a)(1)(A) charge.**

The IJ made numerous errors in sustaining the post hoc charge. First, the charge should have been dismissed because it was brought in retaliation for Mr. Khalil’s First Amendment protected activity. Second, the IJ never found Mr. Khalil to have been a member of either UNWRA or CUAD, which is what DHS alleged in the NTA. Third, the IJ erred in sustaining the charge because, even if the allegations were correct, on their face they contained no element of either willfulness nor materiality and were, thus, insufficient to sustain the charge even if proven—which they were not. Fourth, Mr. Khalil credibly testified that he did not willfully make any misstatement.<sup>13</sup> Fifth, the IJ applied the wrong legal standard in sustaining the charge, as she failed to explain how either allegation would have been in any way material or relevant to Mr. Khalil’s admissibility. Sixth, the IJ invented a baseless legal standard to assert that Mr. Khalil had a forward-looking duty to update his application, when no such duty exists (and certainly did not exist when he submitted his Form I-485).

The IJ erred in finding DHS met its burden of establishing the post hoc charge by clear, unequivocal, and convincing evidence. *Woodby v. INS*, 385 U.S. 276, 286 (1966); INA § 239(c)(3)(A).<sup>14</sup> Notably absent from the allegations is any assertion that any alleged “failure to disclose” was willful,

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<sup>13</sup> Because the IJ found Mr. Khalil credible, the facts as he asserted them must be taken as true. *See, e.g., Matter of R-A-*, 22 I&N Dec. 906, 942 (A.G. 2001; BIA 1999) (“As the respondent has been found credible by the Immigration Judge . . . her account is to be taken as true.”).

<sup>14</sup> The IJ’s decision to admit DHS’s evidence in support of the allegations—all of which was unauthenticated, unreliable, and prejudicial, was also error. *See* Apr. 11 Tr. at 89-93.

material, or done with the intent to deceive, all of which are requirements under INA § 212(a)(6)(C).

To establish that a material misrepresentation occurred, DHS must show that the respondent misstated a material fact to a government official for the purpose of obtaining an immigration benefit to which they were not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). Material misrepresentation requires: (1) the person procured, or sought to procure, a benefit under U.S. immigration laws; (2) the person made a false representation and the false representation was willfully made; (3) the false representation was material; and (4) the false representation was made to a U.S. government official. *Matter of Y-G-*, 20 I&N Dec. 794, 796 (BIA 1994). A finding of a willful, material misrepresentation must be based on “clear, unequivocal, and convincing evidence.” *Matter of D-R-*, 27 I&N Dec. 105, 107 (BIA 2017); *Kungys v. United States*, 485 U.S. 759, 771-72 (1988).

The term “willfully” means knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise true. *Matter of Tijam*, 22 I&N Dec. 408, 425 (BIA 1998); *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). Willfulness requires that an applicant was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately misrepresented material facts. *Matter of G-G-*, 7 I&N Dec. at 161. “An alien’s silence or failure to volunteer information does not, in and of itself, constitute fraud or willful misrepresentation because silence itself does not establish a conscious concealment.” USCIS Policy Manual, Vol. 8, Part J, Ch. 3, § D.2. When determining the “willfulness” of a false representation, the Board must consider the circumstances that existed at the time the representation was made. *Matter of Healy and Goodchild*, 17 I&N Dec. at 28 (noting the uncertain state of the law at the time the applicant applied for his visa, and that he was not afforded an interview with a consular officer prior to issuance of the visa).

A misrepresentation is material when it tends to shut off a line of inquiry that is relevant to the individual’s admissibility *and* that would predictably have disclosed other facts relevant to eligibility for a visa, other documentation, or admission to the United States. *Matter of D-R-*, 27 I&N Dec. at

105; *see also* *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980); *Kungys*, 485 U.S. at 772. A material misrepresentation must be “one that was material at the time the application was ‘made.’” *Ghazali v. Holder*, 585 F.3d 289, 292–93 (6th Cir. 2009).<sup>15</sup>

The Board *must* vacate the IJ’s finding, dismiss the charge under INA § 237(a)(1)(A), and terminate proceedings.

**A. ICE filed the post hoc INA § 237(a)(1)(A) charge in retaliation for Mr. Khalil’s protected First Amendment activity, including his federal lawsuit challenging his unlawful detention and deportation.**<sup>16</sup>

First Amendment retaliation claims are analyzed under the two-step *Mt. Healthy* framework. *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977).<sup>17</sup> Mr. Khalil must first make out a prima facie case that: “(1) [he engaged in] constitutionally protected activity, (2) the defendants’ actions caused [him] to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants’ adverse actions were substantially motivated against the plaintiffs’ exercise of constitutionally protected conduct.” *Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002).<sup>18</sup>

The burden then shifts to the government to prove, by a preponderance of the evidence, it would have taken the same adverse action even absent the protected speech. *Mt. Healthy*, 429 U.S. at 287; *see also* *Suppan v. Dadonna*, 203 F.3d 228, 236 (3d Cir. 2000). Mr. Khalil may then refute that showing by evidence that the ostensible explanation is merely pretextual. *Coughlin v. Lee*, 946 F.2d 1152, 1157 (5th Cir. 1991). Mr. Khalil demonstrates each of the requisite elements here.

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<sup>15</sup> *See also* *Chen v. Mukasey*, 527 F.3d 935, 940 (9th Cir. 2008); *Yousif v. Lynch*, 796 F.3d 622, 633 (6th Cir. 2015).

<sup>16</sup> Mr. Khalil raises this argument but reiterates that he has been prevented from litigating it fully because of the IJ’s refusal to consider constitutional claims and allow development of the record. *See* Motion to Remand; *see also* DHS Opposition, filed February 24, 2025, at 2-3 (reiterating that the IJ and the BIA have no authority to consider constitutional claims).

<sup>17</sup> The Fifth Circuit has also recognized that “[w]hether a deportation is retaliatory depends upon the peculiar facts of the individual case.” *Perales v. Casillas*, 903 F.2d 1043, 1053 (5th Cir. 1990).

<sup>18</sup> *See also* *Conard v. Pennsylvania State Police*, 902 F.3d 178 (3rd Cir. 2018); *Beattie v. Madison Cnty. Sch. Dist.*, 254 F.3d 595, 601 (5th Cir. 2001) (individual must demonstrate they engaged in protected conduct and that it was motivating factor in adverse action).

**1. Mr. Khalil meets his burden under the *Mt. Healthy* factors.**

Factor 1: There is ample record evidence that Mr. Khalil has engaged in protected speech in support of Palestinian rights and speech that is critical of Israel and of U.S. support for Israel’s actions in Gaza—including by making public statements, participating in peaceful protests, and serving as mediator between student activists and university administrators. *See, e.g.*, May 22 Tr. at 344-47; Exhibit 13, Tab A; Exhibit 14, Tab A-D; Exhibit 19, Tab A-F. Such political speech on matters of public concern “occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” *Snyder v. Phelps*, 562 U.S. 443, 452 (2011)); *see also Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (noncitizens afforded same First Amendment rights as citizens). In addition, Mr. Khalil’s subsequent filing of a federal lawsuit is also First Amendment-protected activity. *Wilson v. Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979).

Factor 2: The government’s attempts to detain and remove Mr. Khalil, including by lodging the post hoc charge, constitute retaliatory action sufficient to deter a person of “ordinary firmness” from exercising their First Amendment rights. The Supreme Court has “long recognized” that deportation is “a particularly severe ‘penalty’” for lawful permanent residents. *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)); *see also Ragbir v. Homan*, 923 F.3d 53, 71–72 (2d Cir. 2019) (holding that threat of removal constitutes adverse action under First Amendment analysis).<sup>19</sup> A federal court found that Mr. Khalil’s detention chilled his protected speech, including peaceful protest. *Khalil v. Trump*, 786 F. Supp. 3d 871, 879 (D.N.J. 2025), *vacated on other grounds sub nom. Khalil v. President, United States*, 164 F.4th 259 (3d Cir. 2026). It has also chilled that of other noncitizens in the United States, *AAUP*, 802 F. Supp. 3d at 146; *Stanford Daily v.*

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<sup>19</sup> In addition, Mr. Khalil’s detention incident to the post hoc charge is also an adverse action sufficient to satisfy this prong. *See Ercelik v. Hyde*, No. 1:25-CV-11007, 2025 WL 1361543, at \*11 (D. Mass. May 8, 2025); *see also Mohammed H. v. Trump*, No. 25-1576, 2025 WL 1334847, at \*3 (D. Minn. May 5, 2025) (“Being detained by ICE interferes with Petitioner’s ability to speak, and it is reasonable that losing one’s freedom would chill an ordinary person from continuing to speak.”); *Aditya W. H. v. Trump*, No. 25-CV-1976, 2025 WL 1420131, at \*11 (D. Minn. May 14, 2025) (same).

*Rubio*, No. 25-CV-06618-NW, 2026 WL 125241, at \*10 (N.D. Cal. Jan. 16, 2026)—reinforcing that a person of “ordinary firmness” would be deterred from engaging in such protected expression.

Factor 3: As to causal connection, the record shows that DHS’s (in concert with other agencies) decision to bring the post hoc charge was, and continues to be, substantially motivated by Mr. Khalil’s protected activity—both his speech in support of Palestinian rights and his initiation of a federal lawsuit. To prove causation, Mr. Khalil may rely on both subjective and objective evidence showing that his protected activity “substantially motivated” the government’s decision to take adverse action against him. *Mt. Healthy*, 429 U.S. at 287; *Keenan*, 290 F.3d at 258.

The record demonstrates the post hoc charge was “substantially motivated” by Mr. Khalil’s protected expressive activities and was in fact just one of many retaliatory acts taken by the government to shore up its constitutionally infirm attempt to remove him under the FPG. The government first arrested and detained him in direct response to his speech. *See* Exhibit 1 (NTA). DHS has never bothered to dispute this point. Nor could it. The purported basis of his initial arrest and detention—the FPG—expressly relied on Mr. Khalil’s protected activity. *See* Exhibit 2 (I-261).

Moreover, the government’s executive orders outlining plans to target such advocacy, *see* Exec. Order No. 14161, 90 Fed. Reg. 8451 (Jan. 20, 2025) (instructing agencies to target noncitizens who “espouse hateful ideology”); Exec. Order No. 14188, 90 Fed. Reg. 8847 (Jan. 29, 2025) (instructing agencies to investigate “campus anti-Semitism”); Exec. Order No. 14188 “Fact Sheet” (Jan. 30, 2025) (describing the order as a “promise” to “deport Hamas sympathizers,” sending a message to all “resident aliens who participated in pro-jihadist protests” that the government “will find you . . . and deport you”), public statements reflecting hostility toward pro-Palestine speech, and statements praising Mr. Khalil’s arrest and detention as a blueprint for future immigration enforcement, Exhibit 19a, Tab N-Q; *AAUP*, 802 F. Supp. at 146, further evince that the government’s intent has always been to arrest, detain, and ultimately deport Mr. Khalil in response to his protected speech, *see Ragbir*,

923 F.3d at 70-71 (citing remarks of immigration officials as indicia of retaliation); *Gutierrez-Soto v. Sessions*, 317 F. Supp. 3d 917, 934 (W.D. Tex. 2018) (same).

The government’s addition of the post hoc charge reinforces the retaliatory nature of Mr. Khalil’s detention and removal proceedings. When faced with a petition and a preliminary injunction motion challenging the constitutionality of the Rubio Determination, the government promptly added a charge that is rarely, if ever, brought against LPRs with no criminal history for the types of alleged omissions in a prior adjustment application as was done here. *See* Exhibit 47, Tab A-D.<sup>20</sup> And when faced with a court order enjoining detention based on the Rubio Determination, the government made the even more unusual decision to detain Mr. Khalil on the basis of the post hoc charge.

The timing of DHS’s decisions to add the post hoc charge and, later, to continue detaining Mr. Khalil based on it, provides compelling evidence of retaliatory motive. *Ragbir*, 923 F.3d at 79 (cautioning that additional near-term attempts to remove plaintiff would carry the “taint of the unconstitutional conduct”). As established in Section I.B, the evidence revealed through *AAUP* demonstrates that DHS/HSI reviewed Mr. Khalil’s Form I-485 prior to the filing of his lawsuit with full awareness of his role at UNRWA and his role as a mediator at Columbia and concluded there was no alternative basis on which to charge removability as of March 8. Nevertheless, eight days later, after Mr. Khalil filed a lawsuit challenging his removal and was the subject of nationwide press coverage, protests, and public backlash against the government’s unprecedented attacks on First Amendment rights, DHS then instituted this post -hoc, pretextual charge. *See Aditya W. H.*, 2025 WL 1420131, at \*12 (noting that, since “DHS/ICE had apparently already determined that it would immediately pursue removal of Mr. H *before*” it added a new basis for removal, that timing “flatly undercuts” the nonpretextual motives asserted by the government for the later-added basis).

Finally, this case is replete with evidence of a pattern of antagonism and retaliatory conduct,

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<sup>20</sup> *See also* Motion to Remand, filed February 13, 2025, Att. 8.

both within Mr. Khalil’s case and in related cases. *See Watson v. Rozum*, 834 F.3d 417, 422 (3d Cir. 2016); *see also, e.g.*, Exhibit 47, Tabs B-D (declarations explaining highly unusual nature of post hoc charge); Exhibit 56, Tabs AA-CC (declarations explaining that a waiver would normally be granted to Mr. Khalil, and that denial would appear to be First Amendment retaliation). The retaliation at issue was pursued as part of an unlawful official government policy of targeting pro-Palestinian noncitizen student activists, including Mr. Khalil, with the goal of chilling such protected expression, specifically to “terroriz[e] similarly situated non-citizen (and other) pro-Palestinians into silence,” *AAUP*, 802 F. Supp. 3d at 173, constituting the impermissible and pretextual use of immigration enforcement power as a tool of censorship, *see NRA v. Vullo*, 602 U.S. 175, 196 (2024). *See also Lozman v. Riviera Beach*, 585 U.S. 87 (2018). The government’s enforcement policy and abuse of the removal process to target Mr. Khalil and other lawful permanent residents and visa holders for detention and deportation in order to chill lawful and protected political speech is outrageous and egregious discrimination that requires termination of these proceedings.

Taken together, these patterns of conduct weigh overwhelmingly in support of a finding of unlawful retaliation. *See Gutierrez-Soto*, 317 F. Supp. 3d at 934. This retaliation rises to the level of outrageous discrimination because it involves the targeting of a lawful permanent resident on the basis of lawful and protected political speech.

**2. DHS has not and cannot meet its burden.**

DHS has not attempted to create any record showing it would have taken the same adverse actions—to initiate proceedings, lodge the post hoc charge, and detain him pursuant to it—absent Mr. Khalil’s protected speech. Instead, DHS has only asserted it has a statutory right to do so and relied on the IJ’s purported inability to redress First Amendment claims. *See Mt. Healthy*, 429 U.S. at 287, *see also supra* n. 12. “The presence of a facial statutory ground does not preclude inquiry into retaliatory motive, particularly where—as here—there is evidence that the [decision] was driven by political

speech and followed by a detention unsupported by any individualized showing of danger to the public or flight risk.” *Mohammed H.*, 2025 WL 1334847, at \*5 (citing *Nieves v. Bartlett*, 587 U.S. 391, 402 (2019)). Enforcement of a facially valid law is unconstitutional when it is “deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.” *Allred’s Produce v. U.S. Dep’t of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999); *Bryan v. City of Madison, Miss.*, 213 F.3d 267, 277 (5th Cir. 2000) (retaliation for exercising “right to free speech would be expected to qualify.”).

The same is true here. Mr. Khalil has more than met his burden to establish First Amendment retaliation, and DHS has failed to contest these facts or demonstrate that it would have taken any of these adverse actions in the absence of his protected speech. Nor could a post hoc rationalization carry any weight now, given the government’s repeated public statements about why it has pursued Mr. Khalil’s removal and detention. The factually and legally baseless allegations underlying the charge<sup>21</sup> further corroborate Mr. Khalil’s First Amendment retaliation claim, requiring termination.<sup>22</sup> For all these reasons, the Board must vacate the IJ’s removability finding and terminate proceedings.<sup>23</sup>

**B. The allegations on the Form I-261 do not state that any failure to disclose was willful or material, so sustaining the allegations could not sustain the charge.**

The assertions set forth in Allegations 6, 7, and 8 on the Form I-261 make no claim that the alleged “failure to disclose” was material and done willfully or with the intent to deceive. Consequently, even if the Board were to uphold the IJ’s finding that DHS sustained Allegations 6 and 8, the allegations themselves do not contain the elements for establishing that Mr. Khalil was inadmissible

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<sup>21</sup> See, e.g., Exhibit 47, Tab A (D.N.J. Order); Tab B-C (Declarations of former IJ Dana Leigh Marks and former Principal Legal Advisor for ICE and former IJ Kerry Doyle explaining that the immigration court’s June 20 decision and order sustaining two counts of the misrepresentation charge against Mr. Khalil are highly unusual and not at all supported by the record); *Khalil v. Trump*, Case No. 25-cv-01963, Dkt. 281-12 (Declaration of Stacy Tolchin).

<sup>22</sup> At least one other IJ has since found that PM 25-45 allowed her to consider First Amendment retaliation claims, in an order terminating the proceedings of Rumeysa Öztürk, whose case was also analyzed closely in *AAUP*, based in part on applying *AAUP* to determine Ms. Öztürk’s First Amendment rights were violated. Order of Hon. Roopal Patel, dated Jan. 29, 2026 (Motion to Remand, Att. 10); also available at *Ozturk v. Hyde*, Case No. 25-1019, Dkt. 238 (2nd Cir. Feb. 10, 2026).

<sup>23</sup> As established in Mr. Khalil’s pending Motion to Remand, if the Board believes that it lacks sufficient information to terminate proceedings at this point based on DHS’s retaliation, proceedings must be remanded to the IJ for further factual development with instructions to permit Mr. Khalil to pursue discovery in order to fully develop the record.

under INA § 212(a)(6)(C)(i) at the time he adjusted his status.

When a statute of conviction does not contain a definitional element required for a ground of removal, a person is not removable based on a conviction under that statute. *See, e.g., Mathis v. United States*, 136 S.Ct. 2243 (2016); *Descamps v. United States*, 570 U.S. 254 (2013); *Matter of Chairez-Castrejon*, 26 I&N Dec. 819 (BIA 2016). The same principle applies to the allegations here. Thus, even if the Board were to affirm the IJ's finding and sustain Allegation 6 or 8 despite the overwhelming evidence that Mr. Khalil did not commit fraud or misrepresentation, he still would not be removable pursuant to INA § 237(a)(1)(A) because the allegations do not set forth that the "failure to disclose" pertained to a "material" fact that he "willfully" misrepresented or withheld with the "intent to deceive."

**C. The IJ erred in sustaining Allegation 6 (UNRWA) and failing to apply the proper legal standards to determine if any alleged omission related to this allegation was material, willful, or made with intent to deceive.**

The IJ *never* found Mr. Khalil to be a member of UNRWA and acknowledged that UNRWA is not a membership-based organization. IJ Order of June 20, at 6. Instead, she recited the language of "the question at part 8, page 9" of the Form I-485 and stated that he "was involved and associated with UNRWA for approximately six months and failed to disclose this association and participation[.]" But DHS did not allege that Mr. Khalil "was involved and associated with UNRWA." Allegation 6 therefore could not have been sustained. *See United States v. Hoover*, 467 F.3d 496, 502 (5th Cir. 2006) ("when the government chooses to specifically charge the manner in which the defendant's statement is false, the government should be required to prove that it is untruthful for that reason").

Further, because the IJ never rejected Mr. Khalil's credited and unchallenged testimony that the alleged misrepresentation was not willful, there is *no evidence* in the record on which she could have sustained this allegation on June 20. *Matter of G-G-*, 7 I&N Dec. at 161; *see generally* May 22 Tr. (no cross-examination by DHS on Mr. Khalil's testimony that any misrepresentation was not willful). The IJ later attempted to shore up her decision, asserting that because Mr. Khalil is "an intelligent, ivy-

league educated individual” he “understood the bold, capitalized letters at part 8, page 9 on the I-485 required the disclosure of his affiliations with UNRWA[.]” IJ Order of Sept. 12, at 7. But, in addition to the fact that DHS did not allege Mr. Khalil to have been “affiliated” with UNWRA, the IJ again ignored his un rebutted, credible testimony establishing that any alleged omission was *not* willful.

“Willfully” may be distinguished from “accidentally, inadvertently, or in a good faith belief that the factual claims are true.” USCIS Policy Manual, Vol. 8, Part J, Ch. 3, § D.1; *accord Emokab v. Mukasey*, 523 F.3d 110, 116 (2d Cir. 2008) (addressing willfulness for INA § 212(a)(6)(C)(i)). Mr. Khalil testified that he had publicly disclosed his internship on his LinkedIn, Exhibit 13, Tab D (LinkedIn profile), and never intended to hide it at all. Rather, because his internship at UNRWA was approved by Columbia, overseen by Columbia, paid for by Columbia (through a stipend), and authorized as part of his F-1 student status, he believed that, by disclosing his work as a graduate student at Columbia under the employment section on the Form I-485, his UNWRA internship was necessarily included. May 22 Tr. at 332. The IJ herself found that Mr. Khalil was employed by Columbia when he was completing his UNWRA internship. IJ Order of Sept. 12, at 6.

DHS did not contest Mr. Khalil’s account. Still, the IJ, without explanation, discounted Mr. Khalil’s uncontroverted, credible testimony that he believed he properly provided his employment history. Neither the IJ’s June 20 nor September 12 decisions address Mr. Khalil’s explanation, nor address why someone who was “well educated on matters of international administration and policy,” IJ Order of June 20, at 8, would have willfully failed to disclose an internship for course credit that he believed the U.S. Department of State had to approve, May 22 Tr. at 331, and that he had publicly disclosed on his LinkedIn. At most, any alleged omission was “the product of honest oversight, rather than as deliberate misrepresentations made with the subjective intent to [obtain immigration benefits],” falling far short of the willfulness requirement. *United States v. Hovsepian*, 422 F.3d 883, 888 (9th Cir. 2005); *Gonzalez-Maldonado v. Gonzales*, 487 F.3d 975, 978 (5th Cir. 2007).

Similarly, any alleged omission was immaterial, and the IJ failed to apply the correct legal standard in making the erroneous determination that it was material. Neither of the IJ’s decisions cite to any relevant facts supporting this allegation, nor explain how any facts regarding Mr. Khalil’s school-sanctioned internship with UNRWA were “themselves relevant to his qualifications for [adjustment of status].” *Kungys*, 485 U.S. at 774. The IJ also failed to explain any consequences that may have flowed from the disclosure or what line of inquiry was possibly cut off. Mr. Khalil’s participation in an internship at the United Nations, which was approved by Columbia for course credit and known by the Department of State, was not—by any stretch of the imagination—a potential basis to deny his I-485. The IJ therefore failed to hold DHS to its burden to “produce[ ] evidence sufficient to raise a fair inference that a statutory disqualifying fact actually existed.” *Kungys*, 485 U.S. at 783 (Brennan, J., concurring); *see also United States v. Puerta*, 982 F.2d 1297, 1303-04 (9th Cir.1992) (reviewing opinions in *Kungys* and concluding that “Justice Brennan’s view of materiality controls”). Similar to *Matter of Bosuego*, “where further inquiry might have led and whether it might have resulted in the proper denial of the visa is purely speculative.” 17 I. & N. Dec. 125, 131 (1979); *see also So Yen Lee v. I.N.S.*, 43 F.3d 1483 (10th Cir. 1994) (lack of evidence of effect of misrepresentation on admissibility prevents government from demonstrating materiality by clear and convincing evidence).<sup>24</sup>

In sum, any claimed misrepresentation regarding a school-approved internship was not properly alleged by DHS nor properly sustained by the IJ. It was also not willful and is immaterial because it “had no bearing on his receipt of immigration benefits,” *Gonzalez-Maldonado*, 487 F.3d at 978, the IJ never found otherwise. Allegation 6 cannot be sustained, and the Board must overturn the

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<sup>24</sup> *See also Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1964) (submission of a forged job offer in the United States was not material when the applicant was not otherwise inadmissible as a person likely to become a public charge); *Matter of Mazar*, 10 I&N Dec. 79 (BIA 1962) (no materiality in the nondisclosure of membership in the Communist Party where membership would not have resulted in a determination of inadmissibility); *Matter of S- and B-C-*, 9 I&N Dec. 436, 448-49 (A.G. 1961) (emphasizing that “a remote, tenuous, or fanciful connection between a misrepresentation and a line of inquiry which is relevant to the alien’s eligibility is insufficient to satisfy this aspect of the test of materiality”).

IJ's finding and decision.

**D. The IJ erred in sustaining Allegation 8 (CUAD) and failing to apply the proper legal standards to determine if any alleged omission related to this allegation was material, willful, or made with intent to deceive.**

The evidence demonstrates that Mr. Khalil was never a member of CUAD. He was instead a third-party mediator on behalf of all students involved in the encampment—which did not even begin until approximately one month *after* he submitted his I-485—who was chosen precisely because of his lack of affiliation with CUAD. Exhibit 13, Tabs J-K. DHS presented no witness statements nor *any* other evidence contradicting Mr. Khalil's credible testimony. In fact, DHS did not cross-examine Mr. Khalil on this point at all. *See generally* May 22 Tr. DHS instead relied exclusively on “some of the most tenuous and unreliable evidence ever to be introduced in an administrative or legal proceeding.” *Bridges*, 326 U.S. at 165 (Murphy, J., concurring). *See* Exhibit 7a-7b.

Given the lack of evidence, the IJ could not and did not find Mr. Khalil was a member of CUAD. Instead, she again recited the language of “the question at part 8, page 9” of the Form I-485 and stated that he was “involved in and associated with CUAD and by the Respondent's own admission he was a negotiator between CUAD and Columbia University.” IJ Order of June 20, at 7. But that is not what DHS alleged, nor is it factually accurate to interpret Mr. Khalil's role as a negotiator (after he submitted his I-485) as his being “involved in and associated with CUAD.”

In addition to having no evidence to sustain Allegation 8, the IJ invented a new requirement unfounded in caselaw from the Board or any other legal authority. The IJ held that, even though the record evidence demonstrated that Mr. Khalil “was not involved with CUAD” at the time he submitted his Form I-485, IJ Order of June 20, at 7, (much less a “member”), he had “an ongoing obligation and duty to update his application with corrections as they become available to him.” *Id.* at 7-8. Not only does no such requirement exist in the law, but Mr. Khalil could not possibly have been aware of a requirement that has never been codified by USCIS, the Board, or any other court or

government agency. Applying such a requirement would compromise his “due process interests of ‘fair notice, reasonable reliance, and settled expectations’” *De Niz Robles v. Lynch*, 803 F.3d 1165, 1169 (10th Cir. 2015) (Gorsuch, J.) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)).

In fact, the I-485 instructions (which Mr. Khalil credibly testified he followed, as he completed his application without the assistance of a lawyer), specifically say otherwise. *See* I-485 Instructions as of March 2024, <https://niwaplibrary.wcl.american.edu/wp-content/uploads/i-485-Instructions-1.pdf> (“At your biometrics appointment, you must sign an oath reaffirming that: ... All of this information was complete, true, and correct *at the time of filing.*”) (emphasis added).

USCIS has ample tools to request additional evidence when it chooses to, including issuing a Request for Evidence or issuing a Notice of Intent to Deny, 8 C.F.R. § 103.2(b)(8), or requiring applicants to appear for an interview, 8 C.F.R. § 103.2(b)(9). In the eight months between when Mr. Khalil submitted his Form I-485 in March 2024 and USCIS’s approval in November 2024, USCIS took none of those actions. During this same time, Mr. Khalil appeared in multiple press interviews discussing his role as a mediator on behalf of all students at Columbia. *See* Exhibit 13, Tab A (CNN Interview). As shown by HSI’s March 8 legal determination that no ground of removability, other than the baseless FPG, applied to Mr. Khalil, his role as a negotiator did not affect the adjudication of his Form I-485. Putting aside the clear language of the I-485 establishing that the “ongoing duty” imposed by the IJ is completely without legal authority, it strains credulity that Mr. Khalil would attempt to willfully hide his role as a negotiator on his already-submitted adjustment application in order to shut off questions about it, while going on international news to discuss that same role.

Here, again, the IJ stated that the alleged failure to disclose “shut off a line of inquiry that would predictably have disclosed other relevant facts regarding his activities with CUAD,” IJ Order of June 20, at 7-8, but provided no analysis at all of what it could have disclosed and anything she may

have been imagining was clearly “purely speculative.” *Matter of Bosuego, supra; So Yen Lee v. I.N.S., supra.*<sup>25</sup>

Acting as a third-party mediator for student organizations to reach an amicable resolution with Columbia’s administration would not have made Mr. Khalil ineligible for adjustment of status. Even if Mr. Khalil had somehow timewise been able to disclose his role as a negotiator for students, including those who were part of a group that made up CUAD, before the submission of his I-485, he presented credible and uncontradicted testimony that CUAD is a collective of more 100 different student groups without any individual membership. May 22 Tr. at 341-43. This is not the type of group that the Form I-485 asks about. *See Abusambadaneh v. Taylor*, 873 F. Supp. 2d 682, 690 (E.D. Va. 2012) (applicant’s credible testimony that he omitted an organization on his immigration application because he did not interpret the question to inquire about informal relationships with organizations was a reasonable explanation); *Hajro v. Barrett*, 849 F. Supp. 2d 945, 962 (N.D. Cal. 2012) (informal religious practice is not the type of formal group identified in question 8a on the I-485 application).<sup>26</sup>

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In sum, the record shows Mr. Khalil did not intend to deceive anyone, nor did he commit any misrepresentation, and certainly not a willful and material one. The information in his Form I-485 was

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<sup>25</sup> The IJ attempted to shore up her flawed decision by asserting Mr. Khalil “knew of the potential immigration consequences for his involvement in protests organized by varying organizations on campus, including CUAD” because he “was quoted in the news stating that he did not participate in the protests during this time because he was worried about the immigration consequences of his participation, specifically that he would lose his student visa.” IJ Order of Sept. 12, at 7. But Mr. Khalil stating he did *not* participate in activities that might put his immigration status at risk does nothing to establish that the public-facing role he held as a third-party negotiator would somehow render him inadmissible. “[T]he misrepresentation is only material if it led to the person gaining some advantage or benefit to which he or she may not have been entitled under the true facts.” 8 USCIS-PM, Pt. J. CH. 3 ¶ E.2. “[W]hat is relevant is what would have ensued from official knowledge of the misrepresented fact.” *Kungys*, 485 U.S. at 775. The IJ also failed to conduct the required analysis—nor dispute—that Mr. Khalil’s extensive evidence demonstrating that any affiliation he had with CUAD beginning in April 2024 was not the sort that would have rendered him inadmissible, and she also failed to undertake this analysis with respect to UNRWA. *Matter of D-R*, 27 I. & N. at 113.

<sup>26</sup> *See also Hamdi v. United States Citizenship & Immigr. Serv.*, No. EDCV1000894VAPDTBX, 2012 WL 13135302, at \*10 (C.D. Cal. Aug. 29, 2012) (failure to disclose donation to Palestinian rights organization was not done with the subjective intent to defraud); *United States v. Mousavi*, 378 F. App’x 667, 669 (9th Cir. 2010) (failure to disclose military membership in Iran was not material); *Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 479 (1963) (holding that “deportation is a drastic sanction, one which can destroy lives and disrupt families, and [] a holding of deportability [based on membership in the Communist Party] must therefore be premised upon evidence of ‘meaningful association’”).

true and accurate when he filed it on March 26, 2024, and still is. He had no opportunity to provide any additional information about his internships or actions as a negotiator on behalf of students at Columbia, nor anything else that DHS might have deemed relevant, because his application was approved by USCIS without an interview. The IJ therefore clearly erred in finding by clear, unequivocal, and convincing evidence that he made a willful misrepresentation. Further, there is no allegation that Mr. Khalil ever engaged in any unlawful or criminal activity and, thus, even if he could somehow be found by clear, unequivocal, and convincing evidence to be a “member” of UNRWA or CUAD, any such membership would not have been a basis to deny adjustment of status. *Matter of D-R-*, 27 I&N Dec. at 105; *Matter of Ng*, 17 I&N Dec. at 537; *Kungys*, 485 U.S. at 772. Recognizing that DHS had not met its burden under the law, the IJ opted to present her own new allegations<sup>27</sup> and assert an impermissible requirement in order to achieve the result she wanted. Her ruling cannot stand.

The Board must therefore dismiss the post hoc INA § 237(a)(1)(A) charge and terminate proceedings because Mr. Khalil is not removable as charged.

**III. The IJ erred in finding Mr. Khalil ineligible for an INA § 237(a)(1)(H) waiver.**

Assuming the Board agrees with Mr. Khalil that the IJ erred in finding him removable on the post hoc charge, it need not address the IJ’s clear error in finding him statutorily ineligible for a § 237(a)(1)(H) waiver. If, however, the Board reaches this issue, the IJ made several legal errors.

First, the IJ erroneously referred to Mr. Khalil’s “removability pursuant to INA § 237(a)(4)(C),” IJ Order of Sept. 12, at 4, when she was enjoined from doing so. Though she

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<sup>27</sup> The post hoc charge, as applied to Mr. Khalil, particularly when considered in conjunction with “the question at part 8, page 9” of the Form I-485 that the IJ cited in advancing her own allegations that were not contained in DHS’s NTA or Form I-261, suffers from two fatal defects—it is unconstitutionally vague and violates Mr. Khalil’s First Amendment association rights. As applied, an immigration statute is impermissibly vague when a noncitizen was not on notice that his activities would trigger the provisions of the statute or if the statute was so standardless as to render it subject to arbitrary or discriminatory enforcement with respect to those activities; and here, question at Part 8.1 did not put him on notice of what he was required to answer to that question, e.g., that he needed to list where he was placed for a student internship, where he accurately answered who his employer was. The question is also completely standardless. *See Holder v. Humanitarian L. Project*, 561 U.S. 1, 19, 23 (2010).

acknowledges she was barred from considering the FPG charge, her discretionary (and statutory) rulings regarding the waiver were clearly affected by her barred consideration of the (vacated) charge.<sup>28</sup>

Second, even if the IJ or the Board were permitted to find Mr. Khalil removable under INA § 237(a)(4)(C) (which they are not), it would not render him ineligible for the waiver because he was not otherwise inadmissible at the time of admission, a requirement under the statute to be barred from eligibility. Mr. Khalil was “otherwise admissible” when he adjusted status on November 16, 2024. Not only has the INA § 237(a)(4)(C) charge been vacated by the IJ, but the Rubio Determination was not issued until March 2025, so Mr. Khalil could not possibly have been inadmissible on that basis in November 2024 when he adjusted his status. Accordingly, he was and remains eligible for a waiver.

Third, the IJ ignored binding Board precedent and misinterpreted the statute and Fifth Circuit law to hold that Mr. Khalil is statutorily ineligible for the waiver because the alleged misrepresentation occurred “after his entry into the United States,” at the time of his adjustment of status application. IJ Order of Sept. 12, at 5. The IJ was obligated to follow and adhere to the binding Board precedent set forth in *Matter of Agour*, 26 I&N Dec. 566 (BIA 2015), and her refusal to abide by it was another example of her bias and retaliation against Mr. Khalil for his protected speech and activities. Notwithstanding that attempt to bar Mr. Khalil from statutory eligibility, recent Board precedent unequivocally confirms that Mr. Khalil *is* statutorily eligible for an INA § 237(a)(1)(H) waiver. *See Matter of Forjoe*, 29 I&N Dec. 463 (BIA 2026) (overruling *Matter of Agour*, *supra*, which held that the INA § 237(a)(1)(H) waiver applies to adjustment of status because adjusting status constitutes an “admission” for its purposes, but noting that, because this holding “will effectuate a significant change with respect to the longstanding rule that had provided a broader interpretation regarding whether an alien’s adjustment of status constitutes an ‘admission’ for purposes of the waiver at section

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<sup>28</sup> The IJ’s false assertion that the waiver was intended only to forgive innocent misrepresentation also clearly influenced her decision, despite it being contrary to the statute’s language. *See* INA § 237(a)(1)(H) (“whether willful or innocent”).

237(a)(1)(H) of the INA...[the Board’s] interest in applying the new rule articulated does not outweigh the past expectations on the prior rule, particularly as it was articulated in Board precedent, **and therefore this decision will be applied only prospectively.**”) *Id.* at 472 (emphasis added).

Mr. Khalil both filed for adjustment of status and sought a § 237(a)(1)(H) waiver when *Agour* was governing law. Accordingly, *Matter of Forjoe* clearly establishes that Mr. Khalil is statutorily eligible for the waiver and the IJ’s decision to the contrary cannot stand.<sup>29</sup>

**IV. The IJ violated Mr. Khalil’s statutory, regulatory, and due process rights by completely denying him an evidentiary hearing on his waiver application.**

The IJ’s unfounded decision to deny Mr. Khalil an evidentiary hearing application violated precedent, controlling statutes and regulations, and due process. He was prevented from presenting relevant and probative evidence and testimony that the IJ had to consider in order to properly exercise

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<sup>29</sup> Although the Board’s recent caselaw makes clear that Mr. Khalil is statutorily eligible for a waiver, he nevertheless preserves for appeal, should it become necessary, that *Matter of Forjoe* was wrongly decided, and both *Forjoe* and the IJ’s decision are inconsistent with Fifth Circuit (and other circuit) law. Fifth Circuit law in no way supports the IJ’s legally incorrect interpretation of the statute, nor did it permit her to ignore binding BIA precedent. Notably, even before *Agour* was decided, the Fifth Circuit has assumed individuals who adjusted status are eligible for the INA § 237(a)(1)(H) waiver, see *Silos v. Holder*, 538 F. App’x 426, 430 (5th Cir. 2013), and the Court has never held otherwise. In addition, other circuit courts also have held or assumed that adjustment of status qualifies as an admission for purposes of the waiver, both pre- and post-*Agour*. See, e.g., *Hussam F. v. Sessions*, 897 F.3d 707, 715 (6th Cir. 2018); *Albuay v. U.S. Atty. Gen.*, 661 F.3d 534, 539 (11th Cir. 2011); *Asentic v. Sessions*, 873 F.3d 974, 982 (7th Cir. 2017). *Forjoe* also ignores that the INA also expressly uses the term “admission” to refer to the act of adjustment of status. See, e.g., 8 U.S.C. § 1255(b) (“the Attorney General shall record the alien’s lawful admission for permanent residence as of the date the order ... approving the application for the adjustment of status is made...”); 8 U.S.C. § 1229b(b)(3).

It is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Nat’l Ass’n of Priv. Fund Managers v. Sec. & Exch. Comm’n*, 103 F.4th 1097, 1111 (5th Cir. 2024) (citations omitted); see also *Lemus-Losa v. Holder*, 576 F.3d 752, 757 (7th Cir. 2009). As *Marques* court acknowledged, “any understanding of specific statutory provisions requires that we look not just at the specific words but also the context.” *Marques v. Lynch*, 834 F.3d 549, 558 (5th Cir. 2016). In the context of the entire INA, it would be nonsensical for Congress to permit noncitizens who adjusted status to seek an INA § 212(h) waiver, but bar them from an INA § 237(a)(1)(H) waiver without any reason or explanation. It would be even more absurd to allow initial applicants for admission as LPRs from abroad who have not yet lived in the United States to be eligible for the § 237(a)(1)(H) waiver but not those who have lived in this country and established ties and family for perhaps years. *Casem v. I.N.S.*, 8 F.3d 700, 703 (9th Cir. 1993). Congress could not and did not intend that.

Moreover, the court in *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008), reasoned that its interpretation of the term “admission” at INA § 212(h) was supported by Congress’s desire to be *more* lenient to adjustment applicants, who were likely to have more significant ties to the U.S. 519 F.3d at 545. The court found their conclusion “bolstered by the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.” *Id.* at 544 (quoting *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)). See also *Agour*, 26 I&N Dec. at 578 (citing *Judulang v. Holder*, 132 S. Ct. 476, 485 (2011) (agency action must be based on “relevant factors,” meaning that the Board’s approach must be tied to the purposes of immigration laws or appropriate operation of the immigration system and that a method for disfavoring deportable noncitizens that bears no relation to fitness to remain in the country is arbitrary and capricious)).

her discretion. Both statute and regulations provide Mr. Khalil the right to an evidentiary hearing, and he stated his intention to exercise that right. Exhibit 54; *see also* INA § 240(b)(4)(B); 8 C.F.R. § 1240.11 (“The immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and *shall afford the alien an opportunity to make application during the hearing.*”) (emphasis added); 8 C.F.R. § 1240.11(d) (stating that “[t]he respondent may apply to the immigration judge for relief from removal under sections 237(a)(1)(H)”; 8 C.F.R. § 1240.11(e) (stating that “[a]n application under this section shall be made only during the hearing . . .”). Mr. Khalil also provided un rebutted evidence establishing that the normal course of events is for an IJ to decide a waiver application following an evidentiary hearing. Exhibit 47, Tab A-B. Mr. Khalil was substantially prejudiced by the IJ’s denial of an evidentiary hearing, as he was only permitted to present the limited quantity of evidence he could gather in eight business days, and was prevented altogether from providing testimony from himself, his U.S. citizen wife, and numerous peers, colleagues, relatives, and medical professionals who would attest to his contributions to the United States and how critical it is he remain here with his family. In addition, because no hearing was scheduled, he was prevented from filing additional documents thirty days prior to the ICH, in accordance with the EOIR Practice Manual, Chapter 2.1(b)(2)(B). Now that the Board has clarified he *is statutorily eligible* for the waiver, he is undoubtedly prejudiced by not having that evidence in the record on appeal, as the agency has an incomplete record on which to make a discretionary determination. *See Diaz-Resendez v. I.N.S.*, 960 F.2d 493, 495-97 (5th Cir. 1992). If the Board upholds the finding of removability on the post hoc charge despite what Mr. Khalil has raised above, then the case must be remanded to the IJ for a full hearing on his waiver application where he is not prevented from presenting witnesses and documentary evidence in support of his waiver request.

Due process also entitled Mr. Khalil to a hearing, regardless of the discretionary nature of the relief sought. *See U.S. v. Cordova-Soto*, 804 F.3d 714, 723 (5th Cir. 2015) (right to hearing is “guaranteed

by due process”). “Though the agency’s discretion is unfettered at the outset, if it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as ‘arbitrary, capricious, [or] an abuse of discretion.’” *I.N.S. v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996) (Scalia, J.).<sup>30</sup> “Congress does not have the power to delegate to the Executive discretion so broad that the protection of the due process clause of the Fifth Amendment is abrogated,” *Hernandez v. Cremer*, 913 F.2d 230, 241 (5th Cir. 1990), and there is nothing within the INA altering that.

**V. Mr. Khalil should have been granted a waiver.**

Even based on the limited record before her, the IJ erred in denying Mr. Khalil a waiver. As noted above, the IJ’s consideration of the Rubio Determination in her discretionary analysis was prohibited by the District Court’s injunction (just as the Board’s consideration of the Determination remains enjoined today), but it clearly influenced her decision despite her assertion that it was “(w)holly independent from the foreign policy determination.” IJ Order of Sept. 12, at 6.

Mr. Khalil should have been granted the waiver in the exercise of discretion due to the minimal nature of any even possibly relevant alleged misrepresentation (as described above in Section II.C-D) balanced against the overwhelming strong positive equities. The Supreme Court has commented that Congress enacted previous versions of the fraud waiver as a humanitarian measure, finding it “more important to unite families and preserve family ties than ... to enforce strictly the quota limitations or even the many restrictive sections that are designed to keep undesirable or harmful aliens out of the country.” *I.N.S. v. Errico*, 385 U.S. 214, 220 (1966). In addition to refusing to hold an evidentiary hearing, the IJ ignored entire categories of discretionary evidence in the record, including evidence of

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<sup>30</sup> See also *Calderon-Rosas v. Att’y Gen.* U.S., 957 F.3d 378, 385–86 (3d Cir. 2020) (“petitioners seeking discretionary relief are entitled to fundamentally fair removal proceedings, which constitutes a protected interest supporting a due process claim”).

the hardship Mr. Khalil’s U.S. citizen family members would suffer if forced to relocate to Algeria or Syria, the harm he would suffer in Algeria or Syria, and the nationwide support for Mr. Khalil from civil society groups, religious organizations, students and professors at Columbia (including many who are Jewish), and members of Congress and other officials. Exhibits 54-56; *see Sagaydak v. Gonzales*, 405 F.3d 1035, 1040 (9th Cir. 2005) (“We think it goes without saying that IJs and the BIA are not free to ignore arguments raised by a petitioner.”); *Eduard v. Ashcroft*, 379 F.3d 182, 196 (5th Cir. 2004).

The IJ also failed to acknowledge Congressional intent in establishing this waiver, as well as precedent deciding when waivers are appropriately granted. *See, e.g., Matter of Federiso*, 24 I&N Dec. 661, 663-64 (BIA 2008) (collecting legislative history of iterations of the fraud waiver and noting Congress’ “desire to unite families and preserve family ties”); *Errico*, 385 U.S. at 224–25. The IJ’s finding that Mr. Khalil’s alleged failure to state his internship for a few months with a United Nations entity or list a politically active college club (*even if* he was a member, which he was not) was so egregious that his overwhelming positive equities could not overcome that negative factor flies in the face of the Board’s practice of affirming waiver grants even where LPR status was granted based on far more significant forms of fraud. *See, e.g., Exhibit 56, Tab BB* (Declaration of Kerry Doyle, former General Counsel of ICE) (“In the past, I have routinely had waivers granted with very similar positive equities and much more serious alleged fraud, including the use of a false or photo substituted passport when entering the United States.”).<sup>31</sup>

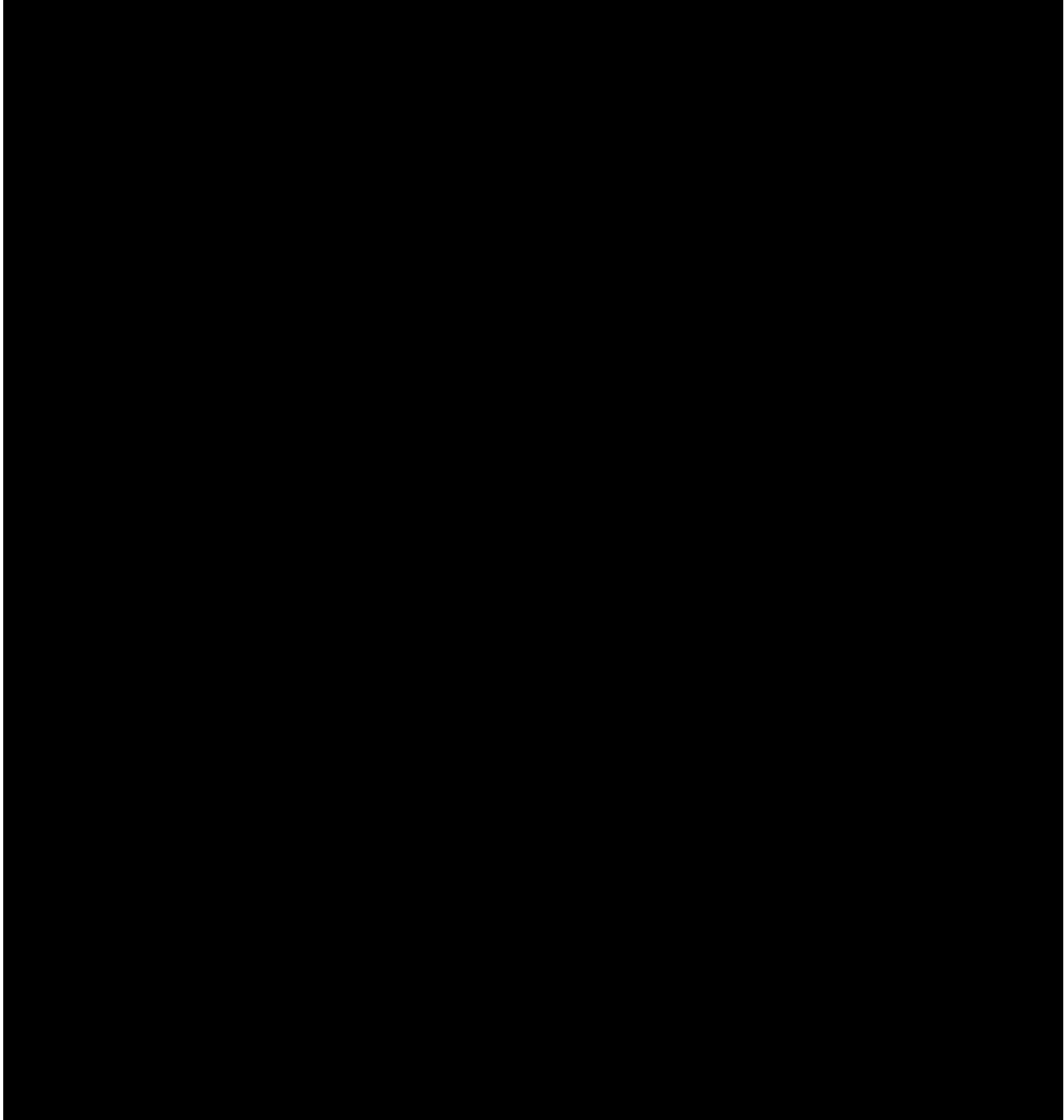
The IJ’s denial of the INA § 237(a)(1)(H) waiver further perpetuated the First Amendment retaliation against Mr. Khalil, as unrebutted documentary evidence establishes.<sup>32</sup> *See, e.g., Exhibit 56, Tab BB* (“[I]t would appear to me that the denial of his application for the waiver would be due to

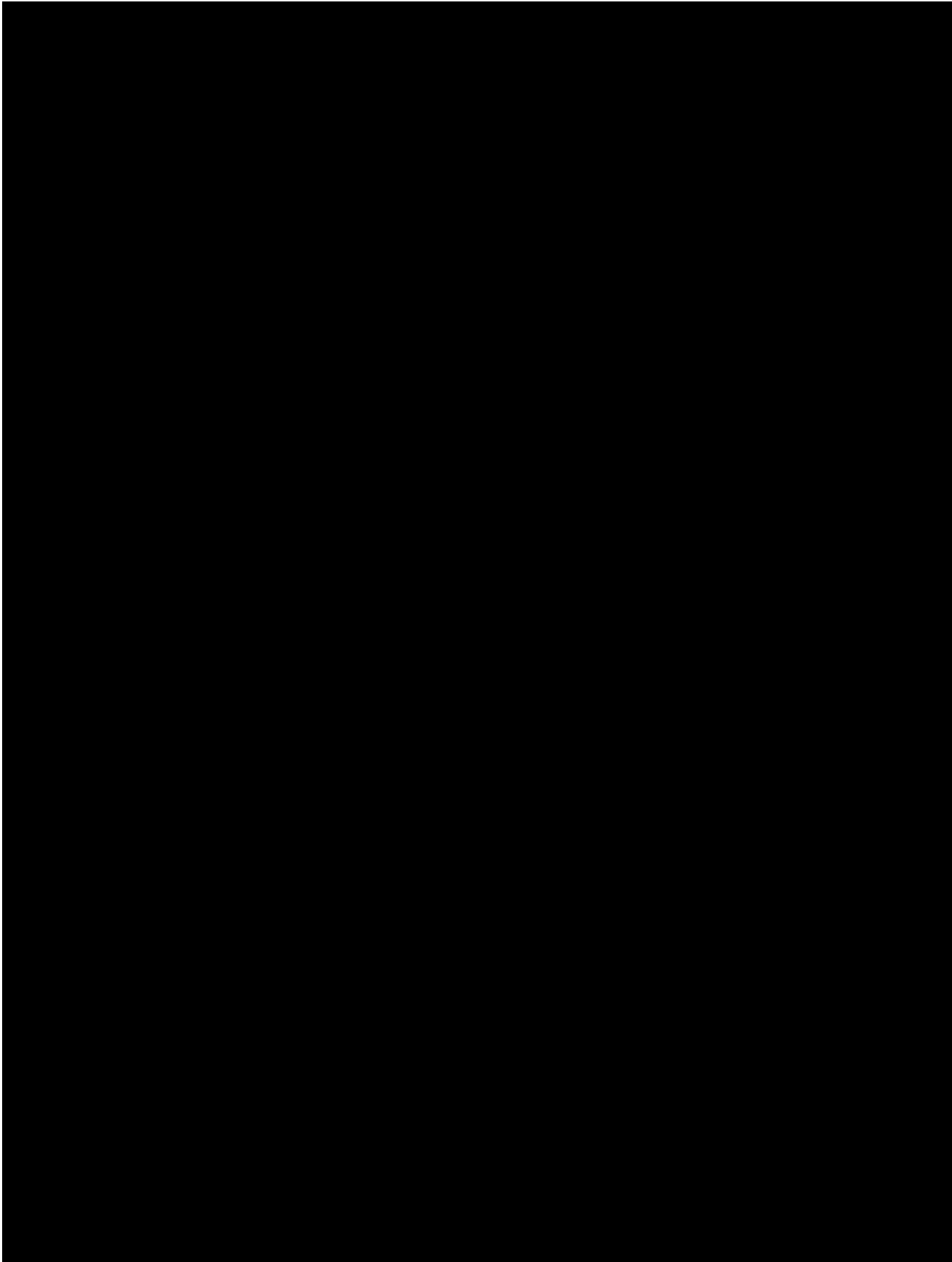
<sup>31</sup> *See also L-V-B-, AXXX XXX 430* (BIA July 26, 2017) (reversing discretionary denial of waiver despite failure to disclose marriage on adjustment and naturalization applications); *Appeal ID 5223284* (BIA July 5, 2022) (upholding discretionary grant of waiver despite failure to disclose removal order on adjustment and naturalization applications).

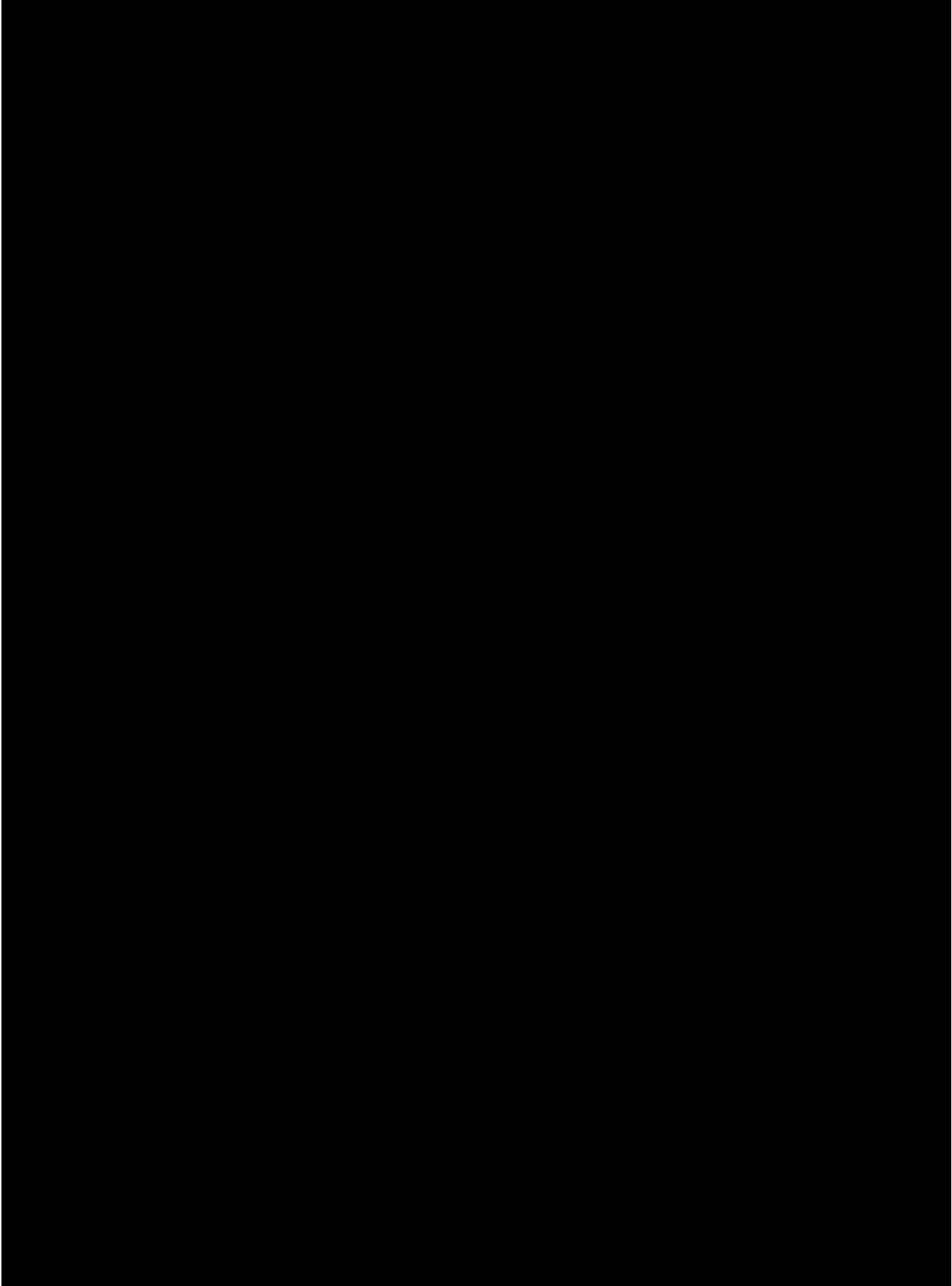
<sup>32</sup> As also did the IJ’s egregious ignoring of BIA precedent and circuit law to attempt to deny him the waiver based on an unlawful assertion and holding that he was statutorily ineligible for the waiver.

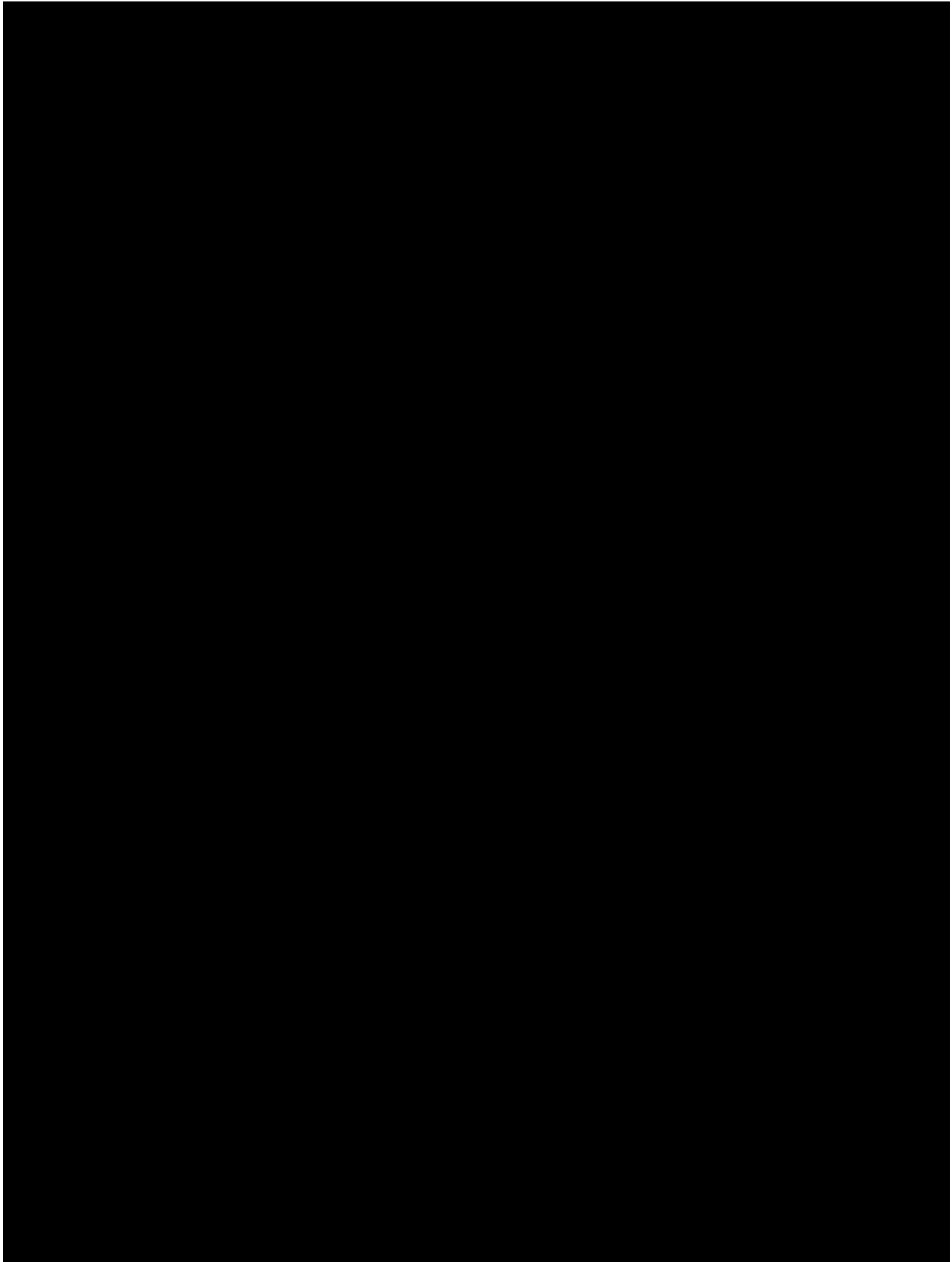
not the merits of the application for the waiver itself but, rather, other factors in the case, potentially including what would appear to be retaliation by the government based on Mr. Khalil's well-documented First Amendment protected activity."); *id.* at Tab CC (finding same).

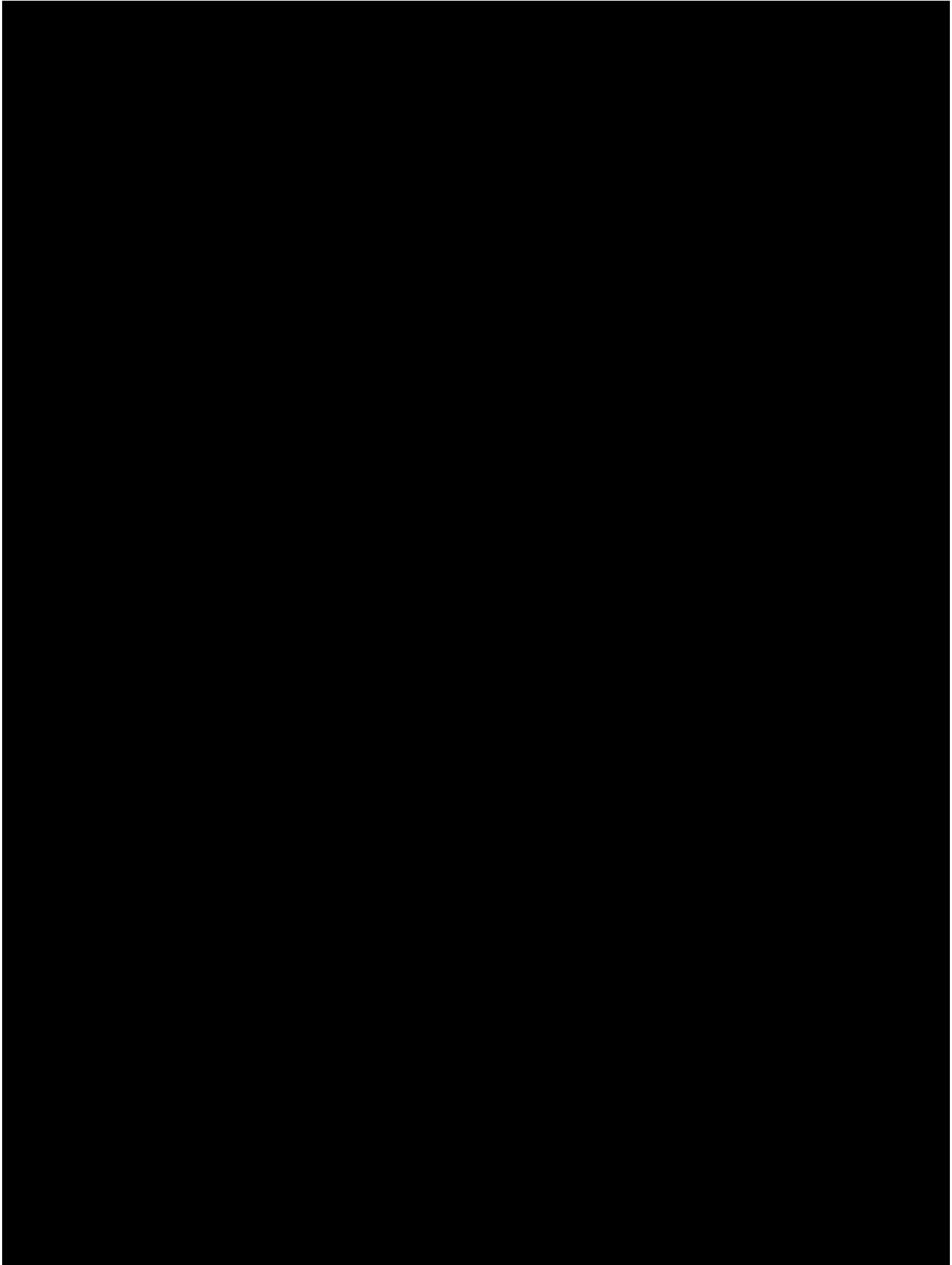
**VI. The IJ erred in denying Mr. Khalil's asylum application.**

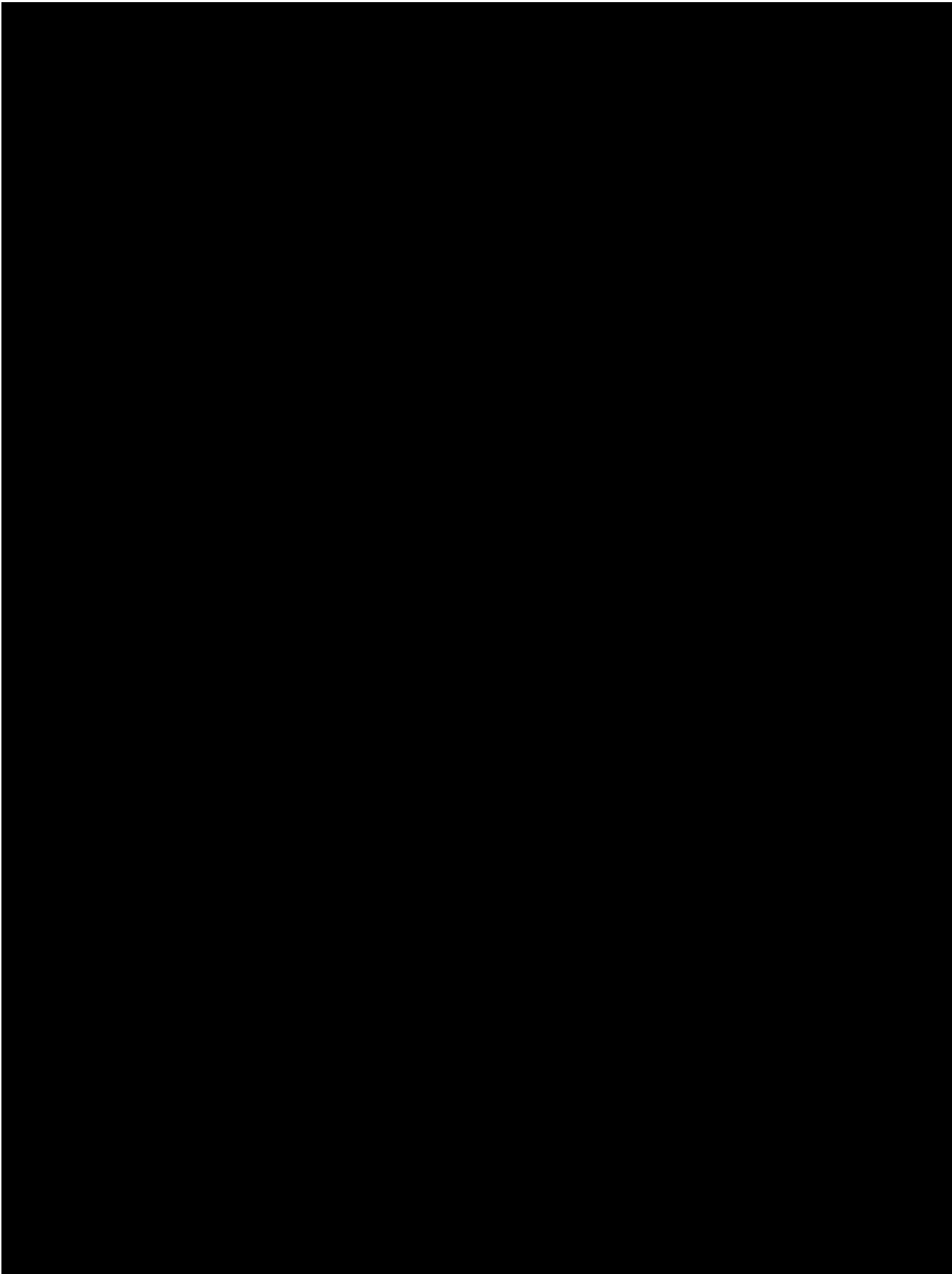


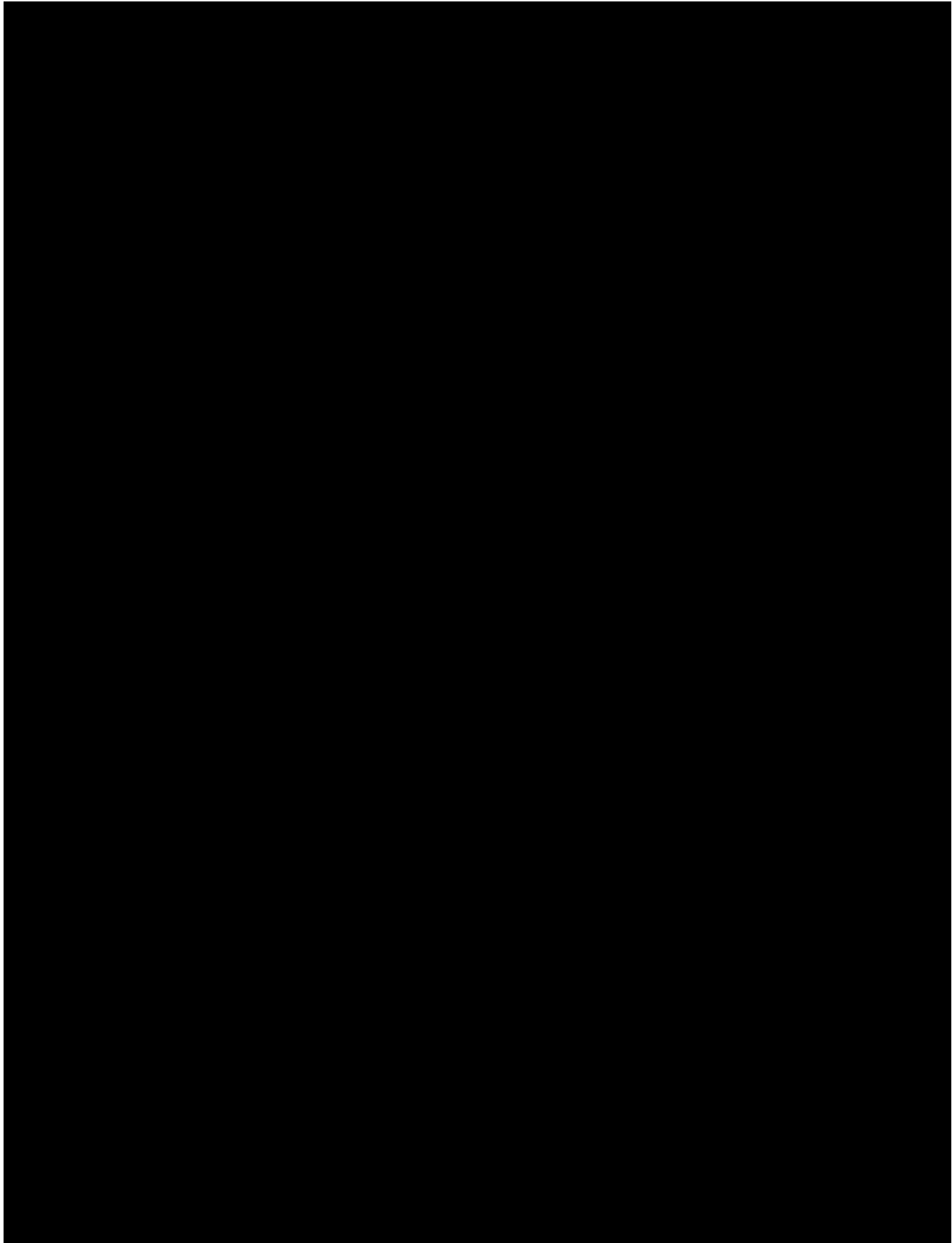


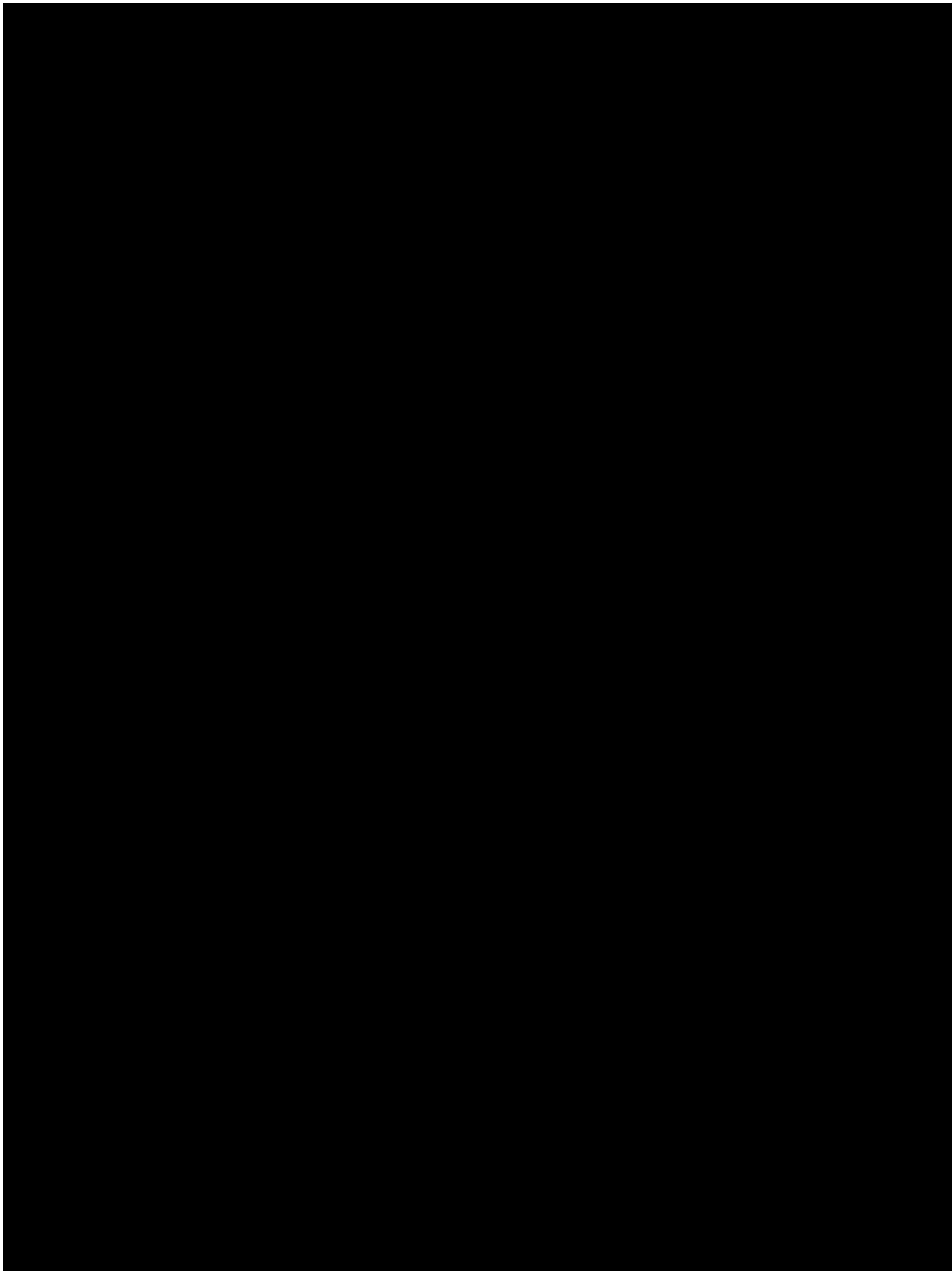


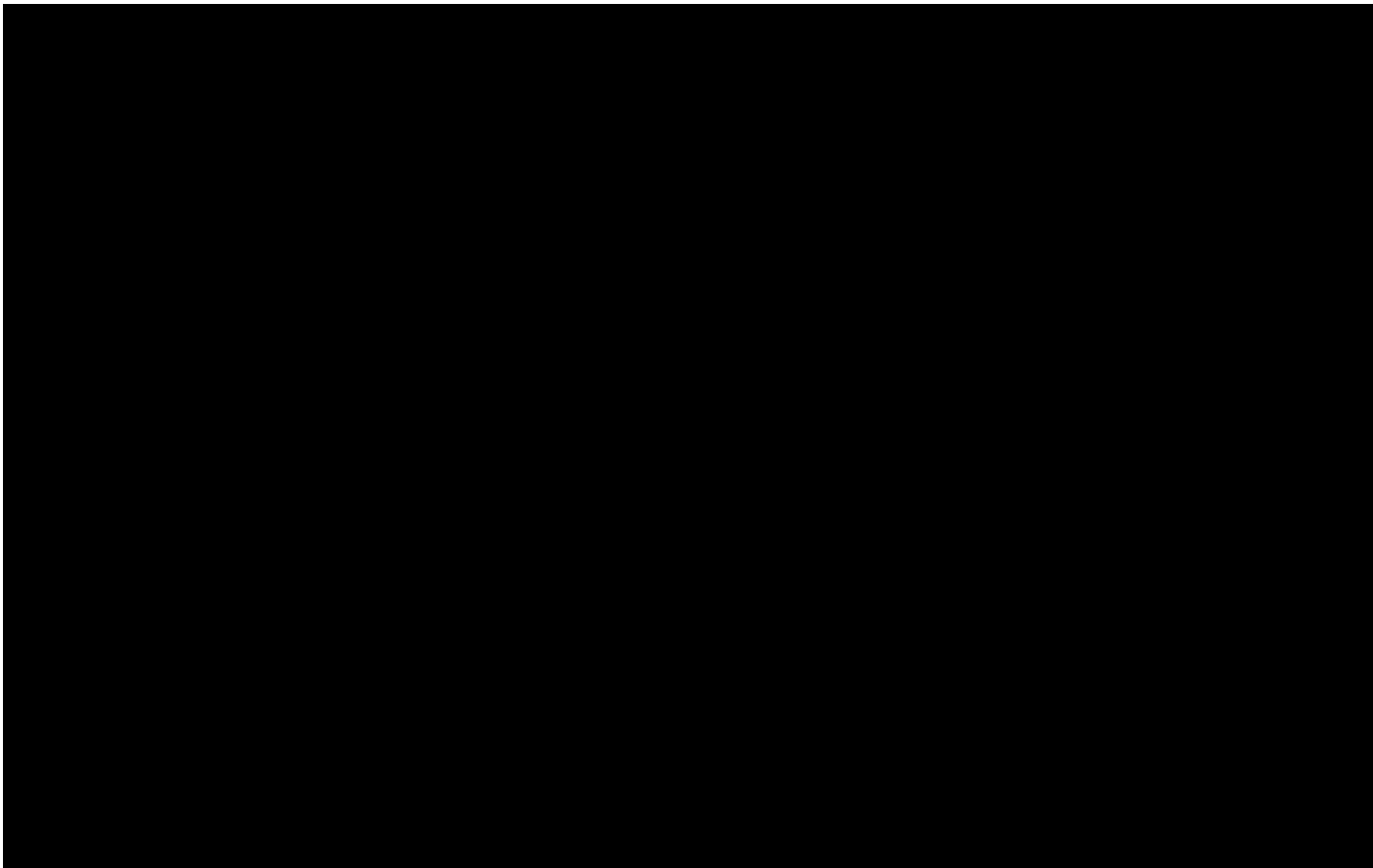












**IX. The IJ ignored Mr. Khalil's request for voluntary departure.**

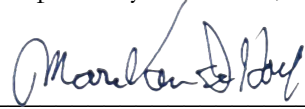
Mr. Khalil repeatedly put forth his alternative request for voluntary departure. Exhibit 15; Exhibit 34 (Written Closing) at n.1. Yet the IJ refused to consider or rule on it, serving as yet another clear legal error. *See Sagaydak*, 405 F.3d at 1040. The case must, at a minimum, be remanded so that Mr. Khalil can present his application for voluntary departure. *Eduard*, 379 F.3d at 196.

**CONCLUSION**

Based on all the aforementioned arguments and evidence, the Board should reverse the IJ's decision, and terminate proceedings, as Mr. Khalil is not removable as charged. Alternatively, the Board should grant the requested relief based on the record as it is. If it decides not to do so, proceedings must be remanded to the IJ for the provision of a full and fair evidentiary hearing where Mr. Khalil can fully (1) develop the record as to his challenges to removal and (2) present his applications for relief, if that were to become necessary.

Dated: March 2, 2026

Respectfully submitted,



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