February 2, 2026

**VIA ACMS**

Catherine O'Hagan Wolfe, Clerk of the Court
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: **No. 25-1019, *Ozturk v. Hyde, et al.*, Response to Respondent-Appellants' Fed. R. App. P. 28(j) Letter regarding *Khalil v. President, United States*, No. 25-2162 & 25-2357, -- F.4th-- , 2026 WL 111933 (3d Cir. Jan. 15, 2026)**

Dear Ms. Wolfe,

This Court need not reach the Section 1252(b)(9) question addressed in *Khalil* because this appeal is moot, and because the transfer order is not an appealable interlocutory order. Pet. Br. 18–23.

Moreover, *Khalil* was wrongly decided, and Section 1252(b)(9) does not bar Petitioner's detention claims. *Khalil* fails to contend with the "staggering results" of holding that Section 1252(b)(9) strips habeas jurisdiction over any detention claims raising questions that potentially overlap with those at issue in removal proceedings. *Öztürk v. Hyde*, 136 F.4th 382, 400 (2d Cir. 2025) (stay panel op.) (quoting *Jennings v. Rodriguez*, 583 U.S. 281, 293 (2018) (opinion of Alito, J.). Adopting the Third Circuit's reasoning would require individuals with First Amendment retaliation claims to *both* detention and removal—and even *separate* Fifth Amendment challenges to detention—to remain in detention with the sole recourse of raising their claims on a petition for review ("PFR") many months or even years after the initial illegal detention. *See* 2026 WL 111933, at *11 (petitioner's punitive detention claim "repackages" his First Amendment "challenge[] to removal"). That position leaves

the government free to use detention to punish and chill the protected speech of a noncitizen, without any check from a federal court for months or even years. *See Öztürk,* No. 25-1019, Dkt. No. 214.1 at 9–10 (Nathan, J., concurring). That is intolerable. *See* Pet. Br. 56 n.22 (invoking Suspension Clause).

Instead, the dissenting judge in *Khalil* had it right. Section 1252(b)(9): (1) only channels claims when there is a final order of removal; and (2) does not strip jurisdiction over "now-or-never claims" for which a PFR provides no meaningful relief. 2026 WL 111933, at *15 (Freeman, J., dissenting) (quotation marks omitted). The First Amendment harm of Ms. Öztürk's detention is precisely the kind of now-or-never injury that would be rendered effectively unreviewable and irremediable on a PFR—and "overlap, even substantive overlap," between a challenge to detention and a later challenge to removal "does not make one claim arise out of the other" for the purposes of section 1252(b)(9). *Öztürk*, 136 F.4th at 400; Pet. Br. 70–71.

Respectfully,

*/s/ Brett Max Kaufman*

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