No. 25-1113

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOHSEN MAHDAWI,

Petitioner-Appellee,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; DAVID T. WESLING, in his official capacity as Acting Boston Field Office Director, U.S. Immigration and Customs Enforcement; J DOE, in official capacity as Vermont Sub-Office Director of U.S. Immigration and Customs Enforcement; DAVID J. VENTURELLA, in his official capacity as Senior Official Performing the Duties of the Director, U.S. Immigration and Customs Enforcement; MARKWAYNE MULLIN, in his official capacity as Secretary of the U.S. Department of Homeland Security; MARCO A. RUBIO, in his official capacity as Secretary of State; and TODD BLANCHE, in his official capacity as the U.S. Attorney General,

Respondent-Appellants.

On Appeal from the United States District Court for the District of Vermont, No. 2:25-cv-389 (Hon. Judge Geoffrey W. Crawford)

BRIEF OF *AMICUS CURIAE* LEGAL SERVICE ORGANIZATIONS AND LAW CLINICS IN SUPPORT OF PETITIONER-APPELLEE ON REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae Immigrant Rights Clinic, the Bronx Defenders, Brooklyn Defender Services, the Legal Aid Society, Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law, Make the Road New York, Neighborhood Defender Service of Harlem, New York Legal Assistance Group, Prisoners' Legal Services of New York, and UnLocal, Inc., state that they do not have a parent corporation and that no publicly held corporation owns 10 percent or more of their stock.

Dated: November 13, 2026
New York, New York

/s/ Alina Das
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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are legal service providers and law clinics who represent people detained pending their removal proceedings.[1] A list of *amici curiae* is provided in Appendix A. *Amici curiae* have expertise in the administrative process—and lack of process—available to people who seek to challenge their immigration detention in immigration court, including through so-called "*Joseph* hearings" pursuant to *Matter of Joseph*, 22 I. & N. Dec. 660 (BIA 1999) ("*Joseph* I") and *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999) ("*Joseph* II"). *Amici curiae* have an interest in ensuring that federal courts do not misinterpret the role, scope, and limitations of *Joseph* hearings when assessing and ensuring the availability of habeas review.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *amici curiae* have obtained the parties' consent to file this *amicus* brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* certify that no person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. The parties have consented to the filing of this brief. *Amici curiae* and counsel gratefully acknowledge the assistance of José Guillermo Gutiérrez and Sofia Rao, law students in the Immigrant Rights Clinic at NYU School of Law, in the research and preparation of this brief.

PRELIMINARY STATEMENT

This Court has affirmed and protected the First and Fifth Amendment rights of noncitizens facing detention and deportation for decades.[2] The panel decision in this case veers off this path by holding that federal habeas courts are powerless to review Petitioner-Appellee Mohsen Mahdawi's challenges to his retaliatory and punitive detention. *Amici* agree with Mr. Mahdawi (as well as the district court below and the prior motions panel) that neither the Immigration and Nationality Act nor the U.S. Constitution permit such a holding.[3] *Amici* write separately to illuminate an aspect of the administrative process that the panel miscomprehends: the so-called "*Joseph* hearing."

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[2] *See, e.g.*, *Black v. Decker*, 103 F.4th 133, 151 (2d Cir. 2024) ("[L]iberty is the norm and detention is the carefully limited exception." (citation and internal quotation marks omitted)), *cert. granted sub nom. Genalo v. Black*, 146 S. Ct. 2733 (2026), *cert. dismissed*, No. 25-886, 2026 WL 2752021 (U.S. Sep. 16, 2026); *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020) ("Noncitizens are . . . entitled to challenge through habeas corpus the legality of their ongoing detention."); *Ragbir v. Homan*, 923 F.3d 53, 71 (2d Cir. 2019) ("To allow . . . retaliatory conduct to proceed would broadly chill protected speech, among not only activists subject to final orders of deportation but also those citizens and other residents who would fear retaliation against others."), *judgment vacated without opinion sub nom. on other grounds Pham v. Ragbir*, 592 U.S. 901 (2020); *see also Lennon v. Immigr. & Naturalization Serv.*, 527 F.2d 187, 195 (2d Cir. 1975) ("The courts will not condone selective deportation based upon secret political grounds.").

[3] *Mahdawi v. Trump*, 781 F. Supp. 3d 214 (D. Vt. 2025), *vacated and remanded*, 183 F.4th 103 (2d Cir. 2026); *Mahdawi v. Trump*, 136 F.4th 443 (2d Cir. 2025).

Mr. Mahdawi argues, and *amici* agree, that requiring him to "channel" his detention claims through the petition-for-review ("PFR") process deprives him of meaningful review. In rejecting those arguments, the panel writes that Mr. Mahdawi has a meaningful opportunity to pursue his constitutional challenges to detention because he may raise such claims through a *Joseph* hearing. *Mahdawi v. Trump*, 183 F.4th 103, 121 (2d Cir. 2026). In concurrence, Judge Menashi agrees, and goes further to state that Mr. Mahdawi failed to exhaust his administrative remedies by failing to seek a *Joseph* hearing. *Id.* at 131 (Menashi, J., concurring). Both of these conclusions—which the government now presses this Court to adopt wholesale, *see* Appellants' Reh'g En Banc Br. 43–44, Dkt. No. 254.1—betray a fundamental misunderstanding of what the agency is empowered to determine in a *Joseph* hearing, and the role of *Joseph* hearing in cases such as Mr. Mahdawi's. As explained below, *Joseph* hearings cannot provide individualized or meaningful review of a constitutional challenge to detention. Nor do principles of administrative exhaustion require noncitizens to seek *Joseph* hearings prior to raising their constitutional challenges to detention.

ARGUMENT

I. A *JOSEPH* HEARING DOES NOT PROVIDE A DETAINED NONCITIZEN WITH INDIVIDUALIZED REVIEW OF HIS CONSTITUTIONAL CHALLENGES TO DETENTION.

As an initial matter, the panel and concurrence erroneously conclude that *Joseph* hearings provide a forum for considering Mr. Mahdawi's constitutional claims. The panel held that "a *Joseph* hearing provides the opportunity to offer evidence and legal authority on the question whether the Government has properly included an alien within a category that is subject to mandatory detention" and such "legal authority includes provisions of the Constitution." *Mahdawi*, 183 F.4th at 121 (cleaned up). Citing the statements by government counsel at oral argument, and policy guidance issued by the Executive Office for Immigration Review ("EOIR"), the panel and concurrence endorse the idea that an immigration judge can consider his First and Fifth Amendment challenges to detention in immigration court. *Id.* (citing Gov't Suppl. Submission after Oral Arg., *Khalil*, No. 25-2162 (3d Cir. Oct. 22, 2025), Dkt. 122 (invoking a "recent [Department of Justice] Policy Memorandum" that affirms IJs can decide constitutional questions, including " 'constitutional challenges to the application of statutes'" (quoting the memorandum)); *see also Mahdawi*, 183 F.4th at 132 (Menashi, J., concurring). The government repeats these errors. *See* Appellants' Reh'g Br. 43–44 (stating that a *Joseph* hearing would have provided Mr. Mahdawi "a genuine opportunity for adequate relief on his constitutional question, as EOIR adjudicators may consider constitutional claims").

Not only does this assertion ignore what happened in Mr. Mahdawi's own case, *see infra* Point III, it ignores binding Second Circuit and agency precedent. The Second Circuit has long held that "constitutional claims lie outside the [Board of Immigration Appeal's (BIA)] jurisdiction." *United States v. Gonzalez-Roque*, 301 F.3d 39, 47 (2d Cir. 2002). The BIA, too, has long held that it is powerless to consider constitutional claims, including First Amendment challenges. *See Matter of H-*, 3 I. & N. Dec. 411, 456 (BIA 1949) (holding, in case where noncitizen challenged a statute as unconstitutionally punishing his viewpoint, that "it is not within the province of this Board to pass upon the constitutionality of statutes enacted by Congress"). While the BIA has carved out exceptions for certain process-based claims with constitutional dimensions (for example, ineffective assistance of counsel claims), no such carve-out exists for the claims that Mr. Mahdawi is raising. To the contrary, the BIA has explicitly held that it will not consider the specific constitutional challenges to the foreign policy ground ("FPG") at issue here. *See Matter of M-K-*, 29 I. & N. Dec. 556, 561–63 (BIA 2026) (refusing to look behind the FPG determination of the Secretary of State and stating instead that constitutional claims may be raised on a petition for review); *see also Matter of Ruiz-Massieu*, 22 I. & N. Dec. 833, 838 & n.2 (BIA 1999) (BIA lacks jurisdiction to entertain constitutional challenges including challenges to the constitutionality of the FPG statute).

Nothing about the scope or posture of a *Joseph* hearing suggests some broader authority. To the contrary, *Joseph* disavows this authority. In *Joseph* I (the first of two decisions on the topic of the process for challenging no-bond detention), the BIA explained that it cannot consider constitutional challenges. 22 I. & N. Dec. at 665 (stating that it was "not within the purview" of the BIA to address a constitutional challenge to the mandatory detention statute). Indeed, *amici* are not aware of any cases in which an immigration judge has addressed a constitutional challenge to no-bond detention in a *Joseph* hearing. All of this flies in the face of the government's representation that a *Joseph* hearing would have afforded Mr. Mahdawi "a genuine opportunity for adequate relief" because "adjudicators may consider constitutional claims." Appellants' Reh'g Br. 44.

The EOIR's recent guidance does not alter this longstanding precedent. The guidance calls into question the agency's reticence to consider constitutional claims, but recognizes—as it must—that immigration judges are still bound by controlling precedent. *See* Sirce Owen, Acting Director, Exec. Off. for Immigr. Rev., PM-25, *Consideration of Constitutional Arguments in Agency Adjudications* 3 (Sep. 5, 2025), https://www.justice.gov/eoir/media/1413276/dl?inline ("EOIR adjudicators may generally consider arguments arising out of constitutional law. . . . In doing so, however, adjudicators should be careful to *faithfully apply established relevant precedent*, just as they do regarding any other issue raised in a

particular case." (emphasis added)). Indeed, the EOIR expressly states that its guidance "cannot—and does not purport to—alter any precedent issued by an EOIR adjudicator," which includes BIA precedent. *Id.* at 4. Thus, notwithstanding the EOIR's efforts to encourage immigration judges to consider certain types of constitutional issues, an immigration judge seeking to follow this guidance must begin with circuit and BIA precedent, both of which hold that the BIA and immigration judges lack authority to consider the types of substantive constitutional claims Mr. Mahdawi raises here.

Both the EOIR guidance and the concurrence point to an Establishment Clause case to suggest that adjudicators may consider some First Amendment claims in some contexts. *Matter of Church Scientology Int'l*, 19 I. & N. Dec. 593, 603 (Comm'r 1988) (affirming denial of a religious organization's visa petition by Immigration and Naturalization Service). But that case was about the process by which the INS adjudicates visa petitions and did not implicate a constitutional challenge to a statute. *Id.* (noting that "Counsel does not . . . claim the statute is unconstitutional" and reaffirming that "the Service cannot pass upon the constitutionality of the statute it administers"); *see also H-*, 3 I. & N. Dec. at 456 (holding that the BIA lacks authority to address First Amendment challenge to a statute, including an as applied challenge). It does not displace BIA precedent that forecloses adjudication of the specific constitutional challenges to the FPG at issue

here. *See, e.g., M-K-*, 29 I. & N. Dec. at 563 (refusing to address constitutional challenges to the FPG); *Ruiz-Massieu*, 22 I. & N. Dec. at 838 & n.2 (holding that the agency lacks authority to address constitutional challenges to the FPG). Nor does the guidance purport to alter BIA precedent refusing to consider constitutional challenges in *Joseph* hearings. *Joseph* I, 22 I. & N. Dec. at 665.

Joseph hearings simply do not provide a forum for consideration of the constitutional claims at issue in this case, and the government is wrong to claim that they do.

II. EVEN IF *JOSEPH* HEARINGS PROVIDE DETAINEES WITH INDIVIDUALIZED REVIEW OF CONSTITUTIONAL CLAIMS, NEITHER THE REVIEW NOR THE RELIEF WOULD BE MEANINGFUL.

Even if constitutional claims could be considered in a *Joseph* hearing, the fundamental purpose of a *Joseph* hearing—and thus both the review and relief it offers—is extremely limited. A *Joseph* hearing serves an extremely narrow function in contested removal proceedings: to determine "whether the [DHS] has properly included [the noncitizen] within a category that is subject to mandatory detention" under relevant statutes and regulations. *See Joseph* II, 22 I. & N. Dec. at 805; *see also* 8 C.F.R. § 1003.19(h)(2)(ii). The entire process is focused on this narrow inquiry. As an initial matter, DHS bears the burden of proving a "reason to believe" the noncitizen is properly included in the no-bond detention category.

Joseph II, 22 I. & N. Dec. at 804. Then a noncitizen must demonstrate that DHS is "substantially unlikely to prevail" on the ground triggering no-bond detention, and only then may an immigration judge conduct a bond hearing and potentially grant release. *Id.* at 807. DHS may then effectively overrule any such release order by seeking an automatic stay pending appeal. *Joseph* I, 22 I. & N. Dec. at 660.[4] Thus, where DHS opposes release, it remains in control of the administrative process unless and until the BIA either reaches the *Joseph* or bond issue or, more often, addresses the removal case as a whole and renders any decision on release moot. *Id*. at 670–74.

Notably, for a noncitizen who is deportable on the same ground that triggers no-bond detention, *Joseph* hearings often play no role. The government already bears the burden of proving deportability by clear and convincing evidence, so if an immigration judge sustains the ground of deportability, a noncitizen cannot prevail on the "substantially unlikely to prevail" standard in *Joseph* hearings. 8 U.S.C. § 1229a(c)(3)(A).

[4] This forces detained individuals to then challenge the automatic stay provision as unconstitutional in federal court. *See, e.g.*, *M.P.L. v. Arteta*, No. 25-cv-5307, 2025 WL 3288354, at *7 & n.6 (S.D.N.Y. Nov. 25, 2025) (holding that the automatic stay provision violates due process and noting that "at least 50 district court decisions across the United States in the last 6 months alone" have similarly ruled that DHS's use of the automatic stay provision violates or likely violates due process).

Even where *Joseph* hearings do have some role to play, they do not provide review of a noncitizen's substantive challenges to his detention, contrary to the panel's decision, Judge Menashi's concurrence, and the government's assertions. *See Mahdawi*, 183 F.4th at 121; Appellants' Reh'g Br. 44 (citing *Mahdawi*, 183 F.4th at 134–136 (Menashi, J., concurring)). As discussed, *Joseph* hearings focus narrowly on whether a noncitizen is properly detained within a no-bond category. Accordingly, they do not reach other challenges to detention, such as whether an individual's detention is retaliatory, as is the case for Mr. Mahdawi. Moreover, even with respect to the types of claims that *Joseph* hearings do address, courts that have considered challenges to the *Joseph* standard have found serious constitutional deficiencies. *See Tijani v. Willis*, 430 F.3d 1241, 1246 (9th Cir. 2005) (Tashima, J., concurring) (explaining "the *Joseph* standard is not just unconstitutional, it is egregiously so"); *Gayle v. Warden, Monmouth Cnty. Corr. Inst.*, 12 F.4th 321, 330–31 (3d Cir. 2021) (concluding that the burden allocation and standard proof at *Joseph* hearings are unconstitutional). Courts have criticized the initial "reason to believe" standard as "virtually undefined" and inconsistently applied. *Gayle*, 12 F.4th at 331 n.7 ("In practice, the 'reason to believe' standard has produced significant confusion."); *Tijani*, 430 F.3d at 1246 (Tashima, J., concurring) ("[T]he *Joseph* standard places little to no risk on the broad shoulders of the government."). When the burden then shifts to the noncitizen to prove that

the government is "substantially unlikely to prevail," the burden becomes "all but insurmountable.", 430 F.3d at 1246 (Tashima, J., concurring); *see also Hernandez v. Decker*, No. 18-CV-5026, 2018 WL 3579108, at *8 n.7 (S.D.N.Y. July 25, 2018). In the rare instance a noncitizen could surmount that burden, any release on bond—an increasingly uncommon occurrence[5]—is subject to yet another unconstitutional process, DHS's unilateral invocation of an automatic stay. 8 C.F.R. § 1003.19(i)(2); *Joseph* I, 22 I. & N. Dec. at 670. The *Joseph* hearing process is, in form and function, no process at all.

Thus, even if *Joseph* hearings were not a fruitless and arbitrary exercise, they still would not present an adequate substitute for habeas review, both in terms of the scope of the review and the available remedies. The narrow legal question at issue in *Joseph* is about misclassification as a no-bond case and does not provide review of the constitutional justifications for immigration detention. *See Zadvydas v. Davis*, 533 U.S. 678, 690–91 (2001) (stating that the government's interests in immigration detention are preventing flight and danger); *Hernandez*, 2018 WL 3579108, at *8 n.7 ("[A] *Joseph* inquiry does not involve an analysis of risk of flight or dangerousness . . . ." (citations omitted)); *Hechavarria v. Sessions*, No.

[5] *See* Kyle Cheney, *Immigration Judges Are Denying ICE Detainees Release. Federal Judges Are Stepping in*, POLITICO (June 17, 2026), https://www.politico.com/news/2026/06/17/trump-administration-immigration-court-00965963 (reporting that immigration judges "are under increasing pressure from the administration to deny bond in the vast majority of cases").

15-CV-1058, 2018 WL 5776421, at *8 (W.D.N.Y. Nov. 2, 2018) ("*Joseph* hearing[s] have no relation to the government's purported regulatory interests . . . ."). The only remedy that a *Joseph* hearing can offer—a bond hearing, whose outcome can then be stayed by DHS's invocation of an automatic stay—is a far cry from the release that Mr. Mahdawi sought and obtained through his habeas petition. *Cf. Yao v. Almodovar*, 813 F.Supp.3d 461, 477 (S.D.N.Y. 2025) (ordering release since a "bond hearing after the fact, by definition, would not and cannot cure th[e] constitutional violation."). A bond hearing granted following a *Joseph* hearing would therefore fail to remedy the unconstitutional detention of Mr. Mahdawi.

To turn *Joseph* hearings into anything approaching a forum for meaningful review would be to create an entirely different process—with different standards and remedies—from whole cloth. No decision by this Court should endorse *Joseph* hearings as a meaningful forum, particularly without any discussion or consideration of its well-documented and fatal flaws.

III. PRINCIPLES OF ADMINISTRATIVE EXHAUSTION DO NOT REQUIRE NONCITIZENS LIKE MR. MAHDAWI TO SEEK *JOSEPH* HEARINGS PRIOR TO RAISING THEIR CONSTITUTIONAL CHALLENGES TO DETENTION.

The concurrence posits, and the government agrees, that Mr. Mahdawi failed to exhaust his administrative remedies by failing to seek a *Joseph* hearing.

Appellants' Reh'g Br. 12, 43–44. As noted above, a *Joseph* hearing cannot meaningfully address Mr. Mahdawi's claims. But even assuming the availability of *Joseph* hearings as a potentially meaningful forum, no exhaustion principles present a barrier to habeas review here.

First, Mr. Mahdawi already exhausted any administrative remedies available to him by challenging his removability and pursuing a motion to terminate. The same ground that serves as the basis for his deportability—the FPG—is the ground triggering his classification as an individual who cannot seek a custody redetermination hearing from the immigration judge. As noted above, the government bears the burden of proving the FPG as a ground of deportability by clear and convincing evidence. An immigration judge initially rejected the FPG and terminated Mr. Mahdawi's removal proceedings, only to be reversed by the BIA, despite the burden being on the government. This is not a context where *Joseph*—with its burden on the noncitizen, addressing the same ground of deportability—provides an administrative remedy.

Second, even if there were some remedy available through the *Joseph* hearing process, all the traditional exceptions to administrative exhaustion would apply. Any exhaustion in the detention context is prudential and subject to

exceptions.[6] *Beharry v. Ashcroft*, 329 F.3d 51, 62 (2d Cir. 2003) (Sotomayor, J.) (noting exceptions to prudential exhaustion for habeas petitioners including when "(1) available remedies provide no genuine opportunity for adequate relief; (2) irreparable injury may occur without immediate judicial relief; (3) administrative appeal would be futile; and (4) in certain instances a plaintiff has raised a substantial constitutional question"); *Zhong v. U.S. Dep't of Just.*, 480 F.3d 104, 123 (2d Cir. 2007), *abrogated on other grounds by Santos-Zacaria v. Garland*, 598 U.S. 411 (2023) ("[J]udicial exhaustion permits courts, in their discretion, to waive administrative exhaustion under certain circumstances." (citations and internal quotation marks omitted)); *Lopez Benitez v. Francis*, 795 F. Supp. 3d 475, 496 (S.D.N.Y. 2025).

Each of these exceptions apply here. First, Mr. Mahdawi raises substantial constitutional claims that go to the heart of whether DHS has any constitutionally

[6] Citing *Howell v. Immigr. & Naturalization Serv.*, 72 F.3d 288, 293 (2d Cir. 1995), Judge Menashi suggests that the exhaustion requirements here stem from the statutory and administrative scheme. *See Mahdawi*, 183 F.4th at 133 (Menashi, J., concurring). But nothing in the Immigration and Nationality Act or regulations requires exhaustion of detention claims. *Cf.* 8 U.S.C. § 1252(d)(1) (explicitly referencing exhaustion in the contest of challenging a removal order, not detention); *see also Santos-Zacaria v. Garland*, 598 U.S. 411 (2023) (holding that § 1252(d)(1) is a claim processing rule, and does not require a noncitizen to file a motion to reopen prior to petitioning for review of a removal order). And even in *Howell*, a case about relief from removal rather than a challenge to detention, the Court held that any exhaustion requirement is subject to exceptions. *See Howell*, 72 F.3d at 291.

adequate justification for detaining him at all. *See, e.g.*, *Lopez v. Barr*, 458 F. Supp. 3d 171, 176 (W.D.N.Y. 2020); *J.U. v. Maldonado*, 805 F. Supp. 3d 482, 490 (E.D.N.Y. 2025); *see also Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions."). Second and relatedly, he faces irreparable injury without immediate judicial review—both in the form of the punitive deprivation of liberty and the chill on his protected speech.[7] *See Able v. United States*, 88 F.3d 1280, 1288 (2d Cir. 1996) (noting that "even minimal impairments on" First Amendment rights "create irreparable injury" (citations omitted)); *see also Öztürk v. Hyde*, 136 F.4th 382, 401 (2d Cir. 2025) (emphasizing that petitioner's "core argument is that her free speech and due process rights are being violated, *now*" and elaborating that requiring her to wait for a final order of removal would make her "detention

[7] In its brief, the government argues Mr. Mahdawi "has not identified any kind of injury that would excuse exhaustion, as the relief he sought in the district court is the same as that he would have sought before the agency" and that "the available remedy," namely, the *Joseph* hearing, "would provide a genuine opportunity for adequate relief on his constitutional question, as EOIR adjudicators may consider constitutional claims." Appellants' Reh'g Br. 44. As explained above, the government is wrong on both counts. Mr. Mahdawi has provided evidence—credited by the district court in this case—that his ongoing detention created serious constitutional harms requiring immediate judicial intervention. *See Mahdawi*, 781 F. Supp. 3d at 234. Moreover, as *amici* establish, a *Joseph* hearing cannot address constitutional claims and does not provide the same relief—namely, release—that a habeas court does. *See* Points I & II, *supra.* This Court should thus disregard the government's conclusory statements to the contrary.

claim . . . 'effectively unreviewable' because, 'by the time a final order of removal is eventually entered, the allegedly excessive detention would have already taken place'" (quoting *Jennings v. Rodriguez*, 583 U.S. 281, 293 (2018) (opinion of Alito, J., joined by Roberts, C.J., and Kennedy, J.)) (emphasis in original)). Unlike individuals subject to mandatory detention in *Demore v. Kim*, 538 U.S. 510 (2003), Congress has made no presumption that individuals like Mr. Mahdawi are flight risks or dangers.[8] This case involves claims that the entire detention and removal process is being weaponized to detain people who are *not* flight risks or dangers, because of their protected political speech. Third, as already noted, administrative review would be futile. *See Rivera-Esperanza v. Francis*, 817 F. Supp. 3d 187, 200–01 (S.D.N.Y. 2025) (excusing exhaustion because a BIA decision made administrative review futile); *see also Mateo v. Warden, Fed. Corr. Inst. Danbury*, No. 25-CV-00814, 2025 WL 2625263, at *5 (D. Conn. Sep. 11, 2025) (similar, but

[8] The concurrence cites *Demore* along with statistics to suggest there is no injury to be detained pending removal proceedings, even wrongfully, because priority cases may be completed in several weeks. *Mahdawi*, 183 F.4th at 134 (Menashi, J., concurring). But detention here was unconstitutionally punitive from day one. Detention here was not mandated by statute, as it was in *Demore.* And "any amount of actual jail time . . . has exceptionally severe consequences for the incarcerated individual." *Rosales-Mireles v. United States*, 585 U.S. 129, 139 (2018) (cleaned up). "Where the noncitizen poses no danger and is not a flight risk, all the government does in requiring detention is separate families and remove from the community breadwinners, caregivers, parents, siblings and employees." *Black*, 103 F.4th at 154 (cleaned up). Wrongful detention is a severe injury—whether it last days, weeks, or years.

regarding the Bureau of Prisons). The BIA has already held it will not review such claims. *See* Point I, *infra.* And fourth, *Joseph* hearings do not provide a genuine opportunity for adequate relief because the process is arbitrary; the remedy is a bond hearing, rather than release; and DHS still controls the process through its invocation of the automatic stay. *See* Point II, *supra.*

CONCLUSION

The people in this Circuit—including the many clients *amici* represent and their families—need to know that they can turn to our federal court system if they are jailed for speaking out. Otherwise, the executive branch has carte blanche to censor whole viewpoints and drive communities into silence by abusing their detention authority. *Joseph* hearings are not a solution to this problem—they are simply another example of how the administrative process fails to provide a meaningful check on unconstitutional detention.

DATED: November 13, 2026
New York, New York

Respectfully submitted,

/s/ Alina Das

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this Brief of Amici Curiae in Support of Plaintiff-Appellant and Reversal complies with the type-volume limitation, typeface requirements, and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6), and 29(a)(5) because it contains 4,144 words, excluding parts of the document exempted by Federal Rule of Appellate Procedure 32(f), and has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using the word-processing system used to prepare the document.

DATED: November 13, 2026
New York, New York

/s/ Alina Das
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Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2026, I electronically filed the foregoing document with the Clerk of the Court using the ACMS system, which will send notification of such filing to all counsel of record.

DATED: November 13, 2026
New York, New York

/s/ Alina Das

Alina Das
Counsel for Amici Curiae

APPENDIX A

Amici Curiae Statements of Interest

Brooklyn Defender Services

Brooklyn Defender Services ("BDS") is a public defender organization that represents approximately 25,000 people every year who cannot afford an attorney in criminal, family, and immigration proceedings. Since 2013, BDS has provided removal defense services through the New York Immigrant Family Unity Project, New York's first-in-the-nation assigned counsel program for detained New Yorkers facing deportation. BDS has represented many detained immigrants in removal proceedings and petitions for writs of habeas corpus in federal district court.

The Bronx Defenders

The Bronx Defenders is a nonprofit provider of innovative, holistic, and client-centered criminal defense, removal defense, family defense, social work support, and other civil legal services and advocacy to indigent Bronx residents. It represents individuals in over 20,000 cases each year and reaches hundreds more through outreach programs and community legal education. The Immigration Practice of The Bronx Defenders provides removal defense services to detained New Yorkers as part of the New York Immigrant Family Unity Project

("NYIFUP") at the Varick Street Immigration Court and also represents non-detained immigrants in removal proceedings. The Bronx Defenders' representation extends to affirmative immigration applications, appeals and motions before the BIA, petitions for review, and petitions for writs of habeas corpus challenging unlawful immigration detention.

Immigrant Rights Clinic ("IRC") of Washington Square Legal Services, Inc.

Immigrant Rights Clinic ("IRC") of Washington Square Legal Services, Inc., has a longstanding interest in advancing and defending the rights of immigrants. IRC has been counsel of record or counsel for *amici curiae* in several cases before this Court and others, challenging the legality and constitutionality of the government's detention authority and its failure to provide immigrants in detention with due process of law.

Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law

The Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law ("IJC") is a law clinic that represents individuals facing deportation, as well as community-based organizations, in both public policy and litigation efforts. IJC has a long-established interest in fighting for the rights of immigrants pursuing their ability to remain in the United States, including representing people who face detention pending removal proceedings.

The Legal Aid Society

The Legal Aid Society ("LAS") has been a tireless advocate for those least able to advocate for themselves over its 150-year history. Over 2,300 staff members operate across all five New York City boroughs in our Civil, Criminal Defense, and Juvenile Rights Practices – guided by the fundamental principle that nobody should be denied justice because of poverty. Since the 1980s, LAS has maintained a citywide Immigration Law Unit within the Civil Practice and is a recognized leader in the delivery of free, comprehensive, and high-caliber immigration legal services to low-income noncitizens in New York City. Over the most recent year, our Immigration Law Unit assisted in over 5,700 individual legal matters benefiting over 15,500 New Yorkers citywide. Staff represent noncitizens before U.S. Citizenship and Immigration Services (USCIS), the Executive Office for Immigration Review (EOIR), the Board of Immigration Appeals (BIA), and in federal courts in habeas proceedings, petitions for review, and other federal litigation matters. In the past year, LAS has filed over 50 habeas petitions on behalf of noncitizen New Yorkers in federal immigration custody. Accordingly, LAS has a direct organizational interest in this matter.

Make the Road New York

Make the Road New York ("MRNY") is a nonprofit, membership-based community organization that integrates adult and youth education, legal and

survival services, and community and civic engagement, in a holistic approach to help low-income New Yorkers improve their lives and neighborhoods. MRNY has over 200 staff, over 24,000 members, and five offices spread throughout New York City, Long Island, and Westchester. MRNY is at the forefront of numerous initiatives to analyze, develop, and improve civil and human rights for immigration communities, including issues related to detention and deportation of immigrant community members. Its attorneys and accredited representatives regularly represent both detained and nondetained clients in the greater New York City area in immigration matters.

Neighborhood Defender Service of Harlem

Neighborhood Defender Service of Harlem ("NDS") is a community-based public defense office serving the residents of Northern Manhattan. NDS's unique holistic defense model provides clients with zealous, client-centered advocacy in addressing a wide array of legal issues. NDS advocates for clients in courthouses across New York City including criminal court, family court, housing court, and civil court, as well as in immigration and custody proceedings. NDS has a strong interest in protecting its clients and all New Yorkers from unlawful detention and harmful separation from their families and communities.

New York Legal Assistance Group

The New York Legal Assistance Group ("NYLAG") is a not-for-profit civil legal services organization advocating for adults, children, and families that are experiencing poverty or have low income. NYLAG provides legal assistance in the areas of immigration, government benefits, family law, disability rights, housing law, special education, and consumer debt, among others. NYLAG's Immigrant Protection Unit (IPU) provides New York immigrant communities experiencing poverty with comprehensive legal services through consultation and direct representation. IPU represents detained and non-detained immigrants in removal proceedings, as well as immigrants with final orders of removal who face imminent removal from the United States.

Prisoners' Legal Services of New York

Prisoners' Legal Services of New York (PLSNY), is a non-profit provider of free immigration legal services to incarcerated and detained individuals in Upstate New York. The Immigration Unit of PLS has offices in Buffalo and Albany, New York and serves individuals at all 42 New York State prisons and multiple county jails. PLS provides merits-blind, universal representation to individuals placed into removal proceedings through the Institutional Hearing Program (IHP) in New York State prisons. Case handlers represent PLS clients through all stages of removal and proceedings from trial, to appeals before the Board of Immigration Appeals, and petitions for review before the Second Circuit. Case handlers also

represent clients in bond proceedings, including Joseph hearings, as well as habeas corpus petitions and post-habeas bond proceedings and appeals. PLS has a strong interest in protecting the due process rights of incarcerated and detained persons and minimizing the harmful effects of prolonged detention.

UnLocal, Inc.

UnLocal, Inc. is a community-centered non-profit organization that provides legal representation and community education to New York City's immigrant communities. UnLocal regularly represents unlawfully-detained individuals both before the agency and in federal courts, thus is aware of the limitations of agency review.