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, Immigration and Customs Enforcement, Enforcement and Removal Operations, J DOE, in official capacity as Vermont Sub-Office Director of Immigration and Customs Enforcement, Enforcement and Removal Operations, MARKWAYNE MULLIN, in his official capacity as Secretary of the Department of Homeland Security, MARCO A. RUBIO, in his official capacity as Secretary of State, TODD BLANCHE, in his official capacity as U.S. Attorney General,

Respondents-Appellants

On Appeal from the U.S. District Court for the District of Vermont, District Court Case No. 2:25-cv-389

BRIEF OF IMMIGRATION LAWYERS, LAW PROFESSORS, AND SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER-APPELLEE ON REHEARING EN BANC

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INTRODUCTION AND STATEMENT OF AMICI[1]

Amici curiae are more than one hundred leading lawyers, law professors, and scholars who practice, write about, research, and teach immigration law.[2] *Amici* collectively have many centuries of experience representing individuals at all stages of their removal proceedings and in federal court. Regardless of their differing views on campus protests and the war in the Middle East, *amici* are united in finding that the federal courts have jurisdiction to decide habeas petitions challenging immigration detention. *Amici* also recognize that removal proceedings do not provide a meaningful forum for the adjudication of constitutional claims. Nor does waiting years for a petition for review to be adjudicated by a circuit court provide a meaningful remedy when prompt judicial intervention is required to protect constitutional rights. *Amici* have a strong interest in ensuring that federal courts retain their longstanding role in preventing unlawful executive detention, especially where the government seeks to detain immigrants based on protected political speech.

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[1] Petitioner and Respondents have consented to the filing of this brief. No party or its counsel had any role in authoring this brief. No person or entity—other than *amici* and their counsel—contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E).

[2] A list of *amici* is set forth in the Addendum. The positions taken in this brief are those of *amici* alone and should not be attributed to any institution with which *amici* are or have been affiliated.

ARGUMENT

Ignoring the strong presumption favoring judicial review and the statute's plain language, the panel held that 8 U.S.C. § 1252(b)(9) barred habeas review of petitioner's claims challenging the constitutionality of his detention and required him to raise those claims through a petition for review of a final removal order. *Mahdawi v. Trump*, 183 F.4th 103, 117–23 (2d Cir. 2026). Respondents contend that 8 U.S.C. § 1252(g) also bars review of petitioner's claims, a position that only Judge Menashi's concurrence embraced. Two days after the panel's decision, the Fourth Circuit reached the opposite conclusion, holding that neither 1252(b)(9) nor 1252(g) barred jurisdiction in a very similar case. *Suri v. Trump*, 184 F.4th 260 (4th Cir. 2026). This Court, sitting en banc, should reject the panel's decision and hold that constitutional challenges to detention are not barred by either 1252(b)(9) or 1252(g).

I. 8 U.S.C. § 1252(b)(9) DOES NOT BAR JUDICIAL REVIEW.

Section 1252(b)(9) does not bar review for three principal reasons. First, as its prefatory language makes clear, 1252(b) only concerns review of final removal orders. At the time the District Court ruled, Mahdawi did not have a final removal order. Consequently, 1252(b)(9) could not have stripped the district court of jurisdiction. Second, even if 1252(b)(9) is not so limited, it

does not bar review of claims challenging unlawful detention because they do not "arise from" removal proceedings. Claims that cannot be vindicated through a petition for review must be heard "now or never." The panel erred in minimizing the "now or never" nature of claims challenging detention pending removal proceedings. Third, the panel erred in finding that removal proceedings would yield an adequate record for review of these constitutional claims, even though neither immigration judges nor the Board of Immigration Appeals (BIA) have authority to adjudicate them.

A. The Plain Language of 1252(b) is Limited to Claims Arising from Review of Removal Orders.

The opening text of 8 U.S.C. § 1252(b) limits application of all its provisions to claims arising from review of removal orders. It states:

> (b) *Requirements for review of orders of removal*
>
> *With respect to review of an order of removal* under subsection (a)(1), the following requirements apply
>
> . . .

8 U.S.C. § 1252(b) (emphasis added). Justice Breyer's opinion in *Jennings v. Rodriguez* correctly explained that this language limits 1252(b)(9) to claims arising in the context of final orders of removal. 583 U.S. 281, 355 (2018) (Breyer, J., dissenting on other grounds).

In rejecting this argument, the panel first argued that the phrase "with respect to" broadens the provision beyond orders of removal. But it is not plausible to read that language to extend the statute's reach beyond the unambiguous limitation it contains—"with respect to review of removal orders" cannot encompass review where there is no removal order. Moreover, Justice Alito's plurality opinion in *Jennings v. Rodriguez* cautions against overbroad interpretations of "capacious phrases," warning that this can "lead[] to results that no sensible person could have intended." 583 U.S. at 293–94 (internal quotation marks omitted). As the absurd hypotheticals he utilizes illustrate, the phrase "with respect to" cannot be read apart from the subsequent specific reference to "an order of removal."

Second, the panel relied on the reasoning in Justice Thomas's concurrence, joined by Justice Gorsuch, which contends that limiting 1252(b)(9) to cases involving final orders of removal "effectively 'reads "or such questions of law or fact" out of the statute.'" *Mahdawi,* 183 F.4th at 118 (quoting *Jennings,* 583 U.S. at 320 (Thomas, J., concurring in part and in the judgment)). But Justice Thomas's interpretation reads the prefatory clause out of the statute—a point Justice Thomas himself acknowledged in arguing that the prefatory clause does not change the scope of the provision in any way. *Jennings,* 583 U.S. at 320–21 (Thomas, J., concurring in part and in the

judgment). Additionally, giving meaning to the prefatory clause does not render "such questions of law or fact" surplusage. This language could still refer to the legal and factual issues that arise in litigation after a final order of removal is issued, for example in cases involving reinstatement of removal (8 U.S.C. § 1231(a)(5)), motions to reopen **(**8 U.S.C. § 1229a(c)(7)), motions to rescind *in absentia* orders of removal (8 U.S.C. § 1229a(b)(5)(C)), challenges related to the country designated for removal (8 U.S.C. § 1231(b)(1)-(2)), or termination of asylum, withholding of removal, or deferral of removal under the Convention Against Torture (8 C.F.R. §§ 1208.24, 1208.17(d)). *See, e.g.*, *Monsalvo Velasquez v. Bondi*, 145 S. Ct. 1232, 1241 (2025) (finding jurisdiction in petition for review to address question arising from litigation ancillary to final removal order). Section 1252(b)(9) generally bars district court review of all such challenges, including "questions of law or fact" raised therein.

The panel further argued that if Mahdawi's reading of the prefatory clause were correct, the plurality opinion in *Jennings* would have had no occasion to "contemplate that [1252(b)(9)] might bar challenges to 'the decision to detain . . . in the first place or to seek removal.'" *Mahdawi,* 183 F.4th at 118 (quoting *Jennings*, 583 U.S. at 294 (plurality)). Respectfully, this assertion rests on a gross misreading of *Jennings*. Justice Alito's plurality

opinion rejected a broad reading of "arising from" that "would [ ] make claims of prolonged detention effectively unreviewable." *Jennings,* 583 U.S. at 293 (plurality opinion). The opinion made clear it did not provide a "comprehensive interpretation," *id*., and therefore held 1252(b)(9) did not apply without deciding the meaning of the prefatory clause. The choice of one sufficient ground for resolving a case does not implicitly reject another.

At least three other circuits have read 1252(b)(9) to limit its reach to cases involving final orders of removal. The Ninth Circuit held that "[b]y its terms, [1252(b)(9)] does not apply to federal habeas corpus petitions that do not involve final orders of removal." *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075–76 (9th Cir. 2006) (emphasis added); *see also Singh v. Gonzales,* 499 F.3d 969, 978 (9th Cir. 2007) ("By virtue of their explicit language, both §§ 1252(a)(5) and 1252(b)(9) *apply only to those claims seeking judicial review of orders of removal*.") (emphasis added).[3] Likewise, the Eleventh Circuit held 1252(b)(9) inapplicable to cases that do not "involve review of an order of removal." *Madu v. U.S. Att'y Gen.,* 470 F.3d 1362, 1367 (11th Cir. 2006).

[3] While *Singh* acknowledged that § 1252(b)(9) covers "any action taken or proceeding brought to remove an alien," the court interpreted that phrase "simply [to] mean[ ] that if the alien fails to consolidate his claims as required under § 1252(b)(9), he may not later bring a separate habeas claim to raise 'questions of law or fact' that should have been brought as part of a challenge to his final order of removal." *Id*. at 978 n. 11.

The Fourth Circuit also recently adopted this interpretation in a case very similar to this one. *Suri,* 184 F.4th at 289; *see also Casa de Maryland v. U.S. Dep't of Homeland Security,* 924 F.3d 684, 697 (4th Cir. 2019) (holding that 1252(b)(9) "doesn't help the government . . . because it 'applies *only* with respect to review of an *order of removal*'") (alteration in original). In *Suri,* the Fourth Circuit engaged in a detailed analysis of *Jennings* and found its conclusion entirely consistent with Petitioner's position here. *Suri,* 184 F.4th at 291-92.

In addition, the D.C. Circuit has suggested that 1252(b)(9) does not apply before removal proceedings have concluded. The court held that "1252(b)(9) prevents [a noncitizen] from relitigating, outside the context of a petition for review, *a question decided against him in the removal proceeding*." *Meza v. Renaud*, 9 F.4th 930, 933 (D.C. Cir. 2021) (emphasis added) (holding that the court could not review Meza's claim that he was an arriving alien, which could have been raised in a petition for review). Concerns about noncitizens relitigating issues decided in the removal proceeding generally would not arise before a final order of removal.

Finally, the legislative history reinforces Mahdawi's straightforward interpretation of 1252(b)'s prefatory language. The Conference Report states that the statutory revisions were intended "to eliminate habeas review *only over*

challenges to removal orders," and not to "preclude habeas review over challenges to detention that are independent of challenges to removal orders." H.R. Rep. No. 109-72, at 175 (2005) (emphasis added). This statement is completely consistent with the prefatory clause's restriction of 1252(b)(9) to cases involving final orders of removal.

B. Mahdawi's Detention Does Not "Arise From" An Action or Proceeding to Remove a Noncitizen from the United States.

Even if this Court does not limit 1252(b)(9) to review of final orders of removal, that jurisdictional bar still does not include challenges to *detention*. The relevant question is whether Mahdawi's detention "*aris[es] from* any action taken or proceeding brought to remove [him]." 8 U.S.C. § 1252(b)(9) (emphasis added). The Supreme Court has repeatedly stressed that the narrow scope of the "arise[s] from" language does not bar jurisdiction over detention challenges. *Jennings,* 583 U.S. at 293–94; *Nielsen v. Preap*, 586 U.S. 392 (2019) (three-Justice plurality reaffirmed that 1252(b)(9) does not bar detention claims, while only Justices Thomas and Gorsuch restated their position from *Jennings*); *cf. Dep't of Homeland Sec. v. Regents of the Univ. of California*, 591 U.S. 1, 19 (2020) (confirming that 1252(b)(9) "'does not present a jurisdictional bar' where those bringing suit 'are not asking for review of an order of removal,' 'the decision . . . to seek removal,' or 'the process by which . . . removability will be determined'") (quoting the plurality opinion in

Jennings while also citing Justice Breyer's dissent).

Here, the panel mistakenly found that "[a]s in *Khalil,* Mahdawi's arguments against detention are [] 'identical to his arguments against removal.'" *Mahdawi,* 183 F.4th at 118 (quoting *Khalil v. President, United States,* 164 F.4th 259, 276 (3d Cir. 2026)). This reasoning is incorrect. Mahdawi's habeas raises constitutional arguments unique to detention. For example, as in *Suri*, Mahdawi's habeas petition asserts that his detention violates due process because it is punitive and bears no reasonable relation to any legitimate government purpose. He argues that he does not pose a danger to the community or a flight risk, which are the only legitimate purposes for detention recognized by the Supreme Court. *See Suri,* 184 F.4th at 293 (citing *Zadvydas v. Davis,* 533 U.S. 678, 690-91 (2001)). These claims are specific to his detention and have no bearing on removal. They arise solely from whether his detention is justified, not from the decision to seek removal.

With respect to the First Amendment arguments, even if Mahdawi's habeas petition and removal proceedings present overlapping questions, § 1252(b)(9) asks whether the questions raised in habeas *arise from* an action taken to remove him. Here they do not. Mahdawi could litigate the First Amendment issues in his habeas without ever raising them in his removal proceedings or petition for review. The First Circuit, where his petition for

review is pending, could also resolve his petition for review on statutory grounds without ever deciding the First Amendment question. And this Court could independently find his detention unconstitutional. The mere possibility that both courts *might* address some of the same questions does not trigger the jurisdictional bar in 1252(b)(9).

The Second Circuit previously addressed similar "arising from" language in 1252(a)(5), holding that whether a claim arises from the removal litigation "will turn on the substance of the relief that a plaintiff is seeking." *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011). In *Delgado*, the petitioner was indirectly challenging her reinstated order of removal, so the court held that section 1252(a)(5)'s jurisdictional bar applied. Here, Mahdawi challenges the constitutionality of his detention, which is not the subject of his removal proceedings. *See Michalski v. Decker*, 279 F. Supp. 3d 487, 494 (S.D.N.Y. 2018) (applying the "substance of the relief" test and holding the petitioner's "challenge to the constitutionality of his arrest and detention is not barred by § 1252(b)(9)"). Even if Mahdawi's removal order is affirmed, his detention could still be unconstitutional. For example, his detention could violate due process because it is unrelated to a legitimate government purpose even if the foreign policy removal ground, 8 U.S.C. § 1227(a)(4)(C), does not violate the First Amendment and is not void for vagueness. These are distinct

issues with different remedies.

Insofar as the panel relied on decisions from other circuits applying 1252(a)(5), those cases are distinguishable. For example, the panel cited *Martinez v. Napolitano,* 704 F.3d 620, 623 (9th Cir. 2012), which found a claim barred by 1252(a)(5) because "the substance of the relief [the plaintiff] is seeking . . . would negate his order of removal." Here, however, the relief of release from custody, or a declaration that detention was unconstitutional, would not necessarily negate the removal order. The panel also cited *Gonzalez-Alarcon v. Macias*, 884 F.3d 1266, 1275 (10th Cir. 2018), which found a claim barred because it was "based on the alleged invalidity of his order of removal." Mahdawi's challenge to detention, however, is not based on the alleged invalidity of a removal order—indeed, he had no removal order when he filed his habeas petition challenging his detention.

Several appellate courts, including the First, Fourth, and Ninth Circuits, have recognized that challenges to detention do not "arise from" removal-related actions or proceedings. *See Suri*, 184 F.4th at 288-89; *Gonzalez v. ICE*, 975 F.3d 788, 810–11 (9th Cir. 2020) (holding that section 1252(b)(9) did not bar jurisdiction "because claims challenging the legality of detention pursuant to an immigration detainer are independent of the removal process"); *Hernández v. Gonzales*, 424 F.3d 42, 42–43 (1st Cir. 2005) (holding that

detention claims are independent of removal proceedings and therefore not barred by section 1252(b)(9)); *Aguilar v. ICE*, 510 F.3d 1, 11 (1st Cir. 2007) (identifying "challenges to the legality of detention" as squarely outside 1252(b)(9)'s scope).

This Circuit and others have also exercised jurisdiction over other challenges that do not "arise from" removal proceedings even though they were connected to the removal litigation in some sense. *See, e.g., Ruiz v. Mukasey*, 552 F.3d 269, 274 n.3 (2d Cir. 2009) (finding jurisdiction to review the denial of a petition to adjust status, and reasoning this was "unrelated to any removal action or proceeding," even though adjustment would be a defense to removal); *E.O.H.C. v. Secretary of DHS*, 950 F.3d 177, 194 (3d Cir. 2020) (holding that an interim removal to Mexico and a constitutional right-to-counsel claim did not arise from removal proceedings and could not await later review); *Hamdi ex rel. Hamdi v. Napolitano*, 620 F.3d 615, 626 (6th Cir. 2010) ("We . . . cannot endorse an interpretation of the 'arising from' language in § 1252(b)(9) that 'swallow[s] all claims that might somehow touch upon, or be traced to, the government's efforts to remove an alien.'") (quoting *Aguilar v. U.S. Immigr. & Customs Enf't Div.*, 510 F.3d 1, 10 (1st Cir. 2007)).

C. The Panel Minimized the "Now or Never" Problem.

The panel also minimized the "now or never" problem in holding that

petitioner had to wait to bring his constitutional challenges to his detention in a petition for review. Citing the Third Circuit's decision in *Khalil*, the panel found that "[a] now-or-never habeas claim must [] raise not only an alleged injury that will occur before the conclusion of removal proceedings . . . but also 'legal or factual *questions*' . . . that are *not* bound up in the ongoing removal proceedings and that 'a court of appeals will not later be able to review meaningfully on a PFR.'" *Mahdawi*, 183 F.4th at 120 (quoting *Khalil*, 164 F.4th at 274–75). As explained above, Mahdawi's habeas petition does this, presenting both legal and factual questions that are not inextricably intertwined with his removal proceedings. Moreover, even where detention claims and removal claims overlap, it does not follow that removal proceedings will be "hamstrung by collateral habeas attacks," as this case already shows. *Mahdawi,* 183 F.4th at 120. And as the Fourth Circuit aptly noted in *Suri,* "[w]hatever concern about piecemeal litigation in detention and removal proceedings . . . is no match for the far more troubling reality of petitioners who are afforded no opportunity for a hearing at all." *Suri,* 184 F.4th at 293-94.

Under the panel's and Respondents' interpretation, a noncitizen like Mahdawi could potentially go *years* before receiving judicial review of the lawfulness of his detention. And in many cases, there might be no avenue of review at all. Under Respondents' approach, Petitioner would need to wait for

months in detention while the Immigration Judge adjudicates his case. If he wins and a removal order is never issued, his detention claim would have proven *entirely unreviewable*—a court would *never* have the power to address his unlawful imprisonment. If he loses, he would normally need to wait months more for the Board of Immigration Appeals (BIA) to decide his appeal. If his appeal is granted, he would win his removal case, again *without ever having had the opportunity to obtain judicial review* of his detention claim. Alternatively, the BIA may order a remand, further prolonging detention while the immigration judge reconsiders the case. In short, Respondents' reading of 1252(b)(9) would permit the government to keep a noncitizen detained for months or years with no opportunity to challenge the constitutionality of his detention. During that time, constitutionally protected speech would be suppressed and due process rights violated without any remedy.

Such an extreme form of jurisdiction stripping would raise serious constitutional concerns under the Suspension Clause. *See Crowell v. Benson*, 285 U.S. 22, 62 (1932) (describing constitutional avoidance as a "cardinal principle" of statutory interpretation); *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (same). Given that there is an alternative reading—one that simply applies the plain text of 1252(b)—this Court should adopt it.

The panel decision suggests that there was an administrative remedy

available to Mahdawi—a hearing under *Matter of Joseph,* 22 I. & N. Dec. 799 (BIA 1999).[4] Even assuming that remedy is available to people detained under the regulation applicable here, which is 8 C.F.R. § 1003.19(h)(2)(i)(C), it does not permit detainees to raise constitutional claims at such hearings.

D. The Petition-for-Review Process Does Not Provide a Meaningful Record or Forum for Constitutional Claims.

The panel's conclusion that constitutional claims can be adequately developed during removal proceedings is foreclosed by Second Circuit precedents and does not reflect practical reality. The removal process fails to provide a meaningful mechanism for developing the factual record necessary to adjudicate constitutional claims.

First, detention-related issues are formally segregated from removal proceedings. Custody proceedings are "separate and apart from" removal proceedings and do not form part of the administrative record underlying a final order of removal. 8 C.F.R. § 1003.19(d).

Second, immigration judges lack both the authority and the procedural tools needed to adjudicate constitutional claims. The Supreme Court has long

[4] Mahdawi is not subject to mandatory detention under Section 1226(c), as the foreign policy ground in 8 U.S.C. § 1227(a)(4)(C) is not listed among the mandatory detention grounds in 1226(c). Rather, his case is governed by 8 U.S.C. § 1226(a) and 8 C.F.R. § 1003.19(h)(2)(i)(C). Under those provisions, he is eligible for release, but only upon the decision of an ICE officer. The regulation bars Immigration Judges from redetermining bond in such cases.

recognized that immigration proceedings are ill-suited to resolving constitutional challenges. *See, e.g.*, *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496–97 (1991). The Second Circuit has also long held that the BIA lacks authority to consider constitutional claims. *See United States v. Gonzalez-Roque*, 301 F.3d 39, 47 (2d Cir. 2002) ("[C]onstitutional claims lie outside the BIA's jurisdiction"); *Rabiu v. INS,* 41 F.3d 879, 882 (2d Cir. 1994) ("the BIA does not have jurisdiction to decide constitutional issues"); *Severino v. Mukasey,* 549 F.3d 79, 83 (2d Cir. 2008) (a noncitizen "need not exhaust issues—including constitutional claims—over which the BIA lacks jurisdiction").

EOIR's September 2025 guidance, which asserts that immigration judges can and do adjudicate constitutional claims, flatly contradicts the binding Second Circuit precedents set forth above.[5] That guidance also contradicts longstanding BIA precedents and the decisions of numerous other circuits. *See In re C-*, 20 I. & N. Dec. 529, 532 (B.I.A. 1992) ("[I]t is settled that the immigration judge and this Board lack jurisdiction to rule upon the constitutionality of the Act and the regulations." (citations omitted)); *Qatanani v. Att'y Gen. U.S.,* 144 F.4th 485, 500 (3d Cir. 2025) ("the Board's

[5] Sirce E. Owen, Acting Dir., EOIR, Consideration of Constitutional Arguments in Agency Adjudications (Sept. 5, 2025), https://perma.cc/8D74-23HT.

lack of 'jurisdiction to adjudicate constitutional issues' rendered it incapable of addressing the due process claim presented here"); *Wojciechowicz v. Garland*, 77 F.4th 511, 518 (7th Cir. 2023); *Vicente-Elias v. Mukasey*, 532 F.3d 1086, 1094 (10th Cir. 2008); *Geach v. Chertoff*, 444 F.3d 940, 945-46 (8th Cir. 2006); *Bagues-Valles v. I.N.S.*, 779 F.2d 483, 484 (9th Cir. 1985); *Monteon-Camargo v. Barr*, 918 F.3d 423, 429–30 (5th Cir. 2019); *Ravindran v. I.N.S.*, 976 F.2d 754, 762 (1st Cir. 1992).

In Khalil's case, for example, the immigration judge told Khalil he was "in the wrong court" to develop his constitutional claims, *see Khalil,* 164 F.4th at 290 (Freeman, J., dissenting), and the government itself asserted that the agency was "powerless" to address them. *See Khalil v. Joyce*, 2:25-cv-1963-MEF-SDA (D.N.J.), ECF 185 at 2. Administrative agency actors simply do not have the authority to strike down as unconstitutional the statutes that govern them. Moreover, immigration court proceedings are not designed to support the type of fact development required for constitutional claims, as there is generally little, if any, discovery available. *See Poole v. Mukasey*, 522 F.3d 259, 263 (2d Cir. 2008) ("[T]he Federal Rules of Civil Procedure do not apply to proceedings before the BIA."); *Matter of Magana,* 17 I. & N. Dec. 111, 115 (BIA 1979).

Third, apart from these procedural limitations, immigration judges lack

the structural independence necessary to serve as a meaningful forum for constitutional claims against the Executive branch. Immigration judges are employees of the Department of Justice who serve under the Attorney General. Recent developments further erode any assurance of neutral adjudication. The present administration removed approximately one hundred immigration judges from the bench in 2025, and a hundred more retired or resigned, "citing discomfort . . . about how they were supposed to adjudicate."[6] Asylum grant rates plunged from 38.2% in August 2024[7] to 6% or lower in 2026.[8] With the Trump administration's newly appointed "deportation judges," these shockingly low grant rates are likely to continue.[9] The current administration has also reduced the BIA's size, dismissing all nine members appointed under former President Biden.[10] Out of 100 precedential BIA decisions issued from

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[6] Anusha Mathur & Ximena Bustillo, *U.S. Has a Quarter Fewer Immigration Judges Than It Did a Year Ago. Here's Why*, NPR (Feb. 23, 2026), https://www.npr.org/2026/02/23/g-s1-110911/trump-immigration-judges-dismissals-numbers.

[7] TRAC, *Immigration Court Asylum Grant Rates Cut in Half* (Nov. 18, 2025), https://tracreports.org/reports/766/.

[8] TRAC, *Asylum Denials Rise to 94% Amid the Remaking of the Immigration Court* (Aug. 31, 2026), https://tracreports.org/reports/779/.

[9] Nate Raymond, *Trump Administration Names Immigration Judges with Enforcement Background Amid Deportation Push*, Reuters (Mar. 12, 2026), https://www.reuters.com/legal/government/trump-administration-names-42-immigration-judges-many-enforcement-backgrounds-2026-03-12/.

[10] Adriel D. Orozco, *DOJ Moves to End Administrative Immigration Appeals to Speed Up Mass Deportation*, American Immigration Council (Feb. 13, 2026),

January 31, 2025, to April 29, 2026, all but one ruled against the immigrant.[11] Requiring immigrants to litigate constitutional claims against the Executive branch in this system simply delays or denies review by a neutral adjudicator.

Fourth, reliance on post hoc mechanisms for record development at the petition-for-review stage—such as remand under the Hobbs Act or appointment of a special master—does not cure these deficiencies. Those mechanisms have almost never been invoked, and their availability is uncertain. In *Reno v. Am.-Arab Anti-Discrimination Comm.*, Justice Scalia observed "[i]t is not at all clear" that the Hobbs Act authorizes remand to the agency or transfer to a district court "when the agency's hearing has not addressed the particular point at issue." 525 U.S. 471, 488 n.10 (1999). *See also* 8 U.S.C. § 1252(b)(4)(A) (requiring appellate courts to "decide the petition only on the administrative record on which the order of removal is based").

Even if this Court rules that the Hobbs Act permits fact finding in district court, that ruling would not be binding on the First Circuit as it considers Mahdawi's petition for review. It is completely unknown whether

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https://www.americanimmigrationcouncil.org/blog/justice-departments-end-immigration-appeals-deportations/.

[11] Jason Cade, *Welcome to the Trump Administration's Board of Immigration Appeals. The Immigrant Always Loses.*, 136 YALE L.J. FORUM 24 (2026).

the First Circuit would authorize remand to the district court for fact finding. Moreover, if it does, that would introduce more delay in a case where exceptionally important First Amendment issues should be quickly resolved.

Finally, the petition-for-review process is not a realistic forum for many noncitizens, particularly those who are detained and unrepresented. As of March 2025, asylum adjudications by immigration judges took an average of 636 days,[12] and only about ten percent of immigration judge decisions are appealed to the BIA,[13] with just 15-20% of those reaching the courts of appeals.[14] These data show that many noncitizens never reach the petition-for-review stage at all, much less in time to obtain meaningful relief. For

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[12] TRAC, *Immigration Court Backlog: Overall Down, Asylum Backlog Up* (Mar. 20, 2025), https://tracreports.org/whatsnew/email.250320.html.

[13] Margy O'Herron, *The Immigration Court System, Explained*, Brennan Ctr. for Just. (June 24, 2025), https://www.brennancenter.org/our-work/research-reports/immigration-court-system-explained. In FY 2023, immigration judges completed approximately 473,000 cases, while 43,039 appeals were filed with the BIA, an appeal rate of 9%. *See* Executive Office for Immigration Review, *Adjudication Statistics: All Appeals Filed, Completed, and Pending* (U.S. Dep't of Just.), https://www.justice.gov/eoir/page/file/1248501/dl?inline=; U.S. Gov't Accountability Off., GAO-25-106867, *Immigration Courts: Actions Needed to Track and Report Noncitizens' Hearing Appearance* 22-23 (2024), https://www.gao.gov/assets/gao-25-106867.pdf.

[14] *See* O'Herron, *supra* note 13; *see also* Admin. Off. of the U.S. Cts., *Federal Court Management Statistics—U.S. Courts of Appeals—Profiles—During the 12-Month Periods Ending December 31, 2020 Through 2025* (Dec. 31, 2025), https://www.uscourts.gov/sites/default/files/document/fcms_na_appprofile1231.2025.pdf (reporting agency appeals filed with circuit courts).

thousands of people each year, detention lasts more than a year,[15] limiting access to counsel,[16] taking a significant toll on mental and physical health,[17] and leading many to abandon meritorious cases.[18]

The U.S. Constitution does not tolerate such a result, especially in the First Amendment context. "[P]rior restraints on speech . . . are the most serious and the least tolerable infringement on First Amendment rights" because such a restraint "has an immediate and irreversible sanction" that "freezes" speech. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Here "[d]elayed review" of the First Amendment issues "may mean no review at all." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 47 (2000) (Thomas, J., dissenting). Unlike petitions for review, habeas proceedings in district court provide the possibility of immediate relief from unlawful detention, permit factual development, and are accessible to pro se litigants. Channeling claims into the petition-for-review process therefore does not preserve judicial

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[15] Emily Ryo & Ian Peacock, *A National Study of Immigration Detention in the United States*, 92 S. CAL. L. REV. 1, 32 (2018).
[16] *See* Ingrid V. Eagly, Steven Shafer & Renee Moulton, *Access to Counsel in Immigration Court, Revisited*, 111 IOWA L. REV. 1, 2, 26, 28 (2025).
[17] Altaf Saadi et al., *Duration in Immigration Detention and Health Harms*, JAMA NETWORK OPEN 8(1) (2025), https://doi.org/10.1001/jamanetworkopen.2024.56164.
[18] S. Poverty L. Ctr., *No End in Sight: Why Migrants Give Up on Their U.S. Immigration Cases* 27, 30, 36 (Oct. 3, 2018), https://www.splcenter.org/sites/default/files/leg_ijp_no_end_in_sight_2018_final_web.pdf.

review—it effectively forecloses it.

II. 8 U.S.C. § 1252(g) DOES NOT BAR JUDICIAL REVIEW.

While the panel relied solely on 1252(b)(9) in finding that it lacked jurisdiction, Respondents urge the Court to find that 1252(g) applies as well, citing Judge Menashi's concurring opinion. The argument that 1252(g) bars all review of Mahdawi's challenges to his detention is plainly foreclosed by binding precedent construing that provision narrowly. Moreover, construing the "arising from" language of 1252(g) to bar all detention-related claims would raise serious constitutional concerns under the Suspension Clause.

As the Supreme Court held in *Am.-Arab Anti-Discrimination Comm. (AADC)*, 1252(g) bars review only over claims challenging the three discrete exercises of "prosecutorial discretion" covered by 1252(g)—"the decision or action . . . to *commence* proceedings, *adjudicate* cases, or *execute* removal orders." 525 U.S. at 482 (emphasis in original). There are "many other decisions or actions that may be part of the deportation process," but challenges to them are not barred. *Id.*; *see also Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (holding 1252(g) did not bar detention claim challenging "the extent of the Attorney General's authority" rather than the "exercise of discretion").

Here, Mahdawi's habeas petition challenges his detention and the policy that produced those actions. It does not challenge the decision to *commence*

removal proceedings against him, as Respondents claim. Mahdawi's detention claims are not barred by 1252(g) because the decision to detain him is legally separate from the decision to commence removal. Removal proceedings are commenced by the filing of a Notice to Appear with the immigration court. 8 C.F.R. § 1239.1. A decision to detain may occur before or after that filing. Removal cases are regularly adjudicated without the noncitizen being detained. The commencement of removal proceedings is just one of many but-for causes of Mahdawi's detention, and if that were sufficient then 1252(g) would bar all detention claims, which clearly is not the case. *See, e.g.*, *Zadvydas,* 533 U.S. at 688; *Black v. Decker*, 103 F.4th 133 (2d Cir. 2024) (addressing detention claims on the merits).

Respondents also argue the reference to habeas claims in 1252(g) shows it is meant to cover detention claims, Resp. Br. at 35, but they acknowledge that reference was added in the REAL ID Act of 2005, where Congress responded to *INS v. St. Cyr*, 533 U.S. 289 (2001). *St. Cyr* concerned the longstanding use of habeas to challenge *removal* orders, not detention claims. *Id.* at 299; *see also Trump v. J.G.G.*, 145 S. Ct. 1003 (2025) (habeas petition challenging removal). Nothing in the REAL ID Act remotely suggests Congress intended to bar detention claims, particularly given the obvious Suspension Clause problems such a scheme would raise. Indeed, the REAL ID Act's legislative history

shows the opposite. As noted above, the Conference Report stated the statute preserved "habeas review over challenges to detention that are independent of challenges to removal orders." H.R. Rep. No. 109-72, at 175 (2005) (Conf. Rep.).[19]

Other circuits have recognized that 1252(g) does not bar jurisdiction over habeas challenges to detention. *See Suri v. Trump*, 184 F.4th 260, 286–89 (4th Cir. 2026); *Kong v. United States*, 62 F.4th 608, 617 (1st Cir. 2023) (holding petitioner's illegal arrest and detention claims based on lack of warrant and regulatory violations were "plainly collateral to ICE's prosecutorial decision to execute Kong's removal"); *Arce v. United States*, 899 F.3d 796, 799–800 (9th Cir. 2018) (FTCA claim for false arrest and imprisonment based on government's violation of stay of removal not barred by 1252(g)); *Madu v. Att'y Gen.*, 470 F.3d 1362, 1368 (11th Cir. 2006) (challenge to legality of detention not barred by 1252(g) because distinct from decision to execute removal order); *Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999) (1252(g) did not bar claims "concern[ing] detention," which "may be resolved without

[19] Even as to removal proceedings, courts have consistently exercised judicial review over challenges to the government's authority to commence proceedings, distinguishing this from the discretionary decision to commence proceedings. *Garcia v. Att'y Gen.*, 553 F.3d 724, 729 (3d Cir. 2009) (finding jurisdiction because "Garcia is not challenging the discretionary decision to commence proceedings, but is challenging the government's very authority to commence those proceedings after the limitation period has expired") (emphases in original).

affecting pending [removal] proceedings").

Finally, Mahdawi's challenge to the government's policy of targeting noncitizens for their protected speech is not barred by 1252(g). A challenge to the lawfulness or constitutionality of a policy does not *arise from* a decision to commence removal proceedings, adjudicate cases, or execute a removal order. *See, e.g., Suri*, 184 F.4th at 288-89; *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 19 (2020) (stressing that 1252(g) is "narrow" and finding that it did not bar challenge to rescission of DACA policy); *cf. Ali v. Mukasey,* 524 F.3d 145, 150 (2d Cir. 2008) (suggesting claim would not be barred if petitioner alleged being placed in removal proceedings "unlawfully or for reasons that would offend the Constitution"). In this respect, this case also differs from *Ragbir v. Homan*, 923 F.3d 53 (2d Cir. 2019) and *AADC* itself, where petitioners sought to enjoin the execution of otherwise valid final removal orders on First Amendment grounds.

CONCLUSION

Based on the foregoing, amici respectfully request reversal of the panel's decision. The Court has jurisdiction to review Mahdawi's constitutional challenges to his detention.

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Pursuant to Federal Rules of Appellate Procedure 29 and 32, undersigned counsel certifies that the foregoing brief:

1. Complies with the type-volume limitation of Local Rules 29.1(c) and 32.1(a)(4)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5731 words.
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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2026, an electronic copy of the brief of amici curiae Immigration Lawyers, Law Professors, and Scholars was filed with the Clerk of the United States Court of Appeals for the Second Circuit by using the ACMS system. I also certify that all participants are registered ACMS users and will be served via the ACMS system.

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