No. 22-1151

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ANDERSON ALPHONSE,
PETITIONER - APPELLANT,
v.

ANTONE MONIZ,
Superintendent of Plymouth County Correctional Facility,
RESPONDENT - APPELLEE

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITONER-APPELLANT ANDERSON ALPHONSE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1, *amici* state that they do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in either of the *amici*.

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan, public interest organization of nearly two million members dedicated to protecting the fundamental rights and liberties that U.S. law guarantees to all persons. The Immigrants' Rights Project of the ACLU engages in a nationwide program of litigation and advocacy to enforce and protect the constitutional and civil rights of immigrants. The legal issues in this case are of significant interest to the ACLU, which has developed a particular expertise on detention and judicial review. The ACLU has litigated numerous cases implicated in this appeal, including *Jennings v. Rodriguez*, 138 S. Ct. 838 (2018).

The American Civil Liberties Union of Massachusetts ("ACLUM") is a state affiliate of the national ACLU and is dedicated to protecting and advancing the civil rights and civil liberties of all people in the Commonwealth. ACLUM represents noncitizens in individual and class action litigation challenging unlawful government conduct and has an interest in preserving noncitizens' access to the federal courts. ACLUM was counsel in *Aguilar v. ICE*, 510 F.3d 1 (1st Cir. 2007).

The American Immigration Lawyers Association ("AILA"), founded in 1946, is a nonpartisan, not-for-profit organization comprised of over 11,000 attorneys and law professors who practice and teach immigration law. AILA members provide professional services, continuing legal education, information, and additionally,

representation for U.S. families, businesses, foreign students, entertainers, athletes, and asylum seekers, often on a pro bono basis. AILA has participated as *amicus curiae* in numerous cases. As a friend of the court, AILA hopes to provide a larger context for the questions presented in this case in order to promote the just administration of law.[1]

INTRODUCTION

Petitioner Anderson Alphonse challenges his mandatory detention, without even the opportunity to seek bond, arguing that his convictions do not qualify under 8 U.S.C. § 1226(c). There is no question that district courts have jurisdiction to hear detention claims, including alleged misapplications of § 1226(c). *See, e.g.*, *Nielsen v. Preap*, 139 S. Ct. 954 (2019). However, the district court held that 8 U.S.C. § 1252(b)(9) forces Mr. Alphonse to wait months or years to raise his claim, until his removal case makes its way to a circuit court on a petition for review ("PFR"). That incorrect interpretation would render Mr. Alphonse's detention challenge "effectively unreviewable" because "[b]y the time a final order of removal was eventually entered, the allegedly [unlawful] detention would have already taken place." *Jennings v. Rodriguez*, 138 S. Ct. 838, 840 (2018) (plurality op.).

[1] No party or party's counsel authored this brief in whole or in part. No party, no party's counsel, and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

The district court's flawed conclusion relied on *Aguilar v. ICE*, 510 F.3d 1 (1st Cir. 2007). But the Supreme Court's subsequent precedent has appropriately focused on the narrowness of § 1252(b)(9), particularly when it comes to detention claims. And *Aguilar* itself in fact reinforces that the district court had jurisdiction here. This Court should therefore hold that § 1252(b)(9) presents no jurisdictional barrier in this case and correct the district court's misreading of *Aguilar*. *See* Part I.

The district court also held the Suspension Clause was satisfied by the availability of review of the merits of Mr. Alphonse's removal case through the PFR process. But a PFR is not an adequate alternative to a detention habeas; again, by the time that review happens, the illegal detention will have already occurred. The district court's contrary holding contravenes history and precedent: Ensuring habeas jurisdiction over detention and access to timely release is central to what the Suspension Clause protects. *See* Part II.

BACKGROUND

8 U.S.C. § 1226, which governs Mr. Alphonse's detention, "distinguishes between two different categories of aliens." *Jennings*, 138 S. Ct. at 837. Section 1226(a), the "default rule," provides that the government "may" detain an "alien" pending removal proceedings, and such detainees are by regulation eligible for a bond hearing to decide whether they will be detained or released. *See* 8 C.F.R. § 1236.1(d). By contrast, 8 U.S.C. § 1226(c) bars such release for "alien[s]" in

certain enumerated categories, subject to exceptions not applicable here. As this Court is aware, removal proceedings, including briefing, argument, and decision on a PFR, often take years to resolve; accordingly, detention under § 1226(c) pending those proceedings also often lasts years.

The categories of individuals subject to § 1226(c) include "alien[s]" who are "deportable" based on certain types of criminal convictions, such as aggravated felonies, crimes involving moral turpitude, and controlled substance offenses. 8 U.S.C. §§ 1226(c); 1227(a)(2)(A)(ii), (A)(iii), (B). Whether a person is an "alien," and whether they are "deportable" or otherwise "removable," are also issues in removal proceedings; those issues are decided by an Immigration Judge ("IJ") and may be appealed to the Board of Immigration Appeals ("BIA") and then to a court of appeals on a PFR. *See* 8 U.S.C. § 1229a(e)(2); *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1619 (2021). Some detention questions under § 1226(c) thus may overlap with removal issues.

They are not, however, the same. The detention statute involves a predictive assessment of whether the government will establish removability, not a final determination of removability itself. *See Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999); *infra* note 5. In addition, the government may rely on one ground of removability to justify detention under § 1226(c) while charging a different ground

of removability in removal proceedings. *Matter of Kotliar*, 24 I. & N. Dec. 124 (BIA 2007).

Here, Immigration and Customs Enforcement ("ICE") decided to detain Mr. Alphonse under § 1226(c) based on its determination that, because of his criminal convictions, he fell within the specified categories. Mr. Alphonse requested that an IJ review his custody determination at a *Joseph* hearing, and the IJ determined that he was properly detained under § 1226(c). Mr. Alphonse then filed a habeas petition in the District of Massachusetts, arguing (as relevant to this brief) that he was not properly detained under § 1226(c) because his convictions do not qualify under the statute. Pet. Br. 6-7.

The district court held that this challenge was barred, concluding that "§ 1252(b)(9) prohibits the exercise of jurisdiction when the legal questions regarding mandatory detention and removability are the same" and that district courts have jurisdiction "only where 'detention claims are independent of challenges to removal orders.'" Add. 20-21 (quoting *Aguilar*, 510 F.3d at 11). The Court then held this construction of § 1252(b)(9) satisfied the Suspension Clause because Congress had provided a purportedly "adequate substitute for adjudicating the same legal issues raised in the petition"—namely, a PFR. Add. 21-23. As explained below, these rulings are not only incorrect, but eviscerate the foundational right to habeas corpus enshrined in the Constitution.

ARGUMENT

I. 8 U.S.C. § 1252(b)(9) DOES NOT BAR MR. ALPHONSE'S HABEAS CHALLENGE TO DETENTION.

8 U.S.C. § 1252(b)(9) channels review of "all questions of law and fact, . . . arising from any action taken or proceeding brought to remove an alien from the United States . . . " into PFRs. The district court held that § 1252(b)(9) bars Mr. Alphonse's claim merely because his argument overlaps with issues that may (or may not) be presented in a PFR. But under *Jennings*, subsequent Supreme Court decisions, and this Court's decision in *Aguilar*, the critical issue is whether the PFR process provides adequate *relief*. 138 S. Ct. at 840 (plurality op.). As the Third Circuit summarized, after *Jennings* the rule is simple: When a petitioner seeks "relief that courts cannot meaningfully provide alongside review of a final order of removal," § 1252(b)(9) does not apply. *E.O.H.C. v. Sec'y, DHS*, 950 F.3d 177, 180 (3d Cir. 2020). Here, just as in *Jennings*, denying jurisdiction to challenge detention until it has "already taken place" would render such detention "effectively unreviewable." 138 S. Ct. at 840 (plurality op.). Indeed, under the district court's view, the government could place anyone—even a noncitizen without convictions that could qualify for § 1226(c)—into mandatory detention, and courts would be powerless to release them.

The district court relied on *Aguilar*, reasoning that Mr. Alphonse's claim is not "independent" of his removal proceedings given the overlapping issues. *See*

Add. 18 (citing *Aguilar*, 510 F.3d at 11). But *Aguilar supports* Mr. Alphonse's case, as it explicitly recognized that "district courts retain jurisdiction over challenges to the legality of detention in the immigration context." 510 F.3d at 11. Any reading of *Aguilar* that would bar review here would be contrary to both *Aguilar* itself and Supreme Court authority beginning with *Jennings*, and should be rejected.

A. *Jennings* Properly Recognized That § 1252(b)(9) Is A Narrow, Targeted Provision.

The district court's analysis failed to adequately take account of recent doctrinal developments in the interpretation of § 1252(b)(9). *Jennings* marked a significant correction to prior trends in this respect, and post-*Jennings* law must therefore be this Court's touchstone.

Jennings was a challenge to immigration detention, in which a class of noncitizens argued that their detention without bond hearings under § 1226(c) (and another statute) was unlawful after six months. The Court held that it had subject matter jurisdiction to review that claim, and specifically that § 1252(b)(9) did not bar review. A three-Justice plurality recognized that the phrase "arising from" could, if read expansively, encompass all claims that would not exist but for the Government's decision to remove a noncitizen—including detention decisions. 138 S. Ct. at 840 (plurality op.). However, the plurality rejected this sort of "uncritical literalism," explaining it could lead to "extreme" and "staggering results" that "no

sensible person could have intended." *Id*. The plurality endorsed a practical approach to cabining § 1252(b)(9):

> Interpreting "arising from" in this extreme way would also make claims of prolonged detention effectively unreviewable. By the time a final order of removal was eventually entered, the allegedly excessive detention would have already taken place. And of course, it is possible that no such order would ever be entered in a particular case, depriving that detainee of any meaningful chance for judicial review.

Id. Three other Justices, dissenting on the merits, agreed that that § 1252(b)(9) did not apply because "Respondents challenge their detention without bail, not an order of removal." *Id*. at 876 (Breyer, J., dissenting). Only two Justices would have held the case jurisdictionally barred by § 1252(b)(9). *Id*. at 852 (Thomas, J., concurring in part and concurring in the judgment).

Since *Jennings*, the Court has continued to find jurisdiction in challenges to detention over the dissents of the same two Justices. *See Nielsen v. Preap*, 139 S. Ct. 954, 962 (2019) (plurality); *id*. at 973 (Thomas, J., concurring in part); *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2284 n.4 (2021); *id.* at 2292 (Thomas, J., concurring in part). Indeed, in *Johnson v. Arteaga-Martinez*, the Court recently decided the merits of another detention challenge without even reiterating that § 1252(b)(9) did not apply, despite the objection of the same two Justices—presumably because that was by now obvious. 142 S. Ct. 1827, 2022 WL 2111342 (2022); *see id*. at *7 (Thomas, J., concurring). The Supreme Court has further

emphasized that the provision's "targeted language" is "narrow." *DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1907 (2020).

In the wake of *Jennings*, lower courts have appropriately recognized and given effect to the Court's focus on ensuring that claims will be "effectively []reviewable," and—as particularly relevant here—that relief would not come only after "the allegedly excessive detention would have already taken place," *Jennings*, 138 S. Ct. at 840 (plurality op.). For example, the Third Circuit examined the Supreme Court's § 1252(b)(9) decisions, particularly *Jennings*, and derived from them a simple "now-or-never" principle: "When a detained alien seeks relief that a court of appeals cannot meaningfully provide on petition for review of a final order of removal, § 1252(b)(9) does not bar consideration by a district court." *E.O.H.C.*, 950 F.3d at 180; *see also id*. at 184-86. As discussed below, *infra* Part I(B), that principle applies with full force in this case.

Likewise, the Ninth Circuit recently cast doubt on its pre-*Jennings* caselaw in light of the Supreme Court's intervening guidance:

> We have [in *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016)] described § 1252(b)(9) as "vise-like in grip," channeling jurisdiction over "any issue—whether legal or factual—arising from any removal-related activity" to the courts of appeal through a petition for review of a final order of removal. But we have also explained that "§ 1252(b)(9) has built-in limits," specifically, "claims that are independent of or collateral to the removal process do not fall within the scope of § 1252(b)(9)." *The Supreme Court has since instructed that § 1252(b)(9) is a "targeted" and "narrow" provision* that "is certainly

> not a bar where, as here, the parties are not challenging any removal proceedings."

Gonzalez v. ICE, 975 F.3d 788, 810 (9th Cir. 2020) (citations omitted, emphasis added). These and other cases have properly recognized that recent Supreme Court precedent requires a narrow construction of § 1252(b)(9). *See, e.g.*, *P.L. v. ICE*, No. 19-CV-01336, 2019 WL 2568648, at *3 (S.D.N.Y. June 21, 2019) ("[A]s the Supreme Court's plurality opinion in [*Jennings*] explained, § 1252(b)(9) should not be construed broadly.").[2]

B. Particularly After *Jennings*, § 1252(b)(9) Does Not Bar Review Of Mr. Alphonse's Challenge To His Mandatory Detention.

Especially in light of *Jennings* and subsequent authority, it is clear that the district court erred in holding that § 1252(b)(9) bars review here. Detention claims like this one are not challenges to removal orders or proceedings, but rather challenges to illegal detention pending those proceedings; as such, they are not channeled into PFRs by § 1252(b)(9). It makes no difference that the legal issues in this particular detention challenge may overlap with issues in removal proceedings, because effective *relief* is not available in a PFR. For petitioners like Mr. Alphonse—a long-term resident languishing in detention potentially for years, despite his claim that it is illegal—a PFR is plainly ineffective because it permits

[2] *See also* Adam J. Garnick, *Noncitizens' Access to Federal District Courts: The Narrowing of § 1252(b)(9) Post*-Jennings, 169 U. Pa. L. Rev. 783, 825 (2021).

review only after the illegal detention has already occurred, if at all. And *Aguilar*, far from dictating a contrary conclusion, in fact supports a finding of jurisdiction here. The Court should thus hold that § 1252(b)(9) poses no bar in this case, and clarify that any reading of *Aguilar* to the contrary is unsustainable after *Jennings*.

1. Detention claims generally fall outside of the scope of § 1252(b)(9).

Mr. Alphonse contends that his convictions do not qualify him for mandatory detention under § 1226(c). As in *Jennings*, *Preap*, *Guzman-Chavez*, and *Arteaga-Martinez*, he challenges only his detention pending removal proceedings, not those proceedings themselves. These cases establish a simple rule: Because the relief sought is not effectively available as part of a PFR, detention claims are not barred by § 1252(b)(9).

Particularly after *Jennings*, the *relief* sought in a district court action is critical. Because Mr. Alphonse "seeks relief that a court of appeals cannot meaningfully provide on petition for review of a final order of removal, § 1252(b)(9) does not bar" his claim in district court. *E.O.H.C.*, 950 F.3d at 180. Indeed, the *Jennings* analysis applies with equal force to Mr. Alphonse's detention challenge: Barring jurisdiction under § 1252(b)(9) would render Mr. Alphonse's claim for relief from interim detention "effectively unreviewable," because "[b]y the time a final order of removal [is] eventually entered, the allegedly excessive detention would have already taken

place." *Jennings*, 138 S. Ct. at 840. In other words, because Mr. Alphonse seeks relief only from interim detention, eventual review on a PFR will come too late.

The district court downplayed the clear import of *Jennings* and its progeny by highlighting the *Jennings* plurality's observation that "the respondents in that case were '*not* challenging the decision to detain them in the first place.'" Add. 19-20 (quoting 138 S. Ct. at 841) (emphasis added by district court). It suggested that Mr. Alphonse, by contrast, was challenging the decision to detain him in the first place, and that *Jennings* therefore bars jurisdiction. But there is no meaningful sense in which Mr. Alphonse is "challenging the decision to detain [him] in the first place" any more than the petitioners in the various Supreme Court detention cases were. Indeed, even if Mr. Alphonse is not properly subject to § 1226(c) mandatory detention, as he contends, he could still have been arrested and detained "in the first place" under § 1226(a), the general non-mandatory detention authority.

This point is made clear by the reasoning of *Preap*. In that case, noncitizens claimed that they were not properly subject to mandatory detention under § 1226(c) based on the lapse of time between their release from criminal detention and their removal proceedings. 139 S. Ct. at 959. Mr. Alphonse likewise contends that the statutory conditions triggering detention without bond under § 1226(c) have not been satisfied. *Preap* concluded that, as in *Jennings*, the petitioners' challenge was not barred by § 1252(b)(9). *Id.* at 962. The Court emphasized that the petitioners

were "not challenging the decision to detain them in the first place or to seek removal [*as opposed to the decision to deny them bond hearings*]." *Id*. (quoting *Jennings*, 138 S. Ct. at 841) (emphasis added, alteration in *Preap*). Precisely the same is true here.

The district court acknowledged *Preap*, but attempted to distinguish it by pointing to the overlapping issues in Mr. Alphonse's detention and removal cases. Add. 20. As explained below, that distinction makes no difference for purposes of analyzing § 1252(b)(9). *See infra*, Part I(B)(2). But in any event, the potential overlap in legal issues certainly does not mean that Mr. Alphonse is "challenging the *decision to detain [him] in the first place*" him any more than were the petitioners in *Preap*. Thus, the general *Jennings* rule applies here: Section 1252(b)(9) does not bar this claim because Mr. Alphonse is challenging his detention.

The district court also relied heavily on this Court's decision in *Aguilar*. Add. 17-18, 20-21. *Aguilar* considered whether transfers to distant detention facilities were unlawful, and held that the plaintiffs' claim based on their "right to counsel in connection with a removal proceeding" was barred by § 1252(b)(9), while their substantive due process challenge to being separated from their families was not. 510 F.3d at 13, 19. *Aguilar*'s analysis *supports* a finding of jurisdiction in this case. Indeed, *Aguilar* emphasized the limits of § 1252(b)(9), explaining that "certain claims, by reason of the nature of the right asserted, cannot be raised efficaciously"

on a PFR, and that reading § 1252(b)(9) to cover such claims "would be perverse" because it would effectively bar "any meaningful judicial review." *Id.* at 11.

In line with that observation, and particularly relevant here, *Aguilar* clearly stated that "district courts retain jurisdiction over challenges to the legality of detention in the immigration context." *Id*. It further noted that Congress had "stated unequivocally that the channeling provisions of section 1252(b)(9) should not be read to preclude 'habeas review over challenges to detention.'" *Id.* (quoting H.R. Rep. No. 109-72, at 175, *as reprinted in* 2005 U.S.C.C.A.N. 240, 300). By *Aguilar*'s own terms, then, § 1252(b)(9) poses no bar to detention claims like Mr. Alphonse's.

Aguilar's reasoning further dovetails with the emphasis in *Jennings* on reading § 1252(b)(9) to avoid delaying review until it is too late to afford any effective relief. Again and again, *Aguilar* underscored the importance of "irreparable injury" in assessing the scope of § 1252(b)(9). 510 F.3d at 14; *see id*. at 12, 17, 19 (holding that "because the petitioners would be left without any effective remedy, they would be irreparably harmed by" application of § 1252(b)(9) to the substantive due process claim). Detention claims like Mr. Alphonse's are, at their most fundamental level, an effort to avoid the irreparable harm of unlawful detention pending removal proceedings.[3] Forcing Mr. Alphonse to remain in allegedly illegal detention until a circuit court might someday hear his legal

[3] *Cf.* 28 U.S.C. § 2243 (requiring expeditious treatment of habeas petitions).

arguments is, as the *Jennings* plurality observed, cold comfort: "By the time a final order of removal was eventually entered, the allegedly [unlawful] detention would have already taken place." 138 S. Ct. at 840.[4]

Thus, contrary to the district court's suggestion, *Aguilar* supports the existence of jurisdiction in this case, and jurisdiction is only clearer after *Jennings*. Under that correct interpretation, § 1252(b)(9) poses no barrier to Mr. Alphonse's claim.

2. Potential overlap in legal issues does not bar jurisdiction over this claim.

The district court concluded that the overlap in legal issues between Mr. Alphonse's detention claim and his removal proceedings sets this case apart from *Jennings*, *Preap*, and all the other detention cases for which jurisdiction is proper. It asserted that Mr. Alphonse's claim that "his convictions do not subject him to

[4] Moreover, by the time a circuit court hears a PFR, the noncitizen may not even be detained under § 1226(c), which governs detention during the pendency of removal proceedings, but rather may be detained under 8 U.S.C. § 1231, which governs detention after an order of removal has been entered. *See* 8 U.S.C. §§ 1231(a)(1)(B), (a)(2), (a)(6) (providing for detention during and beyond the "removal period," which can begin during a PFR if the court denies a stay of removal). In that circumstance, the entire question of the legality of his detention under § 1226(c) may be moot by the time the PFR is decided. Additionally, if no removal order ever becomes administratively final, a PFR would be simply unavailable. *See Jennings*, 138 S. Ct. at 840 (plurality op.) (describing this situation).

mandatory detention under 8 U.S.C. § 1226(c)" was "in substance, a challenge to his removability," and therefore barred by § 1252(b)(9). Add. 18.

That is wrong. Importantly, this case does not involve any attempt to collaterally attack removal proceedings. *Cf.*, *e.g.*, *Martinez v. Napolitano*, 704 F.3d 620, 623 (9th Cir. 2012) (no jurisdiction where claims were "nothing more than indirect attacks on his order of removal" already litigated on a PFR); *see also Gicharu v. Carr*, 983 F.3d 13, 15, 18-19 (1st Cir. 2020) (no jurisdiction where petitioner sought "judicial review of the BIA's decision not to reopen his removal proceedings" and an order "compel[ling] the BIA to 'rescind' the final order of removal" despite having sought and obtained review of that decision on a PFR). Mr. Alphonse is seeking only relief from his interim detention in the form of access to a bond hearing on the ground that the statute authorizing detention without bond is not satisfied.

Indeed, distinct legal standards apply to the detention and removal issues, further underscoring the flaw in the district court's reasoning. The question presented in Mr. Alphonse's detention challenge is not whether he would ultimately be found to be removable based on the grounds set forth in § 1226(c). Instead, the habeas court must assess whether it is "[]likely" enough that Mr. Alphonse is removable on that basis to justify detaining him *pending* the resolution of removal proceedings. *See Joseph*, 22 I. & N. Dec. at 807; *see also Gayle v. Warden*

Monmouth Cnty. Corr. Inst., 12 F.4th 321, 330-34 (3d Cir. 2021).[5] The detention standard is, in other words, a familiar species of legal determination—an initial assessment of the facts and law, subject to revision, in order to decide what the status quo will be pending a final determination. In this respect, the detention claim is analogous to a motion for a preliminary injunction, where the availability of *interim* relief depends on *likelihood* of success at the end of the case. *See, e.g.*, *Waldron v. George Weston Bakeries Inc.*, 570 F.3d 5, 9, 11 (1st Cir. 2009) (affirming district court's "reasonable prediction of the probable outcome of the litigation"); *see also* Pet. Br. 38-39.

To be sure, that predictive question may overlap with the issues that could be decided in the removal proceedings. But § 1252(b)(9) does not apply merely because the issues may overlap. In *Gonzalez*, for example, the Ninth Circuit

[5] There is debate about the proper predictive standard in this context. "Under *Joseph*, the Government must establish merely that there is 'reason to believe' a detainee is properly included within § 1226(c), at which point the burden shifts to the detainee to show that the Government is 'substantially unlikely to prevail on its charge' at the eventual removal hearing." *Gayle*, 12 F.4th at 330 (quoting *Joseph*, 22 I. & N. Dec. at 807). At the other end of the spectrum are arguments that, as in the context of criminal bail pending appeal, a noncitizen should be released if "there is a 'substantial question' whether she is properly included within § 1226(c)." *Id*. In *Gayle*, the Third Circuit held that due process required a standard "in between" those poles: "[T]he Government must show by a preponderance of the evidence that the detainee is properly included within § 1226(c) as both a factual and a legal matter." *Id*. at 333. Here, the Court need not address which standard is proper because, for purposes of the § 1252(b)(9) jurisdictional question in this case, all that matters is that each of these standards involves a predictive analysis.

considered a suit seeking injunctive relief against immigration detainers, which ICE uses to obtain custody of people in jails. The government argued that the relevant claims could be effectively raised in removal proceedings, so they were barred in district court. *See* Appellants' Principal Br., *Gonzalez*, 2020 WL 2772169 at *43 (contending that "claims related to detainers and alleged Fourth Amendment violations are routinely raised in petitions for review before the courts of appeals"). Despite this overlap, the Ninth Circuit held § 1252(b)(9) inapplicable. 975 F.3d at 810-11.

Nevertheless, the district court concluded that because the legal issues in the detention and removal cases overlap, they cannot be "independent" and that § 1252(b)(9) therefore applies. Add. 18 (citing *Aguilar*, 510 F.3d at 11). This conclusion was in error. *Aguilar*'s reference to independence is best understood in terms of the relief sought. 510 F.3d at 18-19 (assessing whether plaintiffs could access an "effective remedy"); *see Martinez*, 704 F.3d at 622 ("the distinction between an independent claim and indirect challenge 'will turn on the substance of the relief that a plaintiff is seeking'") (quoting *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011)). *Aguilar* suggested, for example, that a claim seeking "money damages" would, by virtue of the relief sought, fall outside of § 1252(b)(9). 510 F.3d at 11. And, as noted, *Aguilar* itself emphasized that "detention claims are

independent of removal proceedings and, thus, not barred by section 1252(b)(9)." *Id*.

The district court further suggested that, because the questions Mr. Alphonse raised in his detention challenge could be raised on a PFR, the "questions of law and fact . . . *arise from* the removal process," subjecting those questions to § 1252(b)(9). Add. 21 (emphasis added). That misunderstands the phrase "arising from" as used in § 1252(b)(9). *See Jennings*, 138 S. Ct. at 840 (rejecting "expansive interpretation" of that phrase). Mr. Alphonse's arguments arise from his *detention*. Section 1226(c) designates deportability on certain grounds as a trigger for mandatory detention. The "question[]" of his deportability on those grounds is therefore relevant to his detention challenge because of—and arises from—the detention statute and the government's decision to invoke it. Indeed, Mr. Alphonse could raise precisely this same challenge to his detention even if the government chose not to charge him with those grounds of deportability in his actual removal proceedings, as it is entitled to do. *See Kotliar*, 24 I. & N. Dec. at 126-27. Thus, his arguments arise from his detention, not from removal proceedings.

At most, one might say that the potential overlap in legal issues between detention and removal means that Mr. Alphonse's detention claim is *related* to his removal proceedings. Yet § 1252(b)(9) covers only questions "arising from any action taken or proceeding brought to remove an alien." By contrast, another

subsection of the same statute more broadly bars review over issues "arising from *or relating to* the implementation or operation" of an expedited removal order. 8 U.S.C. § 1252(a)(2)(A)(i) (emphasis added). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Kucana v. Holder*, 558 U.S. 233, 249 (2010) (cleaned up). "If Congress wanted" § 1252(b)(9) to reach questions merely related to removal proceedings, in other words, it "could easily have said so." *Id*. at 248; *accord Aguilar*, 510 F.3d at 10. Particularly in light of the "strong presumption in favor of judicial review of administrative action," *INS v. St. Cyr*, 533 U.S. 289, 298 (2001), Mr. Alphonse's detention claim does not fall within § 1252(b)(9).

II. NO ALTERNATIVE TO HABEAS REVIEW OF MR. ALPHONSE'S DETENTION CLAIM IS ADEQUATE TO SATISFY THE SUPSENSION CLAUSE.

Mr. Alphonse argues that if § 1252(b)(9) is construed to bar his challenge to his detention without access to bond, the statute would violate the Suspension Clause, and that this serious constitutional question is yet another reason to hold that § 1252(b)(9) does not apply. *See* Pet. Br. 43. The district court correctly accepted that the Suspension Clause guarantees habeas review of this claim absent an adequate alternative provided by Congress. Add. 22. But the court nevertheless held the Clause satisfied because, in its view, Mr. Alphonse has access to

mechanisms—particularly a PFR of a removal order—that are "neither inadequate nor ineffective" alternatives to habeas review of his detention claim. *Id.* That is incorrect because, as explained above, any review would come too late to remedy the allegedly illegal detention.

The Suspension Clause is a bedrock constitutional check against illegal detention. "The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom." *Boumediene v. Bush*, 553 U.S. 723, 739 (2008). They enshrined the Suspension Clause as both "one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights," and as "an essential mechanism in the separation-of-powers scheme." *Id.* at 739, 743. "In the system conceived by the Framers the writ had a centrality that must inform proper interpretation of the Suspension Clause." *Id*. at 738.

As the Supreme Court has emphasized, the Clause demands court review over the legality of detention—especially executive detention. "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *St. Cyr*, 533 U.S. at 301. Thus, as the Court recently underscored, "habeas is at its core a remedy for unlawful executive detention." *Thuraissigiam*, 140 S. Ct. at 1970-71 (quoting *Munaf v. Geren*, 553 U.S. 674, 693 (2008)); *see also Swain v. Pressley*, 430

U.S. 372, 386 (1977) (Burger, C.J., concurring) ("[T]he traditional Great Writ was largely a remedy against executive detention."). Such review is precisely what Mr. Alphonse is seeking here.

The alternatives the district court proposed are inadequate to serve the vital role of the Great Writ as a guarantee of court review over executive detention. First, the court relied in passing on the availability of *Executive Branch* review of detention, in the form of a *Joseph* hearing before an IJ and subsequent appeal to the BIA. Add. 22 & n.7. That is plainly inadequate. Unless it is validly suspended, "the Great Writ of habeas corpus allows *the Judicial Branch* to . . . serv[e] as an important judicial check on *the Executive's* discretion in the realm of detentions." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (emphasis added); *see also Boumediene*, 553 U.S. at 790 (holding that "[t]he role of an Article III court in the exercise of its habeas corpus function [could not] be circumscribed"). *Boumediene* emphasized at length that this guarantee of *Judicial Branch* review serves as a separation-of-powers check on the political branches. *Id*. at 742-44. And the dissenting Justices agreed on this point: "Because the central purpose of habeas corpus is to test the legality of executive detention, the writ requires most fundamentally an Article III court able to hear the prisoner's claims." *Id*. at 808 (Roberts, C.J., dissenting). Thus, administrative agency procedures to assess the legality of detention cannot serve as an adequate alternative to habeas.

Second, the district court pointed to the availability of review of an entirely different kind of claim—that detention actually authorized by § 1226(c) violates the Due Process Clause after a certain period of time. Add. 22. That is obviously inadequate as well. The Supreme Court has deemed it "uncontroversial . . . that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene*, 553 U.S. at 779 (quoting *St. Cyr*, 533 U.S. at 302). The constitutional claim referred to by the district court is only available when detention becomes prolonged, whereas Mr. Alphonse's § 1226(c) claim is that his mandatory detention was unlawful even before a certain amount of time passed. Permitting the constitutional prolonged detention claim does not provide a meaningful opportunity to contest the legality of applying § 1226(c) at all. Otherwise, Congress could all but eliminate habeas by providing a forum for selectively chosen legal claims while barring all other challenges to detention.

The district court's holding thus ultimately reduces to its conclusion that the PFR process itself "provides an adequate substitute for adjudicating the same legal issues raised in the [habeas] petition." Add. 23. In other words, in the district court's view, Congress has provided a forum to decide Mr. Alphonse's removability—a PFR—and therefore may eliminate review over his detention challenge. That, too, is mistaken.

As an initial matter, the district court was wrong to suggest the Supreme Court has ever endorsed the view that the PFR process is an adequate alternative to *detention* claims, rather than removal claims. *See* Add. 23 (citing *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1072 (2020)). *Guerrero-Lasprilla* and similar cases, like *INS v. St. Cyr*, are all about judicial review of the eventual *removal order*, not about detention pending review. These cases nowhere suggest that the PFR process is an adequate alternative to habeas challenges to detention.

To the contrary, for the reasons explained *supra*, Part I(B)(1), a PFR cannot be an adequate alternative to a habeas detention challenge in district court. A noncitizen may file a PFR only after a final order of removal has been entered. *See* 8 U.S.C. § 1252(a)(5). But "[b]y the time a final order of removal [i]s eventually entered," allowing a PFR to be filed and eventually decided, "the allegedly [unlawful] detention would have already taken place." *Jennings*, 138 S. Ct. at 840. Eventual vindication as to the overlapping legal issue does not remedy the harm to a habeas petitioner like Mr. Alphonse, whose years of detention cannot be undone even if a court eventually concludes on a PFR that he is not removable.

The Suspension Clause does not merely guarantee a venue to decide some specific legal issue at some future date. *Cf., e.g.*, *Webster v. Doe*, 486 U.S. 592, 603 (1988) (separate doctrine providing that constitutional concerns are raised by a federal statute that denies "any judicial forum for a colorable constitutional claim").

Habeas, as discussed above, is at "its core a *remedy* for unlawful executive *detention*." *Thuraissigiam*, 140 S. Ct. at 1970-71 (emphasis added). As such, an adequate alternative to habeas must—at the absolute minimum—provide the petitioner with "a meaningful opportunity to demonstrate that *he is being held*" unlawfully. *Boumediene*, 553 U.S. at 779 (emphasis added). "And the habeas court *must have the power to order the conditional release* of an individual unlawfully detained." *Id*. (emphasis added). A venue that merely allows certain legal issues to be raised *after* years of illegal detention, without an opportunity to *remedy* the illegal detention, cannot be an adequate alternative to habeas.

In endorsing a PFR as an adequate alternative, the district court implied that the Suspension Clause permits the elimination of review of pretrial (or prehearing) detention so long as the detainee eventually gets a day in court. But that disregard for the harm of interim detention is not at all consistent with the historical use of habeas at the time the Constitution was framed. *See St. Cyr*, 533 U.S. at 301 ("[A]t the absolute minimum, the Suspension Clause protects the writ as it existed in 1789.") (cleaned up). To the contrary, one of the central uses of habeas was precisely to challenge detention *pending* trial. Accordingly, an adequate alternative to habeas must permit release from pretrial or prehearing detention.[6]

[6] *Cf. United States v. Salerno* 481 U.S. 739, 751 (1987) (upholding Bail Reform Act against Due Process challenge in part because the Act provided for immediate

Boumediene surveyed historical precedents and explained that "the common-law habeas court's role was most extensive in cases of *pretrial* and noncriminal detention . . . ." 553 U.S. at 780 (emphasis added). For example, "[w]hen a prisoner applied for habeas corpus before indictment or trial, some courts examined the written depositions on which he had been arrested or committed, and others even heard oral testimony to determine whether the evidence was sufficient to justifying holding him for trial." *Id.* (quoting Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 457 (1966)). And historically one of the central uses of habeas was to obtain *interim release pending further proceedings* in the form of "bail." PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 59-60 (2010).

In light of this history, and the essential attributes of habeas as guaranteed by the Suspension Clause, the district court's holding is untenable. On its reasoning, habeas would cease to be a protection against illegal detention, and instead become a guarantee of someday getting a trial or final court hearing. That view dramatically shortchanges the liberty and separation-of-powers values protected by the Suspension Clause, and runs counter to the history of habeas. Thus, a PFR cannot

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appellate review of an adverse detention decision rather than requiring a detained person to wait until after trial to challenge their detention).

serve as an adequate alternative to Mr. Alphonse's habeas challenge to his detention pending removal proceedings.

CONCLUSION

The Court should reverse.

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Respectfully submitted,

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I certify that on July 5, 2022, the foregoing Brief of *Amici Curiae* was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system.

Dated: July 5, 2022

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