Nos. 25-2162 & 25-2357

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MAHMOUD KHALIL,

Petitioner-Appellee,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; WILLIAM P. JOYCE, in his official capacity as Acting Field Office Director of New York, Immigration and Customs Enforcement; YOLANDA PITTMAN, in her official capacity as Warden of Elizabeth Contract Detention Facility; TODD LYONS, in his official capacity as Acting Director of U.S. Immigration and Customs Enforcement; MARKWAYNE MULLIN, in his official capacity as Secretary of the Department of Homeland Security; MARCO RUBIO, in his official capacity as Secretary of State; and PAMELA BONDI, in her official capacity as Attorney General of the Department of Justice,

Respondents-Appellants,

On Petition for Rehearing En Banc

Brief Amici Curiae of Habeas Scholars Marc D. Falkoff, Martin S. Flaherty, Eric M. Freedman, Helen Hershkoff, Randy A. Hertz, Aziz Z. Huq, Lee Kovarsky, Aziz Rana, Stephen I. Vladeck, and Larry Yackle in Support of Petitioner-Appellee's Petition for Rehearing En Banc

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INTEREST OF AMICI CURIAE[1]

Amici curiae (listed in Addendum A) are professors of law who have expertise in habeas corpus and constitutional law, including whether a statutory substitute for the Great Writ is adequate and effective under the Constitution's Suspension Clause, art. I, § 9, cl. 2.

PRELIMINARY STATEMENT

Petitioner-Appellee Mahmoud Khalil filed a writ of habeas corpus challenging his unconstitutional detention solely because of his protected speech. The panel majority held jurisdiction to do so is stripped by 8 U.S.C. § 1252(b)(9).

Rather than habeas, the panel held, Khalil must go through an administrative process that concededly can neither provide the relief he seeks nor create an adequate factual record to support his constitutional claims. Only after the agency issues a final order of removal may he file a petition for review (PFR) to a federal court of appeals.[2] And even upon

[1] Counsel for amici certify that no person other than amici and their counsel helped author this brief or contributed funds.

[2] No final order has issued, more than a year after Khalil's detention on March 8, 2025, meaning he would still be imprisoned but for the district court's entry of habeas relief the panel held improper.

reaching the PFR court, no relief is possible because that court will lack an adequate factual record.

Instead, Khalil must then seek (through an uncertain and potentially unavailable mechanism) to have the PFR court transfer or remand his claims to some forum in which he could develop an adequate factual record. If that happens, likely years later, only then could he return to the PFR court to challenge his unconstitutional detention, when meaningful relief is no longer available.

The panel's decision focuses on its interpretation of the scope of § 1252(b)(9) itself. This Court previously held that "§ 1252(b)(9) poses no jurisdictional bar [and] does not strip jurisdiction when aliens *seek relief that courts cannot meaningfully provide* alongside review of a final order of removal," i.e., through the PFR process. *E.O.H.C. v. Sec'y U.S. DHS*, 950 F.3d 177, 186 (3d Cir. 2020) (emphasis added). This holding cannot be reconciled with the panel's conclusion that meaningful review only implicates whether the PFR court can review factual and legal issues, not whether it can provide meaningful relief. And, as this brief argues, the panel's conclusion cannot be reconciled with the Suspension Clause.

The panel discounted the relevance of the Suspension Clause in ten words: "[T]he availability of the PFR process satisfies the Suspension Clause." *Khalil v. President, United States*, 164 F.4th 259, 279 (3d Cir. 2026) (citing *Luna v. Holder*, 637 F.3d 85, 95 (2d Cir. 2011)). But *Luna* demonstrates the opposite. First, *Luna* found the PFR process an adequate and effective substitute, as applied to the particular petitioners, only after carefully reviewing the specific claims raised and only after dictating precisely how the PFR process must proceed to satisfy the Suspension Clause—assurance unavailable here because this Court will not be the PFR court.

Second, *Luna* provided four guideposts to assessing adequacy and effectiveness under the Suspension Clause, benchmarks this Court has adopted. *Osorio-Martinez v. Att'y Gen. United States of Am.*, 893 F.3d 153, 177 & n.22 (3d Cir. 2018). The PFR process here fails to satisfy each guidepost.

As applied to Khalil, the Suspension Clause either warrants: (1) interpreting § 1252(b)(9) to avoid significant constitutional questions, if that is fairly possible, by reading § 1252(b)(9) not to bar his habeas

claim,[3] or (2) holding that, under the Suspension Clause, the PFR process is not an adequate and effective substitute for habeas.

LEGAL ARGUMENT

I. THE HISTORY OF HABEAS CORPUS DEMONSTRATES THAT HABEAS—OR ANY ADEQUATE AND EFFECTIVE SUBSTITUTE—MUST BE ABLE TO PROVIDE PROMPT AND EFFECTIVE RELIEF.

Habeas—or any adequate and effective substitute satisfying the Suspension Clause—requires the availability of *prompt* relief and of *effective* relief from detention and other executive branch restraints on liberty. A "lawful permanent resident" [like Khalil] is "the quintessential example of an alien entitled to 'broad constitutional protections," *Osorio-Martinez*, 893 F.3d at 174, 177 (citations omitted), and when reviewing "executive detention orders[,] the need for habeas corpus is more urgent," *Boumediene*, 553 U.S. at 783.[4]

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[3] Congress plainly intended to bar *many* habeas claims through § 1252(b)(9). But as *E.O.H.C.* held—or at the very least preserved the fair possibility that—Congress did not intend to bar claims that could not meaningfully be remedied through the PFR process. The question is therefore whether the statute reflects clear Congressional intent to bar habeas claims of the sort Khalil raises.

[4] This need for urgency undercuts the panel's suggestion that delay is a matter of course in habeas, thus unexceptionable here, because those improperly criminally convicted must exhaust direct appeals before seeking habeas. *Khalil*, 164 F.4th at 275. But barriers to "federal,

Habeas "cu[ts] through all forms and g[oes] to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved[,] opens the inquiry whether they have been more than an empty shell." *Id.* at 785 (cleaned up). A process that eventually declares: "Your legal claims are correct, for years you have been imprisoned in violation of the First and Fifth Amendments and your First Amendment rights chilled, but unfortunately no meaningful relief is available"—that is an empty shell, indeed.

Before 1789, and thus plainly within the ambit of the Suspension Clause, "Parliament codified the common law procedures in the Habeas Corpus Act of 1679, which ensured that the writ itself would be continually available [and] that relief sought under it would not be obstructed or delayed." Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 Va. L. Rev. 1361, 1368 (2010). Prompt, meaningful relief was thus historically vital.

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postconviction review after criminal proceedings in state court" "give little helpful instruction (save perhaps by contrast) [in] cases where no trial has been held." *Boumediene*, 553 U.S. at 774.

Habeas, moreover, reaches the harms imposed by even brief, politically motivated detention. "As a practical matter, the threat of even temporary imprisonment might suffice to silence political opposition and allow an ambitious president to accrete more power." *Id.* at 1408 n.167. The "Great Writ achieved its celebrity in the constitutional struggles of the seventeenth century as a remedy against political arrests by the King's council and ministers," "afford[ing] a guarantee that individuals would not be detained on executive fiat." Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 971 (1998).

Delay in the availability of an effective remedy was historically impermissible. Habeas is "a writ antecedent to statute," "perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement." *Williams v. Kaiser*, 323 U.S. 471, 484 n.2 (1945) (Frankfurter, J., dissenting); 3 W. Blackstone, Commentaries *135 ("[I]f any person be committed by the king [or privy council] he shall have granted unto him, without any delay upon any pretence whatsoever, a writ of *habeas corpus*.").

"[H]abeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings, and today." *Fay v. Noia*, 372 U.S. 391, 401-02 (1963). The writ's "function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. [If] imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." *Id.* So, too, here.

II. THE PETITION FOR REVIEW PROCESS—AS APPLIED TO KHALIL—DOES NOT PROVIDE AN ADEQUATE AND EFFECTIVE SUBSTITUTE FOR HABEAS.

This Court has adopted benchmarks to assess the existence of an "acceptable substitute for habeas review," whether: (A) "the entity substituting for a habeas court" can "formulate and issue appropriate orders for relief"; (B) the substitute procedure is subject to governmental manipulation or discretion; and (C) the purpose and effect of the substitute delays or frustrates the detainee's claims. *Osorio-Martinez*, 893 F.3d at 177 & n.22. None of these criteria are satisfied here.

A. The Entity Substituting for a Habeas Court Must Have the Capacity to Issue Appropriate Orders for Relief.

The most plainly relevant criterion is whether "the entity substituting for a habeas court '[has] adequate authority . . . to formulate and issue appropriate orders for relief.'" *Id.* (emphasis added) (cleaned up). This Suspension Clause mandate—the capability of issuing appropriate relief—directly conflicts with the panel's construction of § 1252(b)(9).

The panel held—based on the "text, title, and purpose" of § 1252(b)(9)—that for a habeas claim to be outside the jurisdiction-stripping reach of § 1252(b)(9), it "must raise legal or factual questions that a court of appeals will not later be able to review meaningfully on a PFR. It is not enough to assert an injury that cannot be remedied later." *Khalil*, 164 F.4th at 274-75.

Even assuming the panel was justified in choosing among plausible interpretations of § 1252(b)(9) left open by *E.O.H.C.*, this construction cannot be squared with the Suspension Clause: Any adequate and effective substitute for habeas must be able to provide appropriate and meaningful relief. *Osorio-Martinez*, 893 F.3d at 177 n.22; *Boumediene*, 553 U.S. at 787 (holding that habeas or its substitute requires the

capacity "to formulate and issue appropriate orders for relief"); *Leguillou v. Davis*, 212 F.2d 681, 684 (3d Cir. 1954) (upholding a substitute "remedy [as not] 'inadequate or ineffective'" because the court "could have" "granted the very relief the prisoner is seeking").

B. The Substitute Procedure Must Not Be Subject to Government Manipulation.

The next criteria are whether "the scope of the substitute procedure [is] 'subject to manipulation' by the Government" or is "wholly discretionary." *Osorio-Martinez*, 893 F.3d at 177 n.22. First, the Attorney General has unfettered discretion to overturn any BIA decision and to dismiss its members, *see* Neuman, *Habeas* Corpus, 98 Colum. L. Rev. at 1024, as she has done for nine members appointed by the prior administration.

Second, under the panel's holding, the government is empowered to evade review while imprisoning Khalil and other immigrant protesters for years on "blatantly lawless" grounds, "retaliat[ing] against the person because of his political views." *Oestereich v. Selective Serv. System*, 393 U.S. 233, 237-38 (1968) (rejecting jurisdiction-stripping, despite the plain statutory prohibition, given the blatantly unlawful political retaliation).

C. The Purpose and Effect of the Substitute Process Must Not Delay or Frustrate the Detainee's Claims.

The last benchmark considers whether "the purpose and effect of the [substitute] was to expedite consideration of the [detainee's] claims, not to delay or frustrate it." *Osorio-Martinez*, 893 F.3d at 177 n.22. First, under the PFR process here, unlike in a habeas proceeding (or typical substitute process requiring exhaustion of an administrative remedy or direct criminal appeal that *could* provide prompt and effective relief), Khalil's claims are inevitably delayed and frustrated through the many initial layers of the PFR process.

This is so because Khalil cannot build an adequate record before the agency and cannot secure relief from the agency on First and Fifth Amendment harms that the agency will not address or remedy during the lengthy pendency of the agency proceedings. He asserts a pattern-and-practice claim that the government is detaining students solely because of their otherwise-protected political speech, an assertion the panel recognized ill-suited to development before the agency, and he challenges the Secretary of State's determination that his student protests present a national security danger, a finding the agency has concluded it is powerless to review. *See* JA 162 (IJ informs Khalil that

"he is in the wrong court" for development of a factual record supporting his constitutional claims).

Second, the effect of the PFR process may well be to preclude the possibility that adequate factual development will ever occur, and the inevitable effect is to greatly delay and thereby necessarily frustrate the efficacy of relief. The panel presumed that fact development could eventually occur because the PFR court could employ some sort of "Hobbs Act remand, a special master, or a similar administrative mechanism to supplement the record as needed," *Khalil*, 164 F.4th at 281. Potential difficulties abound.

First, in the best-case scenario, delay is inescapably prolonged before *any* entity would have the power to find Khalil's detention unconstitutional. Second, the panel's supposition that some form of fact-finding mechanism could be available to the PFR court "to supplement the factual record if needed," and its refusal to "anticipate what another court is given to decide," i.e., whether the PFR court would actually employ the fact-finding "tools" that the panel suggests could be available, *id.*, is insufficient to provide the necessary assurance that the PFR

process will provide Khalil an adequate and effective substitute for habeas.

Boumediene illuminates the necessary level of assurance before a substitute can be found adequate and effective. *Boumediene* held that a risk that the process substituting for habeas could unduly limit fact development was "not a remote hypothetical," and thus the non-remote possibility that the statutory substitute might "limit[] the scope of collateral review to a record that may not be accurate or complete" dictated that "the DTA [judicial] review proceeding falls short of being a constitutionally adequate substitute" for habeas. *Boumediene*, 553 U.S. at 789-90.

The panel acknowledged this need for assurance of adequate factual development but responded by surmising that the PFR court could employ some form of remand to the agency or transfer to the district court under 28 U.S.C. § 2347 of the Hobbs Act or appointment of a special master or similar mechanism "born out of 'constitutional necessity.'" *Khalil*, 164 F.4th at 280. But the possibility that these mechanisms may not prove workable is not a remote hypothetical, foreclosing assurance of a constitutionally adequate substitute. *Cf. Rivera–Cruz v. INS*, 948 F.2d

962, 967 (5th Cir. 1991) (finding, without considering § 2347, an immigrant's attempt to argue "facts for the first time in this forum is misplaced, for we cannot weigh evidence that has not been brought previously before the Board").

Courts have expressed skepticism about the viability of employing § 2347 for fact-gathering, contrary to the panel's suggestion. *See*, *e.g.*, *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 488 n.10 (1999) (observing that "[i]t is quite possible" that fact development under § 2347 would not be available). Because frustration of adequate fact-gathering is quite possible rather than a remote hypothetical, the panel's presumption otherwise cannot provide the requisite assurance of an adequate and effective substitute for habeas.

Finally, if "constitutional necessity" requires *some* fact-development mechanism not permitted by § 2347, *Khalil*, 164 F.4th at 280, as would seemingly be required, that constitutional necessity warrants a conclusion by *this* Court that the statutory scheme as it stands is not an adequate and effective substitute. There is no basis to conclude with the sufficient assurance the Great Writ demands that the PFR court—not bound by whatever this Court might hold—would agree,

and no basis to wait to see if an uncertain substitute process proves inadequate and ineffective after a lengthy delay and irreparable harm to Khalil. *Accord Luna*, 637 F.3d at 100 ("[W]e cannot avoid" a Suspension Clause determination by waiting to see if a substitute procedure proves ineffective because "[w]e have an obligation to determine whether the [substitute] process is a constitutionally adequate substitute for habeas.").

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Rehearing En Banc.

Respectfully submitted,

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Dated: April 7, 2026

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CERTIFICATIONS OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations stated in Fed. R. App. P. 32(a)(7)(B). Using the word count feature of Microsoft Word, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and L.A.R. 29.1(b), this brief contains no more than 2,597 words. The brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook typeface.

I certify that the text of the electronic and hard copies to be produced of this brief are identical.

I certify that Jon Romberg and Jonathan Hafetz are members of the bar of this Court.

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/s/ Jon Romberg
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Dated: April 7, 2026

CERTIFICATION OF SERVICE

I hereby certify that on April 7, 2026, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Third Circuit by using the CM/ECF system. All counsel of record in this case are registered CM/ECF users.

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Dated: April 7, 2026