No. 22-1151

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ANDERSON ALPHONSE,
Petitioner-Appellant,

v.

ANTONE MONIZ,
Superintendent, Plymouth County Correctional Facility
Respondent-Appellee.

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

BRIEF OF *AMICUS CURIAE* HARVARD LAW SCHOOL CRIMMIGRATION CLINIC IN SUPPORT OF PETITIONER-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, I, Tiffany Lieu, as counsel for *amicus curiae*, state that the Harvard Law School Crimmigration Clinic does not have parent corporations, nor does it issue stock, and thus no publicly held corporation owns 10% or more of its stock.

DATED: July 5, 2022

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INTEREST OF *AMICUS CURIAE*

The Harvard Law School Crimmigration Clinic teaches law students how to advocate for immigrants' rights by engaging in direct representation, policy advocacy, and impact litigation at the intersection of criminal law and immigration law. The Clinic's staff and faculty have published scholarly articles, including on issues relating to immigration detention. The Clinic has filed briefs as *amicus curiae* on similar issues before the U.S. Supreme Court, the federal courts of appeals, the Board of Immigration Appeals, and various international tribunals.[1]

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), counsel for Petitioner-Appellant and Respondent-Appellee have consented to the filing of this brief.

INTRODUCTION

Petitioner Anderson Alphonse ("Mr. Alphonse") has been mandatorily detained for nearly two years pursuant to New Jersey offenses that immigration adjudicators deemed to be a controlled substance-related offense and an aggravated felony. Mr. Alphonse appealed this determination on the merits to the Board of

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae* states that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no person other than *amicus curiae*, its members, and its counsel contributed money that was intended to fund preparing or submitting the brief.

Immigration Appeals ("BIA" or "Board") within the Third Circuit, which remains pending. In the meantime, Mr. Alphonse's only recourse to challenge his unlawful mandatory detention is through a petition for a writ of habeas corpus.

The district court below, however, denied his habeas petition for lack of jurisdiction, finding that the claim was barred by 8 U.S.C. § 1252(b)(9) because the questions of law and fact involved "arise from the removal process." *Alphonse v. Moniz,* No. 21-11844-FDS, 2022 WL 279638, at *3–7 (D. Mass. Jan. 31, 2022). Critically, the district court determined that the petition for review ("PFR") process was an adequate substitute for habeas relief. But this is not the case.

The PFR process is not an adequate substitute for habeas relief because it subjects individuals to prolonged proceedings without sufficient recourse to challenge the legality of their mandatory detention. This is particularly true in cases, as here, that involve crime-based grounds of removal that may trigger mandatory detention. In those cases, immigration adjudicators often misapply the complex analyses required to determine whether an offense constitutes a crime-based ground of removal. Indeed, in the past two years alone, the Third Circuit—which would review any PFR from Mr. Alphonse—has reversed the Board multiple times for misapplication of the categorical analysis and other legal errors in applying crime-based grounds of removability. In some cases, the court was forced to remand multiple times because of repeated BIA errors.

Absent habeas proceedings, an individual with a meritorious claim is left to languish in detention as their case winds its way up and down the courts in the course of PFR proceedings. Where a court of appeals finds that an individual is not in fact subject to mandatory detention, this decision comes too late: noncitizens like Mr. Alphonse will have already suffered months or years of unlawful detention. Accordingly, *amicus curiae* respectfully urges the Court to find that PFR proceedings are not an adequate substitute for habeas proceedings.

ARGUMENT

I. The PFR Process Is An Inadequate Substitute for Habeas Because Errors by Immigration Adjudicators Commonly Result in Prolonged Proceedings Without the Opportunity to Challenge the Legality of Detention.

To adequately substitute for habeas, an alternative procedure must not be "more limited" than habeas review in the protections it affords. *See Boumediene v. Bush*, 553 U.S. 723, 774–79 (2008). An alternative remedy is permissible where its purpose is "to expedite . . . not to delay or frustrate," consideration of the individual's claims. *See id.* at 775. The PFR process is not an adequate substitute for habeas proceedings because it subjects individuals to prolonged detention without sufficient recourse to challenge the legality of that detention. Indeed, due to the complexity of immigration law, it is not uncommon for immigration adjudicators to erroneously determine that an individual is subject to a crime-based ground of removal and thus must be mandatorily detailed. Without habeas relief,

an individual must challenge these legal errors through PFR proceedings, which often result in remand to the agency to correct those errors. Throughout these prolonged proceedings, noncitizens are forced to languish in detention even if that detention is unlawful.

A review of Third Circuit case law over the last two years demonstrates that the court has reversed immigration adjudicators on a number of occasions due to errors related to crime-based grounds of removal that trigger mandatory detention.[2] To begin, immigration adjudicators have erred in applying the notoriously complex categorical approach to determine whether an individual's state conviction constitutes a crime-based ground of removal or inadmissibility, such as an aggravated felony, that subjects them to mandatory detention.

Under the categorical analysis, courts determine "whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding aggravated felony." *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013) (internal quotation marks and citation omitted). A state offense categorically matches a generic federal offense "only if a conviction of the state offense necessarily involved facts equating to the generic federal offense." *Id.*

[2] *Amicus curiae* analyzed cases involving crime-based grounds of removal in the Third Circuit because that is the jurisdiction that would adjudicate Mr. Alphonse's PFR proceedings and concurrent challenge to the legality of Mr. Alphonse's mandatory detention should he be foreclosed from habeas relief.

Under this approach, courts may not consider the underlying conduct involved; rather, courts must look only to the elements of the conviction. *See Mathis v. United States*, 579 U.S. 500, 510 (2016); *see also Taylor v. United States*, 495 U.S. 575, 576 (1990). Where the statute is divisible, courts apply the modified categorical approach and look to the limited record of conviction to determine "what crime, with what elements, a defendant was convicted of," and whether that crime categorically matches the generic offense. *See Mathis*, 579 U.S. at 504–06.

This Court and others have consistently recognized that the categorical analysis is difficult and complex. *See King v. United States*, 965 F.3d 60, 65 (1st Cir. 2020) (calling the categorical approach "complex"); *United States v. Faust*, 853 F.3d 39, 65 (1st Cir. 2017) (Barron, J., concurring) ("The complexity of the categorical approach, as it has developed, is undeniable."); *see also Mathis*, 579 U.S. at 532 (2016) (Breyer, J., dissenting) (calling the modified categorical analysis a "time-consuming legal tangle"); *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009) ("[T]he categorical method is not always easy to apply."); *United States v. Evans*, 924 F.3d 21, 31 (2d Cir. 2019) (noting the "judicial difficulties with the categorical approach"); *United States v. Aguila-Montes de Oca*, 665 F.3d 915, 917 (9th Cir. 2011) (noting that courts have "struggled to understand" the approach and that "no other area of the law has demanded more of our resources"). As the Third Circuit opined in *Larios v. Attorney General United States*, the categorical

approach "sounds simple in theory but has proven difficult (and often vexing) in practice, necessitating a 'modified categorical approach' and generating an evolving jurisprudence around when the categorical approach or modified categorical approach applies." 978 F.3d 62, 65 (3d Cir. 2020).

The BIA has similarly emphasized the difficulty of the categorical approach, calling it "exceedingly complex." *Matter of Valentine C. Morgan*, 28 I. & N. Dec. 508, 517 n.9 (BIA 2022); *see also Matter of Emmanuel Laguerre*, 28 I. & N. Dec. 437, 448 (BIA 2022) (concurrence) (noting that while the Supreme Court stated the categorical analysis would be easy, "we unfortunately have not found that to be so").

In light of this complexity, it is not uncommon for the Third Circuit to vacate and remand BIA decisions due to errors in applying the categorical approach. For example, in *Cabeda v. Attorney General United States*, the Third Circuit held that the BIA erred in its application of the categorical approach to find that the noncitizen was convicted of an aggravated felony. 971 F.3d 165, 167 (3d Cir. 2020). In that case, the BIA held that the noncitizen's conviction under Pennsylvania's involuntary deviate sexual intercourse statute was a categorical match with the generic offense for the aggravated felony of sexual abuse of a minor, 8 U.S.C. § 1101(a)(43)(A). *Id.* On appeal, the Third Circuit held that the BIA legally erred because the mens rea required for the Pennsylvania conviction—

recklessness—was broader than that required for the generic offense—knowing. *Id.* at 173–74. The court vacated the decision and remanded the case to the BIA for further proceedings. *Id.* at 179. Throughout this time, the noncitizen could remain detained.

Similarly, in *Tokpah v. Attorney General United States*, the Third Circuit held that the immigration judge and BIA erred in concluding that the noncitizen's New Jersey conviction for possession with intent to distribute cocaine within 1,000 feet of school property categorically constituted an aggravated felony. 859 F. App'x 619, 621–23 (3d Cir. 2021). In so doing, the immigration judge and BIA relied on *Matter of Rosa*, 27 I. & N. Dec. 228 (BIA 2018), a Board decision that held that the same New Jersey conviction was an aggravated felony. *Tokpah*, 859 F. App'x at 621. The Third Circuit, however, subsequently overturned the Board's decision in *Matter of Rosa* because it misapplied the categorical approach—i.e., it improperly compared the state statute of conviction to multiple federal statutory provisions rather than, as required, "to only [its] most similar federal analog." *Tokpah*, 859 F. App'x at 622 (quoting *Rosa v. Att'y Gen.*, 950 F.3d 67, 76 (3d Cir. 2020)). The court vacated the Board's decision and remanded for further proceedings. *Id.* at 623.

In *Davis v. Attorney General of United States*, the Third Circuit vacated the BIA's determination that the noncitizen's Pennsylvania conviction for possession

with intent to distribute marijuana categorically constituted an aggravated felony and remanded for further proceedings. No. 20-2937, 2021 WL 4145114, at *1 (3d Cir. Apr. 21, 2021). In that case, the BIA reasoned that a state marijuana conviction is equivalent to a federal drug felony if it involves payment for more than a "small amount" of marijuana, and the amount of marijuana at issue was more than a small amount. *Id.* at *2. The Third Circuit held that the BIA erred in relying on the amount of marijuana involved because the Pennsylvania statute at issue was divisible and thus required a modified categorical analysis. *Id.* at *3–4. Under the modified categorical approach, adjudicators may only consider a limited set of documents, and none of the relevant documents contained any mention of the amount of marijuana involved. *Id.* at *3–4. On appeal, the Third Circuit held that, if the correct approach had been applied, the conviction would not have been an aggravated felony. *Id.*

The Third Circuit also vacates and remands cases to the BIA because of other immigration adjudicator errors involving crime-based removal grounds. For example, in *Francisco-Lopez v. Attorney General United States*, the Third Circuit held that the BIA erred in retroactively applying an expanded definition of crimes involving moral turpitude ("CIMTs") to find that Mr. Francisco-Lopez was convicted of a CIMT and thus was inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(I). 970 F.3d 431, 440 (3d Cir. 2020). There, the Board applied a

2016 BIA decision, which expanded the definition of a CIMT to include "circumstances where the owner's property rights are substantially eroded," to Mr. Francisco-Lopez's 2012 New York grand larceny conviction. *Id.* at 434 (citation omitted). The Third Circuit disagreed, holding that, under the five-factor test to determine whether a rule applies retroactively as set forth in *Retail, Wholesale & Department Store Union, AFL-CIO v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972), the BIA improperly applied the expanded CIMT definition retroactively. *Id.* at 436–40. Accordingly, the Court vacated the BIA's order and remanded to the BIA to consider the New York statute under the prior CIMT standard. *Id.* at 440 n.8.

The Third Circuit similarly held that the BIA misapplied the circumstance-specific approach in concluding that a noncitizen's conviction constituted an aggravated felony in *Joe v. Attorney General United States*, No. 21-2637, 2022 WL 604038, at *3 (3d Cir. Mar. 1, 2022). Courts apply the circumstance-specific approach to determine whether an offense meets the loss amount required for certain aggravated felony provisions. *Id.* In *Joe*, the BIA found that the noncitizen's conviction was an aggravated felony because the record showed that the noncitizen's offense resulted in loss to the victim exceeding the required amount of $10,000. *Id.* The Third Circuit, however, held that the immigration judge and BIA misapplied the circumstance-specific approach because it was

unclear whether the loss exceeding $10,000 was connected to the conviction. *Id.* The Third Circuit remanded the case to the BIA for further proceedings. *Id.*

In *Deemi v. Attorney General United States*, the Third Circuit held that the BIA "acted arbitrarily and capriciously" by failing to consider its own precedent or explain its departure from that precedent. 842 F. App'x 767, 768, 771 (3d Cir. 2021). In that case, the Board held that Mr. Deemi's conviction for second degree sexual assault under N.J. Stat. § 2C:14-2c(2), which criminalizes sexual conduct with individuals of a certain status, was "categorically turpitudinous." *Id.* at 771. The Third Circuit held the BIA erred because it failed to consider whether the New Jersey statute requires the perpetrator to know the status of the victim. *Id.* at 772. In so doing, the BIA ignored its own decision in *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (BIA 2016), which held that an offense must involve "reprehensible conduct and a culpable mental state" to constitute a CIMT. *Id.* at 771. By departing from its own precedent and failing to provide an explanation for that departure, the Board acted arbitrarily, and the court accordingly vacated and remanded the case. *Id.* at 772.

In *Singh v. Attorney General of United States*, the Third Circuit held that the BIA erred in statutory interpretation. 12 F.4th 262 (3d Cir. 2021). At issue in that case was whether an individual who was a naturalized citizen at the time of conviction, but whose citizenship was later revoked, is removable under the

aggravated felony provision, 8 U.S.C § 1227(a)(2)(A)(iii). *Id.* at 266–67, 275–77. The BIA held that the revocation of citizenship related back to the time of conviction, and thus Mr. Singh was a noncitizen at the time of conviction and accordingly removable as an aggravated felon. *Id.* at 268. The Third Circuit disagreed. The court concluded that the BIA's relation-back interpretation of the aggravated felony provision was arbitrary and "an unreasoned declaration of law based on earlier unreasoned declarations," and thus was not owed *Chevron* deference. *Id.* at 271–77. Properly interpreted, the statute provides that an individual is removable for an aggravated felony only if they were in fact a noncitizen at the time of conviction. *Id.* at 277–78. The court thus held that Mr. Singh was not convicted of an aggravated felony, vacated the removal order, and remanded the case. *Id.* at 277–79.

These examples illustrate a pattern of error among immigration adjudicators at all levels in cases involving crime-based removal grounds that trigger mandatory detention, like those at issue in Mr. Alphonse's case. In PFR proceedings, these errors result in remands to the Board, which may, in turn, require remand to the immigration judge for further fact-finding. The case may ultimately be appealed back to the BIA and up to the circuit courts of appeals in another PFR. Absent habeas relief, individuals unlawfully subject to mandatory detention like Mr.

Alphonse remain detained throughout those prolonged proceedings without recourse to challenge the legality of their detention.

Detention in PFR proceedings may be prolonged even further because the circuit court may be forced to remand a single case multiple times due to repeated immigration adjudicator error. For example, in *Rad v. Attorney General United States*, the Third Circuit emphasized that it had already remanded to the BIA twice before and was loathe to "give it a third bite at th[e] apple." 983 F.3d 651, 669–70 (3d Cir. 2020). The court noted that the Board "failed to meaningfully revise its reasoning after the first remand" and "ignor[ed] . . . authorities." The court, however, was "compelled to give the Board one last opportunity to review" the case because courts must, "except in rare circumstances" remand to the agency. *Id.* at 670 (quoting *Fla Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). In so doing, however, the court warned that "should this troubling trend continue, we will have no choice but to eschew remand and instead direct the Board to reject DHS' request to remove Rad." *Id.*

The Third Circuit did just that in *Larios v. Attorney General United States*, 978 F.3d 62 (3d Cir. 2020). Instead of giving the BIA a third bite at the apple, the court itself applied the modified categorical analysis and found that the offense at issue was not a CIMT. *Id.* at 67–73. The consequence of cases like *Rad* and *Larios* that have been remanded three times is that, despite the court having recognized

that the BIA erred on the merits, an individual may nonetheless continue to be erroneously detained while their case winds its way up and down the chain of review.

Indeed, a recent habeas case in the Third Circuit illustrates how multiple remands due to immigration adjudication errors can prolong detention to the point of unreasonableness. In *German Santos v. Warden Pike County Correction Facility*, 965 F.3d 203 (3d Cir. 2020), the noncitizen petitioned for review of the immigration judge and BIA's finding that he was convicted of an aggravated felony. In PFR proceedings, the Third Circuit granted the government's request to remand the case for the Board to reevaluate its application of the modified categorical approach in finding that the conviction was an aggravated felony. *Id.* at 207. On remand, the Board determined that the conviction was not, in fact, an aggravated felony. *Id.* at 207–08. Nonetheless, the noncitizen remained detained for at least two years and seven months while the Board remanded the case in turn to the immigration judge regarding his application for cancellation of removal. *Id.* In subsequent habeas proceedings, the Third Circuit concluded that two years and seven months of detention was unreasonable and violated due process. *Id.* at 214.

Such prolonged lengths of detention are not uncommon. According to a study of certain noncitizens subjected to mandatory detention for at least six months, those whose cases involved only immigration court proceedings were

detained an average of 330 days. *See* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 Hastings L.J. 363, 370 n.32 (2014) (citing Declaration of Susan B. Long at Ex. A at 8, B-1, *Rodriguez v. Holder*, No. CV 07-3239 TJH, 2013 WL 5229795 (C.D. Cal. Aug. 6, 2013)) [hereinafter "*Rodriguez* Report"]. By contrast, the average length of detention was 448 days for cases involving administrative appeals to the Board, and 667 days for cases involving appeals to the Ninth Circuit. *Id.*; *see also id.* at 369 n.29 ("[O]f noncitizens who had been in mandatory detention under any immigration statute for six months or longer, 78% were detained eight months or longer, 47% for one year or longer, 21% for eighteen months or longer, and more than 9% for two years or longer." (citing *Rodriguez* Report)).

In sum, immigration adjudicators in the Third Circuit, where Mr. Alphonse's immigration proceedings are pending, legally err in cases involving crime-based grounds of removal that trigger mandatory detention. Without the right to challenge unlawful detention based on these errors through habeas proceedings, individuals are forced to follow the lengthy PFR process. But the PFR process is no salve. Errors by the Board often require remanding the case to the Board—sometimes numerous times—throughout which time the noncitizen may languish in detention. As a result, the PFR process is not an adequate substitute for habeas

proceedings. It is imperative that detained noncitizens retain their right to petition for habeas relief while awaiting the results of their removal proceedings.

II. Noncitizens Suffer Irreparable Harm When Immigration Adjudicators Erroneously Subject Them To Mandatory Detention.

While courts have deemed immigration detention to be a "civil" consequence rather than "criminal" punishment, this distinction is in name only. Immigration detention is generally indistinguishable from criminal incarceration. *See, e.g.*, *German Santos*, 965 F.3d at 212–13 ("German Santos has been detained in prison . . . since late 2017. Despite its civil label, his detention is indistinguishable from criminal punishment."). Moreover, conditions in detention facilities are onerous and often abhorrent, causing irreparable damage to the health and wellbeing of those detained. Without the opportunity to petition for habeas relief, noncitizens may be unlawfully subjected to these consequences while awaiting a final decision under the PFR process.

It is well-documented that noncitizens suffer harmful conditions in immigration detention. A recent congressional investigation examined "troubling reports of deaths of adults and children, deficient medical care, prolonged detention, improper treatment . . . filthy conditions," and "dangerous and overcrowded conditions" at some two dozen detention facilities in the country. *See* STAFF REPORT OF H. COMM. ON OVERSIGHT & REFORM & SUBCOMM. ON CIVIL RIGHTS AND CIVIL LIBERTIES, 116TH CONG., THE TRUMP ADMINISTRATION'S

MISTREATMENT OF DETAINED IMMIGRANTS: DEATHS AND DEFICIENT MEDICAL CARE BY FOR-PROFIT DETENTION CONTRACTORS 1 (Sept. 2020), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-09-24.%20Staff%20Report%20on%20ICE%20Contractors.pdf. "In some cases, conditions were so poor that Committee staff warned contractor officials during their visits about deficiencies in the treatment of detainees." *Id.* The report describes grossly unsanitary conditions in facilities detaining noncitizens, including moldy and rotten food, unsanitary and malfunctioning bathrooms, and failure to treat and prevent the spread of infectious diseases even prior to the COVID-19 crisis. *Id.* at 3, 28–34 (noting outbreaks of measles and mumps and failure to provide consistent flu vaccinations). The investigation further reported that negligence and inadequate medical care resulted in the deaths of several immigrants while in custody. *Id.* at 10–28.

Conditions are particularly dire in county jails or detention facilities run for profit, where most immigrants are detained.[3] Noncitizens suffer serious medical

[3] *See* Eunice Cho, *More of the Same: Private Prison Corporations and Immigration Detention Under the Biden Administration*, ACLU (Oct. 5, 2021), https://www.aclu.org/sites/default/files/field_document/2021.10.07_private_prisons_and_ice_detention_blog-factsheet_003.pdf (reporting that, as of September 2021, 79 percent of detained immigrants are detained in private detention facilities); *Profiling Who ICE Detains—Few Committed Any Crime*, Transactional Recs. Access Clearinghouse (TRAC) Immigr. (Oct. 9, 2018), https://trac.syr.edu/immigration/reports/530/ (showing that, as of June 2018, 71

and physical abuse in detention, often with fatal consequences. For example, dozens of detainees were forced to undergo unnecessary, unwanted, and sometimes undisclosed gynecological procedures while detained at the Irwin County Detention Center in Georgia. *See* SPECIAL REPORT, PRIYANKA BHATT ET AL., *VIOLENCE & VIOLATION: MEDICAL ABUSE OF IMMIGRANTS DETAINED AT THE IRWIN COUNTY DETENTION CENTER* (Sept. 2021), https://projectsouth.org/wp-content/uploads/2021/09/IrwinReport_14SEPT21.pdf; Joel Rose, *Dozens of Women Allege Unwanted Surgeries and Medical Abuse in ICE Custody*, NPR (Dec. 22, 2020), https://www.npr.org/2020/12/22/949257207/dozens-of-women-allege-unwanted-surgeries-and-medical-abuse-in-ice-custody.

Additionally, at Adelanto ICE Processing Center, the U.S. Environmental Protection Agency sent a letter warning that the facility was using a pesticide at concentrations exceeding recommended levels for close proximity to humans, leading to symptoms of illness in detained noncitizens. *See* Letter from Amy C. Miller-Bowen, Dir., Enf't & Compliance Assurance Div., U.S. Env't Prot. Agency, to George C. Zoley, CEO, The GEO Grp. (Mar. 2, 2021), https://earthjustice.org/sites/default/files/files/now_geo_final_1.pdf; *see also*

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percent of detained immigrants were held in facilities run by private, for-profit companies); *Detention By the Numbers*, Freedom for Immigrants, http://www.endisolation.org/resources/immigration-detention/ (last visited June 27, 2022) (reporting that over 70 percent of noncitizens are detained in privately-run detention centers).

DETENTION WATCH NETWORK & CIVIC, *ABUSE IN ADELANTO: AN INVESTIGATION INTO A CALIFORNIA TOWN'S IMMIGRATION JAIL* 13 (Oct. 2015), https://www.detentionwatchnetwork.org/sites/default/files/reports/CIVIC%20DWN%20Adelanto%20Report.pdf (reporting that individuals detained at Adelanto suffer medical neglect, religious freedom issues, and physical abuse by staff).

Conditions at some detention centers have been so dire that investigating officials have recommended terminating immigration detention contracts with those facilities. For example, following an unannounced inspection of the Torrance County Detention Facility in New Mexico, the Office of Inspector General issued an alert recommending that all detainees be removed from the facility because the facility was "critically understaffed" and failed to provide "a safe, secure, and humane environment." OFF. OF THE INSPECTOR GEN., OIG-22-31, *MANAGEMENT ALERT – IMMEDIATE REMOVAL OF ALL DETAINEES FROM THE TORRANCE COUNTY DETENTION FACILITY*, U.S. DEP'T OF HOMELAND SEC. 2, 8–11 (Mar. 16, 2022), https://www.oig.dhs.gov/sites/default/files/assets/2022-05/OIG-22-31-Mar22-mgmtalert.pdf. According to the report, detainees were exposed to excessive and avoidable unsanitary conditions and security risks. *Id.* at 2–7.

The Massachusetts Office of the Attorney General similarly recommended shutting down Bristol County Detention Center in Massachusetts after an investigation into reports of abuse. *See* OFF. OF THE MASS. ATT'Y GEN., CIV. RTS.

DIV., *INVESTIGATION INTO THE EVENTS OF MAY 1, 2020 AT THE C. CARLOS CARREIRO IMMIGRATION DETENTION CENTER, UNIT B, BRISTOL COUNTY SHERIFF'S OFFICE* 1, 53–54 (Dec. 15, 2020), https://www.mass.gov/doc/ago-report-into-bcso-response-to-may-1-disturbance/download ("As expeditiously as possible, DHS should terminate its [Intergovernmental Service Agreement] and 287(g) agreement with the [Bristol County Sheriff's Office]."). The investigation revealed that guards unreasonably used a flash bang grenade, pepper-ball launchers, anti-riot shields, pepper spray, canines, and hands-on force against detainees who were not combative or resisting, injuring several and causing two to be hospitalized. *Id.* at 33–36, 45–46. The report found that the detention center acted with "deliberate indifference to a substantial risk of serious harm to the health of the detainees" in using "excessive" and "disproportionate" force, and "unnecessarily caused, or risked causing, harm" to them. *Id.* at 1. One detainee who required emergency chest compressions due to officers' excessive use of pepper spray was sent not to the hospital, but rather to solitary confinement. *Id.* at 1–2.

These severe and sometimes fatal conditions at immigration detention facilities render even more imperative the need for individuals to retain the right to challenge unlawful mandatory detention through habeas proceedings. Forcing noncitizens to languish in detention pending prolonged PFR proceedings is to

unnecessarily subject them to damage to their mental and physical health and wellbeing.

III. Mandatory Detention Impedes Noncitizens' Access to Counsel and Effective Representation.

Erroneous mandatory detention further harms noncitizens because it impedes their ability to obtain legal counsel and otherwise effectively present their case in removal proceedings.

It is well-documented that noncitizens in detention face difficulties in accessing legal counsel. As of February 2022, 78.7% of detained individuals in removal proceedings did not have counsel. ADITI SHAH & EUNICE HYUNHYE CHO, ACLU RESEARCH REPORT, *NO FIGHTING CHANCE: ICE'S DENIAL OF ACCESS TO COUNSEL IN U.S. IMMIGRATION DETENTION CENTERS*, ACLU 6 (2022) [hereinafter, "ACLU Research Report"], https://www.aclu.org/sites/default/files/field_document/no_fighting_chance_aclu_research_report.pdf; *see also* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 34 (2015) ("[O]nly 36% of detained respondents seeking counsel actually found counsel, versus 71% of respondents who were never detained and 65% of respondents who were released."). This difficulty in accessing counsel is in large part because "detention makes it difficult for attorneys to provide representation," including that detention facilities are often located in remote areas and ICE transfers noncitizens

between facilities with little or no notice. *Id.* at 35; *see also* AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 7, 29, 31–36 (2011), http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf (citing "frequent and sudden transfers of detainees to facilities located far away from courts, advocates, and family" as a barrier to accessing legal counsel) [hereinafter, "Jailed Without Justice"]. These challenges are compounded by the fact that noncitizens are not guaranteed access to state-funded counsel in immigration court and pro bono immigration services are limited, especially for detained noncitizens. *See* 8 U.S.C. § 1362. Due to the restraint on their liberty, detained noncitizens are unable to travel to attorney's offices or work to pay private counsel. Eagly & Shafer at 34–35.

Even when detained noncitizens are able to secure legal counsel, detention often obstructs effective communication between noncitizens and their attorneys. *See id.* at 35; ACLU Research Report at 6. Many detention facilities do not permit attorneys to meet their detained clients in person. *See* ACLU Research Report at 22–28. At the same time, many detention facilities restrict the times when attorneys may schedule phone calls with their detained clients, and when phone calls do take place, they are often prohibitively expensive for noncitizens, costing up to $.40 per minute. *See id.* at 12–18. Moreover, many facilities prohibit access to electronic mail and messaging, yet at the same time face delays in delivering

legal mail to detainees, causing individuals to miss key filing deadlines, among other consequences. *Id.* at 20–22.

These issues are of grave significance, as both detention and meaningful legal representation are important predictors of outcomes in removal proceedings. *See, e.g.*, Eagly & Shafer at 54–57 ("In short, at every stage in immigration court proceedings, representation was associated with dramatically more successful outcomes for immigrant respondents."); Jailed Without Justice at 31 (reporting that individuals are five times more likely to be granted asylum if they are represented). Detained pro se respondents are more likely to have removal charges sustained against them and less likely to apply for relief from removal. *Id.* at 50. In fact, between 2007 and 2012, only 2 percent of pro se, detained noncitizens obtained relief, in stark contrast to a 60 percent success rate for represented, nondetained noncitizens and 17 percent of pro se noncitizens who were never detained. *Id.*; *see also* Peter L. Markowitz et al., *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 Cardozo L. Rev. 357, 383–84 (Dec. 2011) (finding that, in New York immigration courts in 2011, only 13 percent of individuals who were unrepresented and detained obtained successful outcomes, as compared to 74 percent of individuals who were represented and not detained). As such, potentially prolonged detention under the PFR process threatens the outcomes of these life-altering cases.

Without access to habeas proceedings, unlawfully detained noncitizens like Mr. Alphonse may face abhorrent detention conditions and barriers to legal representation for a prolonged period while their cases are remanded back and forth between the immigration judge, BIA, and the courts of appeals. The implications for their physical and mental wellbeing, as well as their case outcomes, are dire. As a result, the PFR process is not an adequate substitute for habeas proceedings when determining whether an individual is properly subjected to mandatory detention; noncitizens must retain their ability to petition for relief from unlawful detention under habeas.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges this Court to find that the PFR process is not an adequate substitute for habeas proceedings and that the district court accordingly has jurisdiction over Mr. Alphonse's habeas petition challenging the legality of his mandatory detention.

Respectfully submitted,

Dated: July 5, 2022

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CERTIFICATE OF COMPLIANCE

This brief complies with Fed. R. App. P. 29(a)(5) as it contains 5,159 words, excluding those parts exempted by Fed. R. App. P. 32(f). Additionally, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in Microsoft Word, using Times New Roman in 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2022, I electronically filed the foregoing, Brief of *Amici Curiae* in Support of Petitioner-Appellant with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit by using the appellate CM/ECF system. I certify that the counsel of record for Petitioner and Respondent in this case are registered CM/ECF users and will therefore be served by the appellate CM/ECF system.

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