

No. 26-380

In the
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
ET AL.,
Petitioners,

v.

BADAR KHAN SURI,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth
Circuit**

**BRIEF OF SENATOR ERIC SCHMITT AS *AMICUS*
CURIAE IN SUPPORT OF PETITIONERS**

JAMES R. CONDE
Counsel of Record
TAYLOR M. MYERS
WALKER FORTENBERRY
BOYDEN GRAY PLLC
800 Connecticut Avenue NW
Suite 900
Washington, DC 20006
(202) 955-0620
jconde@boydengray.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	7
I. Section 1252 Bars District Court Review of Suri’s Claims	7
A. Congress Has Repeatedly Channeled All Challenges Arising From Removal to the Courts of Appeals	7
B. The Decision Below Eviscerates the Zipper Clause	10
C. Congress’s Authority Over Immigration and the Jurisdiction of Inferior Federal Courts Leaves No Room for a Presumption of Review.....	14
II. Congress’s Channeling Scheme Is Consistent With the Suspension Clause	17
A. Suri’s Claims Fall Outside the Historic Core of Habeas Corpus	18
B. Congress Has Provided an Adequate and Effective Substitute for Habeas.....	20
III. The Circuit Split on an Exceptionally Important Question of Federal Law Warrants This Court’s Review	23
CONCLUSION	25

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Alexandre v. Att’y Gen.</i> , 452 F.3d 1204 (11th Cir. 2006).....	21, 22
<i>Alvarez v. U.S. Immigr. & Customs Enf’t</i> , 818 F.3d 1194 (11th Cir. 2016).....	23
<i>Bhd. of R.R. Trainmen v. Toledo, Peoria & W. R.R. Co.</i> , 321 U.S. 50 (1944).....	16
<i>Ex parte Bollman</i> , 8 U.S. (4 Cranch) 75 (1807)	20
<i>Bouarfa v. Mayorkas</i> , 604 U.S. 6 (2024).....	5, 17
<i>Carlson v. Landon</i> , 342 U.S. 524 (1952).....	12
<i>Demore v. Kim</i> , 538 U.S. 510 (2003).....	12, 18, 19
<i>Dep’t of Homeland Sec. v. Thuraissigiam</i> , 591 U.S. 103 (2020).....	18
<i>Ewonwu v. Gonzales</i> , 438 F.3d 22 (1st Cir. 2006)	22
<i>Felker v. Turpin</i> , 518 U.S. 651 (1996).....	20
<i>Fiallo v. Bell</i> , 430 U.S. 787 (1977).....	15

<i>Foti v. INS</i> , 375 U.S. 217 (1963).....	7
<i>Freytag v. Comm’r</i> , 501 U.S. 868 (1991).....	14
<i>Gonzalez-Alarcon v. Macias</i> , 884 F.3d 1266 (10th Cir. 2018).....	22
<i>Guerrero-Lasprilla v. Barr</i> , 589 U.S. 221 (2020).....	10, 16, 17
<i>INS v. St. Cyr</i> , 533 U.S. 289 (2001).....	7, 8, 9, 18, 20, 24
<i>Jennings v. Rodriguez</i> , 583 U.S. 281 (2018).....	11, 13, 22
<i>Khalil v. President, United States</i> , 164 F.4th 259 (3d Cir. 2026).....	6, 11, 21, 22
<i>Luna v. Holder</i> , 637 F.3d 85 (2d Cir. 2011)	22
<i>Mahdawi v. Trump</i> , 183 F.4th 103 (2d Cir. 2026).....	12, 13, 22
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985).....	22
<i>Mohamed v. Gonzales</i> , 477 F.3d 522 (8th Cir. 2007).....	22
<i>Monsalvo Velázquez v. Bondi</i> , 604 U.S. 712 (2025).....	5

<i>Muka v. Baker</i> , 559 F.3d 480 (6th Cir. 2009).....	22
<i>Mullin v. Doe</i> , 609 U.S. 324 (2026).....	17
<i>Nasrallah v. Barr</i> , 590 U.S. 573 (2020).....	10
<i>Nishimura Ekiu v. United States</i> , 142 U.S. 651 (1892).....	15
<i>Nken v. Holder</i> , 556 U.S. 418 (2009).....	21
<i>Preiser v. Rodriguez</i> , 411 U.S. 475 (1973).....	19
<i>Puri v. Gonzales</i> , 464 F.3d 1038 (9th Cir. 2006).....	22
<i>Reno v. Am.-Arab Anti-Discrimination Comm.</i> , 525 U.S. 471 (1999).....	8, 12
<i>Sheldon v. Sill</i> , 49 U.S. (8 How.) 441 (1850).....	16
<i>Steel Co. v. Citizens for a Better Env't</i> , 523 U.S. 83 (1998).....	16
<i>Swain v. Pressley</i> , 430 U.S. 372 (1977).....	20
<i>United States v. Hudson</i> , 11 U.S. (7 Cranch) 32 (1812)	16

<i>United States v. Valenzuela-Bernal</i> , 458 U.S. 858 (1982)	2
<i>West Virginia v. EPA</i> , 597 U.S. 697 (2022)	5
<i>Wilkinson v. Dotson</i> , 544 U.S. 74 (2005)	20
<i>Ziglar v. Abbasi</i> , 582 U.S. 120 (2017)	19

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 4	5, 15
U.S. Const. art. I, § 8, cl. 9	5, 15
U.S. Const. art. I, § 9, cl. 2	18
U.S. Const. art. III, § 1	5, 15

STATUTES

8 U.S.C. § 1226(a)	3, 13
8 U.S.C. § 1226(e)	13
8 U.S.C. § 1227(a)(4)(C)(i)	3
8 U.S.C. § 1252(a)(2)(D)	6, 10, 21
8 U.S.C. § 1252(a)(5)	9, 10, 14
8 U.S.C. § 1252(b)(3)(B)	6, 21
8 U.S.C. § 1252(b)(9)	2, 3, 4, 8, 10, 11, 14

8 U.S.C. § 1252(g)	2, 8
28 U.S.C. § 2241	8
Act of Sept. 26, 1961, Pub. L. No. 87-301, 75 Stat. 650	7
Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996)	8
REAL ID Act of 2005, Pub. L. No. 109- 13, div. B, 119 Stat. 302	9
COURT FILINGS	
Am. Pet. for Writ of Habeas Corpus, <i>Suri v. Trump</i> , No. 1:25-cv-00480 (E.D. Va. Apr. 8, 2025), ECF No. 34	19
Br. of Appellee, <i>Suri v. Trump</i> , No. 25-1560 (4th Cir. Sept. 26, 2025), ECF No. 41	17
Order, <i>Mahdawi v. Trump</i> , No. 25-1113 (2d Cir. Sept. 3, 2026), ECF No. 244	23
OTHER AUTHORITIES	
8 C.F.R. § 236.1(b)	13
H.R. Conf. Rep. No. 109-72 (2005)	9

John Harrison, <i>The Original Meaning of the Habeas Corpus Suspension Clause, the Right of Natural Liberty, and Executive Discretion</i> , 29 Wm. & Mary Bill Rts. J. 649 (2021)	18, 20
John Harrison, <i>The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III</i> , 64 U. Chi. L. Rev. 203 (1997).....	15
U.S. Immigration & Customs Enforcement, ICE Detention Statistics, https://tinyurl.com/yjryn7pt (last visited Oct. 9, 2026)	24
3 William Blackstone, <i>Commentaries on the Laws of England</i> (1768).....	19

INTEREST OF *AMICUS CURIAE*¹

Amicus curiae is United States Senator Eric Schmitt, who represents the State of Missouri. As a member of Congress, *amicus* has a strong interest in (1) ensuring that courts faithfully adhere to the jurisdictional limits Congress has repeatedly enacted in the Immigration and Nationality Act (“INA”), and (2) protecting and preserving Congress’s prerogative to channel all claims arising from removal proceedings, including challenges to detention pending removal, into a single petition for review in the court of appeals.

As Judge Wilkinson explains in his dissenting opinion, the decision below “subverts” the jurisdictional “compromises” Congress struck in the INA. Pet.App.87a. *Amicus* files this brief to defend Congress’s role in setting immigration policy and to prevent the judiciary from undermining the statutory scheme that Congress enacted. As Chairman of the Senate Judiciary Committee’s Subcommittee on the Constitution, *amicus* is well positioned to make that argument.

¹ No party’s counsel authored this brief in whole or in part, and no person or entity other than *amicus* or his counsel made a monetary contribution intended to fund its preparation or submission. All parties have received timely notification of the filing of this brief.

SUMMARY OF ARGUMENT

“It is dispiriting to observe that the courts have, over a period of time, often attempted to tease ill-conceived and unpersuasive loopholes out of strong, affirmative legislative language” channeling jurisdiction in our immigration system. Pet.App.87a (Wilkinson, J., dissenting). This is yet another chapter in that dispiriting story.

“The power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government.” *United States v. Valenzuela-Bernal*, 458 U.S. 858, 864 (1982) (citation omitted). Exercising that authority, and its authority to control the subject-matter jurisdiction of the inferior federal courts, Congress enacted 8 U.S.C. § 1252. That provision channels “all questions of law and fact ... arising from any action taken or proceeding brought to remove an alien” into “judicial review of a final order,” *id.* § 1252(b)(9), and strips courts of jurisdiction over “any cause or claim ... arising from the decision or action ... to commence proceedings, adjudicate cases, or execute removal orders,” *id.* § 1252(g). This scheme is the product of a “65-year back and forth” between Congress and the courts, in which Congress three times amended the statute to route all removal-related claims exclusively to the courts of appeals. Pet.App.69a (Wilkinson, J., dissenting).

This case concerns whether the judiciary will follow the text enacted by Congress on the third try. After Secretary of State Rubio determined that Respondent Badar Khan Suri was deportable because his presence “would have potentially serious adverse

foreign policy consequences,” 8 U.S.C. § 1227(a)(4)(C)(i), the government began deportation proceedings and detained him pending removal. Suri sought habeas relief in district court, alleging that he is unlawfully detained because Secretary Rubio’s determination that he was a deportable alien on foreign policy grounds is retaliation for protected speech.

Suri’s central “allegation is a thinly disguised attempt to challenge his removal (‘I cannot be detained pending removal *because* I cannot be removed’).” Pet.App.87a (Wilkinson, J., dissenting). Such claims must be raised through the petition-for-review process. Over Judge Wilkinson’s dissent, the Fourth Circuit nevertheless let all of his claims proceed in district court. Pet.App.61a. Further, despite the Fourth Circuit’s assertion that Suri’s allegations are independent of his removal, the panel affirmed an order forbidding the government from removing Suri from the United States “in aid of [its] ... jurisdiction[.]” Pet.App.62a–65a, 89a–90a (citation omitted).

That is wrong. Section 1252(b)(9), the “zipper clause,” applies here. Suri’s principal claim—that the Secretary’s determination was made in retaliation for protected political speech—“aris[es] from” the action taken to remove him, because it turns on the lawfulness of the deportability determination underlying both his removal and his incidental discretionary detention. 8 U.S.C. §§ 1226(a), 1252(b)(9). Focusing on detention instead of removal does not change that. Detention is an “action taken” to remove Suri, *id.* § 1252(b)(9), because the purpose

of discretionary detention under § 1226(a) is to ensure an alien’s removal. That claim must therefore be decided by the court of appeals on a petition for review.

The Fourth Circuit’s decision blows a crater-sized hole in the statutory channeling scheme that Congress enacted. The decision below holds that the zipper clause applies “only to the review of an order of removal.” Pet.App.44a.² That conclusion is as textually untenable as it is momentous. As the plain text of the zipper clause shows, the purpose of the clause is to consolidate litigation over issues arising from “any action taken” to remove an alien, 8 U.S.C. § 1252(b)(9), not just issues arising from removal orders. Indeed, the very point of the zipper clause is to prevent wasteful interlocutory litigation while removal proceedings are pending. Pet.App.76a (Wilkinson, J., dissenting). Under the Fourth Circuit’s reasoning, however, the zipper clause reaches *no* lawsuits filed by aliens before there is an order of removal, no matter how related to removal. This reasoning unravels the zipper clause by enabling district courts to preemptively decide any questions of law and fact relating to removal actions in piecemeal proceedings, including questions that could be dispositive of removal, sidestepping the INA’s orderly administrative review process and forcing the government “to litigate the alien’s removability in two

² 8 U.S.C. § 1252(g) separately bars the claims. Pet.App.83a–85a (Wilkinson, J., dissenting). *Amicus* focuses on the zipper clause because the Fourth Circuit’s interpretation virtually reads that provision out of the statute, requiring an urgent course correction.

forums and win in both.” Pet.App.87a (Wilkinson, J., dissenting).

To support this reading, the Fourth Circuit cited the presumption of judicial review. But that presumption is not a “get-out-of-text-free card[].” *West Virginia v. EPA*, 597 U.S. 697, 779 (2022) (Kagan, J., dissenting). The presumption does not authorize courts to misconstrue text, and it has no purchase where Congress has spoken clearly and channeled judicial review to a specific forum. *See Bouarfa v. Mayorkas*, 604 U.S. 6, 19 (2024). That is especially true here, where Congress acted at the intersection of its immigration power and its power over the jurisdiction of the lower federal courts. *See* U.S. Const. art. I, § 8, cls. 4, 9; *id.* art. III, § 1. Courts that disregard Congress’s decision to withdraw jurisdiction over these claims “risk aggrandizing [them]selves at the expense of the political branches.” *Monsalvo Velázquez v. Bondi*, 604 U.S. 712, 737 (2025) (Thomas, J., dissenting).

Suri’s Hail-Mary argument below—that channeling his claims would violate the Suspension Clause—also fails. It is far from clear that the Clause guarantees any minimum of habeas review at all, as opposed to simply limiting Congress’s power to vest the Executive with broad discretion to detain individuals. But even assuming it does, as it existed in 1789, the writ was not generally available to aliens challenging detention pending removal, and did not redress conditions of confinement. And even if Suri’s claims fell within the ambit of the historic writ, Congress provided an adequate substitute through the petition-for-review process, which reaches every

constitutional claim and question of law and carries with it the power to stay removal and to order factfinding. *See* 8 U.S.C. § 1252(a)(2)(D), (b)(3)(B); *Khalil v. President, United States*, 164 F.4th 259, 280 (3d Cir. 2026) (per curiam). Every court of appeals that has considered the question agrees.

The decision below has fractured the uniform administrative scheme Congress enacted, and only this Court can restore it. The Fourth Circuit openly split with the Third, leaving a patchwork of immigration law in which an alien's access to district court turns on where he happens to be detained. And within the Fourth Circuit, the decision below invites every alien detained pending removal to bypass the petition-for-review process and file habeas petitions instead.

This Court should grant the petition and reverse.

ARGUMENT

I. SECTION 1252 BARS DISTRICT COURT REVIEW OF SURI'S CLAIMS

A. Congress Has Repeatedly Channeled All Challenges Arising From Removal to the Courts of Appeals

Congress has amended the INA “multiple times over 65 years for the purpose of reducing duplication and delay.” Pet.App.88a (Wilkinson, J., dissenting). In the mid-twentieth century, Congress confronted a wave of “judicial actions being instituted by undesirable aliens ... solely for the purpose of preventing or delaying indefinitely their deportation from this country.” *Foti v. INS*, 375 U.S. 217, 224 (1963) (quoting H.R. Rep. No. 87-1086, at 22–23 (1961)). To end these “dilatory tactics in the courts,” *id.* at 224, Congress amended the INA in 1961 by making a petition for review in the court of appeals “the sole and exclusive procedure for ... the judicial review of all final orders of deportation.” *Id.* at 221; *see* Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 650, 651.

Nonetheless, “courts construed the 1961 amendments as channeling review of final orders to the courts of appeals, but still permitting district courts to exercise their traditional jurisdiction over claims that were viewed as being outside of a ‘final order.’” *INS v. St. Cyr*, 533 U.S. 289, 313 n.37 (2001). As a result, aliens seeking to avoid removal could pursue piecemeal challenges in multiple forums, reviving the delay tactics that Congress sought to stop.

In 1996, Congress tried again. The Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) “repealed the old judicial review scheme” in § 106 “and instituted a new (and significantly more restrictive) one in 8 U.S.C. § 1252.” *Reno v. Am.-Arab Anti-Discrimination Comm.* (“AADC”), 525 U.S. 471, 475 (1999). The new statute withdrew from district courts review of “all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien.” IIRIRA, Pub. L. No. 104-208, div. C, § 306(a)(2), 110 Stat. 3009-546, 3009-610 (1996) (codified at 8 U.S.C. § 1252(b)(9)). By channeling into the petition-for-review process every claim arising from removal, Congress sought to minimize “the deconstruction, fragmentation, and hence prolongation of removal proceedings.” *AADC*, 525 U.S. at 487; *id.* at 482–83 (describing § 1252(b)(9) as a “zipper” clause); *St. Cyr*, 533 U.S. at 313. Congress also added § 1252(g), which, except as provided in § 1252, denies any court jurisdiction over claims “arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders.” IIRIRA § 306(a)(2), 110 Stat. at 3009-612 (codified at 8 U.S.C. § 1252(g)); *see AADC*, 525 U.S. at 482.

Despite the statute’s sweeping language, in *St. Cyr*, this Court held that § 1252(b)(9) did not eliminate the habeas jurisdiction of district courts under 28 U.S.C. § 2241, reasoning that the provision consolidated only “judicial review,” “a term historically distinct from habeas,” and therefore did not “clearly apply to actions brought pursuant to the

general habeas statute.” 533 U.S. at 313–14. In reaching this conclusion, the Court relied upon several canons, including “the strong presumption in favor of judicial review of administrative action,” “the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction,” and the canon of constitutional avoidance. *Id.* at 298–300.

Predictably, the loophole opened in *St. Cyr* enabled criminal aliens to delay removal for years. *See* H.R. Conf. Rep. No. 109-72, at 173 (2005); *St. Cyr*, 533 U.S. at 327 (Scalia, J., dissenting). As a result, Congress *again* amended § 1252(b)(9) in 2005. This time, Congress expressly listed habeas corpus and stripped courts of jurisdiction “by habeas corpus under section 2241 of title 28 ... or any other habeas corpus provision, ... or by any other provision of law (statutory or nonstatutory),” to review such questions, except through the petition-for-review process. REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 106(a)(2), 119 Stat. 302, 311. With that amendment, Congress supplied the clear statement *St. Cyr* had found missing.

Congress also made the petition for review the “sole and exclusive means” of reviewing a removal order, and defined “judicial review” throughout the chapter to include habeas. *Id.* § 106(a)(1)(B), 119 Stat. at 310 (codified at 8 U.S.C. § 1252(a)(5)). And to quell any remote constitutional doubt regarding the Suspension Clause, Congress ensured that aliens otherwise barred from seeking judicial review, including criminal aliens, could raise constitutional claims and questions of law in a petition for review in

the courts of appeals. 8 U.S.C. § 1252(a)(2)(D); *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 231–32 (2020).

The statute’s text confirms what its history shows. Section 1252(a)(5) makes a petition for review “the sole and exclusive means for judicial review of an order of removal.” 8 U.S.C. § 1252(a)(5). Section 1252(b)(9) then channels “all questions of law and fact ... arising from any action taken or proceeding brought to remove an alien” into the petition for review, making review available “only in judicial review of a final order,” and provides that “no court shall have jurisdiction, by habeas corpus ... or by any other provision of law,” to review those questions otherwise. *Id.* § 1252(b)(9). “Between ‘any,’ ‘all,’ ‘sole and exclusive,’ ‘only,’ and ‘no,’ it is difficult to imagine how Congress could have expressed its intentions more forcefully.” Pet.App.70a (Wilkinson, J., dissenting).

As this text and history make clear, each time courts reopened the district court door to removal-related claims, Congress closed it again. This Court should not permit the decision below to become the latest example of courts “systematically chip[ping] away at ... jurisdictional limitations on immigration claims, thus thwarting Congress’ intent.” *Nasrallah v. Barr*, 590 U.S. 573, 594 (2020) (Thomas, J., dissenting).

B. The Decision Below Eviscerates the Zipper Clause

The Fourth Circuit held that § 1252(b)(9) applies “only to the review of an order of removal” and that detention is a “separate governmental action[]” from

removal, so Suri's claims may proceed in district court. Pet.App.44a, 52a. On that view, the zipper clause applies only *after* there is an order of removal, allowing aliens to bring collateral challenges before then. That reading disregards the statute's history and text, and it splits with the Third Circuit. See *Khalil*, 164 F.4th at 274.

The zipper clause precludes judicial review, through habeas or otherwise, of all "questions of law and fact," so long as the questions "aris[e] from any action taken ... to remove an alien." 8 U.S.C. § 1252(b)(9). The initial discretionary decision to arrest and detain an alien pending removal, just like the discretionary decision to initiate removal proceedings, is plainly an action taken to remove an alien. A plurality of this Court in *Jennings v. Rodriguez* read the statute the same way, explaining that "[t]he question is not whether detention is an action taken to remove an alien but whether *the legal questions* in this case arise from such an action." 583 U.S. 281, 294 n.3 (2018) (plurality opinion). A habeas petition filed in district court on the first day of custody, asking the court to decide whether the removal charge and associated detention are lawful because the whole process was undertaken for unconstitutional retaliatory motives, is exactly the sort of collateral attack the statute was written to prevent.

This Court's precedent confirms that § 1252(b)(9) channels claims arising before any final order of removal, not just challenges to and after the order itself. In *AADC*, the Court described § 1252(b)(9) as a "general jurisdictional limitation" that applies to "all

claims arising from deportation proceedings,” including the “many ... decisions or actions that may be part of the deportation process.” 525 U.S. at 482–83. By way of example, the Court cited the decision to open an investigation and the decision to surveil a suspected violator. *Id.* at 482. If even surveillance—which happens before any charge of removability and may not ultimately lead to removal proceedings—is part of the deportation process, then the detention of an alien charged as removable, held to secure his removal, surely is as well. Indeed, more than seventy years ago, this Court recognized that “[d]etention is necessarily a part of th[e] deportation procedure.” *Carlson v. Landon*, 342 U.S. 524, 538 (1952). “Detention of deportable criminal aliens pending their removal proceedings,” this Court explained, “necessarily serves the purpose” of removing the alien from the country. *Demore v. Kim*, 538 U.S. 510, 527–28 (2003) (emphasis omitted).

Suri’s claims fall within the heartland of the zipper clause because they are “inextricably intertwined with the claim that removal itself is unlawful.” *Mahdawi v. Trump*, 183 F.4th 103, 117 (2d Cir. 2026), *reh’g en banc granted*, No. 25-1113 (2d Cir. Sept. 3, 2026). Suri principally alleges that the Secretary’s determination, and his “targeting, arrest, transfer, and ongoing detention,” violated the First and Fifth Amendments, chiefly because each was retaliation for protected speech. Pet.App.9a (citation omitted). Each claim turns on the same question: whether the Secretary’s determination under § 1227(a)(4)(C)—the basis for Suri’s removal and related detention—was unconstitutional retaliation. That question arises from the action taken to remove him, regardless of the

relief Suri seeks or his attempts at artful pleading. The INA authorizes detention only “pending a decision on whether the alien is to be removed,” 8 U.S.C. § 1226(a), and the initial custody decision may be made when the notice to appear issues, 8 C.F.R. § 236.1(b). A challenge to detention on that authority, brought on the ground that the removal charge is retaliatory, presents the same question the removal proceeding will answer.³

Even under the *Jennings* plurality’s narrow reading of “arising from,” § 1252(b)(9) bars claims challenging “the decision to detain [aliens] in the first place or to seek removal,” or “any part of the process by which their removability will be determined.” 583 U.S. at 294–95 (plurality opinion). The alien detainees in *Jennings* avoided that bar only because they contested the length of their detention without a bond hearing, not the initial decision to detain them or to remove them. *Id.* Suri, by contrast, challenges the decision to detain him in the first place and the decision to seek his removal, and by attacking the Secretary of State’s determination as retaliation for protected speech, he challenges “the process by which [his] removability will be determined” as well. *Id.*

The Fourth Circuit nonetheless held that §§ 1252(b)(9) and 1252(a)(5) “only appl[y] to an order

³ Section 1226(e), which provides that “[n]o court may set aside any action or decision by the Attorney General under this section regarding the detention of any alien,” 8 U.S.C. § 1226(e), is an additional bar to Suri’s challenge to his § 1226(a) detention. *See Jennings*, 583 U.S. at 323 n.6 (Thomas, J., concurring in part and concurring in the judgment); *Mahdawi*, 183 F.4th at 124 (Menashi, J., concurring).

of removal, and no order of removal is at issue here.” Pet.App.61a. The panel reasoned that “Suri is not seeking judicial review of an order of removal. Thus, § 1252(b)(9) (or any of § 1252(b)’s subsections) does not apply.” Pet.App.44a.

That holding is stunning. The Fourth Circuit’s reading eliminates the zipper clause and “makes no sense of the provision’s text and structure.” Pet.App.76a (Wilkinson, J., dissenting). The zipper clause by its plain terms applies to “any action taken” to remove an alien, 8 U.S.C. § 1252(b)(9), not just to challenges to removal orders. Indeed, § 1252(a)(5) *already* does the work of ensuring that “a petition for review” is the “sole and exclusive means for judicial review of an order of removal.” *Id.* § 1252(a)(5). The Fourth Circuit’s reading of the zipper clause therefore makes the clause superfluous, contrary to basic principles of interpretation. *See Freytag v. Comm’r*, 501 U.S. 868, 877 (1991). The main point of the zipper clause is different: it is to avoid piecemeal litigation of collateral issues prior to a final order of removal. But the majority’s reading nullifies that core statutory purpose. Pet.App.76a–77a (Wilkinson, J., dissenting). As Judge Wilkinson explained, this “erases the 1996 law in favor of the 1961 one.” Pet.App.77a. A course correction is urgently needed.

C. Congress’s Authority Over Immigration and the Jurisdiction of Inferior Federal Courts Leaves No Room for a Presumption of Review

The Fourth Circuit also treated § 1252 as though it pushed “the outer limits of Congress’ power,” demanding a fourth “clear statement of congressional

intent” to withdraw jurisdiction from district courts before giving it effect. Pet.App.34a (citation omitted). But the statute rests on two of Congress’s most firmly established powers: its plenary power over immigration and its control over lower federal courts’ jurisdiction. Where those powers converge, Congress’s authority is at its apex, and the case for a judge-made presumption against it is at its weakest.

The Constitution entrusts broad control over immigration matters to the political branches, not the courts. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); U.S. Const. art. I, § 8, cl. 4. “[O]ver no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.” *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (citation omitted). For that reason, courts owe “special judicial deference to congressional policy choices in the immigration context.” *Id.* at 793. That deference extends to Congress’s choice about how, and in which forum, removal-related questions are reviewed, and cannot be harmonized with a judge-made presumption that heavily loads the dice against that choice.

Congress also “enjoys substantial power over the jurisdiction of the federal courts.” John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. Chi. L. Rev. 203, 209 (1997). Article I gives Congress power “[t]o constitute Tribunals inferior to the supreme Court,” U.S. Const. art. I, § 8, cl. 9, and Article III vests the judicial power “in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” *Id.* art. III, § 1. Congress need

not vest jurisdiction to the limits of Article III when establishing inferior federal tribunals, but may control jurisdiction incident to the power to ordain and establish. So long as Congress does not violate other constitutional provisions, its “control over the jurisdiction of the federal courts” is “plenary.” *Bhd. of R.R. Trainmen v. Toledo, Peoria & W. R.R. Co.*, 321 U.S. 50, 63–64 (1944).

The greater power to create those courts includes the lesser power to define and limit their subject-matter jurisdiction. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812); accord *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448–49 (1850). That authority is “an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101 (1998).

Congress “occasionally wields this power to prevent federal courts from reviewing certain actions through jurisdiction-stripping statutes,” *Guerrero-Lasprilla*, 589 U.S. at 243–44 (Thomas, J., dissenting) (citing 12 U.S.C. §§ 1818(i)(1), 4208; 15 U.S.C. § 719h(c)(3); 31 U.S.C. § 3730(e)(4)(A)), including habeas jurisdiction over alien detention, as it plainly did in § 1252 of the INA. Withdrawing jurisdiction and precluding review is thus an ordinary exercise of Congress’s Article III power, not a step to the outer limits of it.

The Fourth Circuit nonetheless faulted the Third Circuit for its “failure to grapple with” the presumption in favor of judicial review in *Khalil*.

Pet.App.55a. But that presumption is only a presumption, and readily yields to statutory text which, as here, “clearly expresses Congress’s desire to preclude judicial review.” *Bouarfa*, 604 U.S. at 19; *see also Mullin v. Doe*, 609 U.S. 324, 340 (2026).

Courts “cannot simply invoke the presumption of reviewability to circumvent Congress’ decision.” *Guerrero-Lasprilla*, 589 U.S. at 247 (Thomas, J., dissenting). By doing so here, the Fourth Circuit deprived Congress of both “its longstanding control over federal court jurisdiction,” Pet.App.82a (Wilkinson, J., dissenting), and its authority to decide how challenges to removal are resolved. That “upsets, not preserves, the separation of powers reflected in the Constitution’s text.” *Guerrero-Lasprilla*, 589 U.S. at 247 (Thomas, J., dissenting).

II. CONGRESS’S CHANNELING SCHEME IS CONSISTENT WITH THE SUSPENSION CLAUSE

As a last resort, Suri turned to the Suspension Clause, urging the Fourth Circuit to construe the statute narrowly to avoid suspending the writ. Br. of Appellee at 45, *Suri v. Trump*, No. 25-1560 (4th Cir. Sept. 26, 2025), ECF No. 41. The Fourth Circuit did not address this constitutional issue but left it “lurking.” Pet.App.82a (Wilkinson, J., dissenting). But constitutional avoidance has no role to play here, because § 1252’s channeling of removal-related claims into a petition for review does not suspend the writ under any plausible reading of the Clause.

To begin, there is substantial reason to doubt that, as an original matter, the Clause guarantees any baseline of habeas review at all. “The Suspension Clause is written as a limitation, not an affirmative

command.” John Harrison, *The Original Meaning of the Habeas Corpus Suspension Clause, the Right of Natural Liberty, and Executive Discretion*, 29 Wm. & Mary Bill Rts. J. 649, 704–05 (2021) (Harrison, *Original Meaning*). On its original understanding, the Clause is not a requirement that the federal courts have habeas jurisdiction, but “primarily a substantive protection of the right of natural liberty”—a restraint on Congress’s power “to confer on the executive very broad discretion to detain individuals.” *Id.* at 651, 704. On that view, § 1252, which does not expand the Executive’s detention authority but simply channels jurisdiction among the federal courts, does not implicate the Clause at all. *See id.* at 707–08. But the Court need not resolve that question, because even assuming the Clause protects some minimal scope of habeas review, Suri’s claims fall short. As it existed in 1789, the writ neither extended to aliens in Suri’s position nor permitted the kind of review he seeks.

A. Suri’s Claims Fall Outside the Historic Core of Habeas Corpus

The Suspension Clause provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. Const. art. I, § 9, cl. 2. To the extent the Clause secures any habeas baseline, this Court has measured that protection against the writ “as it existed in 1789.” *St. Cyr*, 533 U.S. at 301 (citation omitted); *Dep’t of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 116 (2020). That writ was not “generally available to those in [Suri’s] position in 1789 ... to challenge detention during removal proceedings.” *Demore*, 538 U.S. at

537–38 (O’Connor, J., concurring in part and concurring in the judgment). And even after federal immigration controls spurred habeas challenges to executive exclusion and deportation orders, “in no case did the Court question the right of immigration officials to temporarily detain aliens while exclusion or deportation proceedings were ongoing.” *Id.* at 539. When this Court finally entertained such a challenge in 1952, it “reaffirmed the power of Congress to order the temporary detention of aliens during removal proceedings.” *Id.* (citing *Carlson*, 342 U.S. at 538). The historic writ thus did not offer aliens held pending removal an avenue to contest that incidental detention.

To the extent Suri challenges the conditions of his confinement, he seeks a form of relief the historic writ did not provide. *See* Am. Pet. for Writ of Habeas Corpus ¶ 106, *Suri v. Trump*, No. 1:25-cv-00480 (E.D. Va. Apr. 8, 2025), ECF No. 34. Regardless of their merit, such claims go to how Suri is held, not to whether he may be held.

This Court has never decided “whether [detainees] might be able to challenge their confinement conditions via a petition for a writ of habeas corpus.” *Ziglar v. Abbasi*, 582 U.S. 120, 144 (2017). But the historical record forecloses that possibility. “It is clear ... from the common-law history of the writ ... that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody.” *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973); *see also* 3 William Blackstone, *Commentaries on the Laws of England* *137 (1768)

(explaining that the writ’s traditional function was “removing the injury of unjust and illegal confinement”) (emphasis omitted). But a detainee who complains of how he is held seeks relief that “neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody.” *Wilkinson v. Dotson*, 544 U.S. 74, 86 (2005) (Scalia, J., concurring). Such a claim does not “spell speedier release” and therefore lies outside habeas corpus. *Id.* at 82 (majority opinion).

B. Congress Has Provided an Adequate and Effective Substitute for Habeas

Even if Suri’s claims fell within the historic writ, the statutory scheme does not suspend it. Because federal habeas jurisdiction exists only by “written law,” *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93–94 (1807), Congress may route review of removal-related claims through another statutory channel, so long as it provides “a collateral remedy which is neither inadequate nor ineffective to test the legality of a person’s detention.” *Swain v. Pressley*, 430 U.S. 372, 381 (1977); *see also Felker v. Turpin*, 518 U.S. 651, 664 (1996) (citation omitted) (recognizing that “judgments about the proper scope of the writ are normally for Congress to make”). This Court in *St. Cyr* acknowledged as much, explaining that “Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals.” 533 U.S. at 314 n.38; *see also Harrison, Original Meaning, supra*, at 707–08 (explaining that Congress’s exercise of its power over the jurisdiction of inferior federal courts is “not naturally described as

a suspension of the writ, because that which was not there to begin with is not suspended”).

Congress did precisely that in the REAL ID Act. Although Congress foreclosed habeas relief in § 1252(b)(9) and (g), it provided aliens with an alternative means to challenge actions taken to remove them: a petition for review filed in a court of appeals, in which they may press any “constitutional claims or questions of law.” 8 U.S.C. § 1252(a)(2)(D). A court of appeals may stay removal while it considers the petition, *id.* § 1252(b)(3)(B); *Nken v. Holder*, 556 U.S. 418, 426 (2009). And where a claim depends on facts that the agency did not develop, the court of appeals may order factfinding. *Khalil*, 164 F.4th at 280–81. That review is therefore at least as broad as habeas was in the immigration context; historically, the writ reached legal questions but not factual or discretionary determinations. *See Alexandre v. Att’y Gen.*, 452 F.3d 1204, 1206 (11th Cir. 2006) (*per curiam*). Nor does the timing of that review make it inadequate: any delay inherent in channeling “does not foreclose meaningful review. It just streamlines the process for seeking it.” *Khalil*, 164 F.4th at 275.

The Fourth Circuit nonetheless treated the timing of that review as decisive. In its view, if Suri’s injury “is not redressed until after removal proceedings, then it cannot be redressed at all.” Pet.App.60a–61a. That is wrong. Suri may press his speech claims if he is finally ordered removed. And if he is not ordered removed, he must be released. But a free-speech claim does not confer immunity from detention pending removal, let alone a right to circumvent Congress’s

prescribed judicial-review process. *Cf. Mitchell v. Forsyth*, 472 U.S. 511, 527–28 (1985).

The *Jennings* plurality understood the statute to cover challenges to “the decision to detain [an alien] in the first place.” 583 U.S. at 294–95 (plurality opinion). That is so even though review is delayed. Congress legislated with the same understanding. As the Second Circuit panel put it, quoting then-Judge Alito, the scheme reflects a decision “to delay federal court review of claims by aliens against whom [removal] proceedings have been instituted until the conclusion of the administrative proceedings.” *Mahdawi*, 183 F.4th at 123 (quoting *Massieu v. Reno*, 91 F.3d 416, 422 (3d Cir. 1996)). Congress withdrew only the ability to use a detention petition to obtain an early district court ruling on removability. Routing that question to the court of appeals postpones but does not deny review.

For these reasons, every circuit to address the question has held that the petition-for-review process is an adequate and effective substitute for habeas. *See Mahdawi*, 183 F.4th at 120–21; *Khalil*, 164 F.4th at 279; *Gonzalez-Alarcon v. Macias*, 884 F.3d 1266, 1278–79 (10th Cir. 2018); *Luna v. Holder*, 637 F.3d 85, 92 (2d Cir. 2011); *Muka v. Baker*, 559 F.3d 480, 484 (6th Cir. 2009); *Mohamed v. Gonzales*, 477 F.3d 522, 526 (8th Cir. 2007); *Puri v. Gonzales*, 464 F.3d 1038, 1041–42 (9th Cir. 2006); *Alexandre*, 452 F.3d at 1206; *Ewonwu v. Gonzales*, 438 F.3d 22, 32–33 (1st Cir. 2006).

The petition-for-review process reflects Congress’s considered judgment about how to balance orderly adjudication against prompt relief. That judgment

satisfies the Suspension Clause on any understanding of what it protects, and this Court should not strain to narrow a statute Congress made sweeping in order to avoid a nonexistent constitutional problem.

III. THE CIRCUIT SPLIT ON AN EXCEPTIONALLY IMPORTANT QUESTION OF FEDERAL LAW WARRANTS THIS COURT'S REVIEW

This case presents an acknowledged conflict on an important and recurring question of federal jurisdiction. The Fourth Circuit explicitly rejected the Third Circuit's opinion in *Khalil* and held that § 1252(b)(9) does not bar a detained alien from challenging, in district court habeas proceedings, the decision to detain him incident to removal, based on legal questions that go to the core of whether he was lawfully deemed a deportable alien. Pet.App.54a–61a. The Second Circuit has granted rehearing en banc in *Mahdawi* to consider the same question but is holding that case in abeyance pending this Court's action. Order, *Mahdawi v. Trump*, No. 25-1113 (2d Cir. Sept. 3, 2026), ECF No. 244. And the decision below is in tension with the Eleventh Circuit's reading of § 1252(g), which bars district court review of claims arising from the Executive's decision to commence removal proceedings, including the detention that accompanies that decision. See *Alvarez v. U.S. Immigr. & Customs Enf't*, 818 F.3d 1194, 1203 (11th Cir. 2016).

Absent this Court's review, the conflict will persist, leaving a patchwork of immigration law that undermines the uniform scheme Congress enacted in the REAL ID Act. Whether an alien in Suri's position may litigate his removability in district court now

turns on nothing more than where he happens to be detained. That result cannot be squared with a statute designed to channel review into a single forum. *See St. Cyr*, 533 U.S. at 313.

The question presented is also exceptionally important. On any given day, U.S. Immigration and Customs Enforcement detains tens of thousands of aliens pending removal—more than 65,000 as of July 2026—and has booked between 30,000 and 40,000 into detention each month of fiscal year 2026. *See* U.S. Immigration & Customs Enforcement, ICE Detention Statistics, <https://tinyurl.com/yjryn7pt> (last visited Oct. 9, 2026). Under the decision below, every such detainee in the Fourth Circuit now has “a pathway into district court for a thinly veiled habeas challenge to his removability.” Pet.App.66a (Wilkinson, J., dissenting). And “[e]ach such suit will grind removal proceedings to a halt, invite a district court to take control of them, and require the government to prove the alien’s removability a second time.” *Id.* That “medley of duplication and delay,” multiplied “by the many thousands of aliens who are detained pending removal,” threatens to overwhelm “the immigration system Congress carefully designed,” Pet.App.66a, 88a, and to seriously damage the separation of powers.

Three times, Congress has responded to judicial interference with removal by stripping district courts of jurisdiction over removal-related challenges and channeling review to the courts of appeals. Three times is enough. The Court should give effect to that repeated choice, grant review, and resolve the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

JAMES R. CONDE

Counsel of Record

TAYLOR M. MYERS

WALKER FORTENBERRY

BOYDEN GRAY PLLC

800 Connecticut Avenue NW

Suite 900

Washington, DC 20006

(202) 955-0620

jconde@boydengray.com

October 21, 2026